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2024 SUPPLEMENT

ANALYSIS OF CASES DECIDED BY THE SUPREME
COURT OF THE UNITED STATES TO JULY 1, 2024



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INTRODUCTION TO THE 2024 CONSTITUTION ANNOTATED SUPPLEMENT

The 2024 supplement to *The Constitution of the United States of America, Analysis and Interpretation (Constitution Annotated)* captures constitutional developments that have occurred since publication of the 2022 hardbound decennial edition. The 2024 supplement also includes a literal print of the Constitution of the United States of America. This literal print reflects the text, spelling, and punctuation contained in the U.S. National Archives and Records Administration's (NARA) High Resolution Downloads of the Constitution, which, as of December 2024, are available on NARA's website at <https://www.archives.gov/founding-docs/downloads>.

Like the 2022 edition, the 2024 supplement is designed to complement the online *Constitution Annotated*, <https://constitution.congress.gov>, which explains the Constitution in an easily-searchable digital format and is updated contemporaneously with the release of new Supreme Court decisions. To this end, the 2024 supplement follows the 2022 edition by identifying each essay by its online *Constitution Annotated* serial number rather than by referencing the page number on which the essay appeared in the 2022 edition. The serial numbers indicate how the essay fits into the Constitution's framework and how the essay relates to other *Constitution Annotated* essays. By referring to the serial numbers, readers can easily locate the corresponding essays both in the 2022 edition and on the online *Constitution Annotated*.

The 2024 supplement includes all essays explaining specific articles and amendments of the Constitution that were either added to the online *Constitution Annotated* or modified since the publication of the 2022 edition. Because these essays are concise, they are reprinted in their entirety in the 2024 supplement to save readers from having to track insertions or deletions to the text of the 2022 edition across multiple documents.

The 2024 supplement also reflects the reorganization of introductory essays included in the 2022 edition and posted on the online *Constitution Annotated*. These introductory essays provide background on the organization and methodology of the *Constitution Annotated*; the historical context in which the Constitution's articles and amendments were adopted; and information on basic principles underlying the Constitution and approaches that Supreme Court Justices have used to interpret it. Since publication of the 2022 edition, the order of some of the introductory essays has been revised. Only those essays for which the reorganization resulted in a change to the essay's serial number have been included in the 2024 supplement. In addition, a new introductory essay, *Intro.7.6 Application of the Bill of Rights to the States Through the Fourteenth Amendment and Selective Incorporation*, has been included in the 2024 supplement.

Like the 2022 print edition, the 2024 supplement does not include information created specifically for the online *Constitution Annotated* because of the large volume of material. Following publication of the 2022 edition, two new introductory essay groups—*Intro.9 The Supreme Court's Evolving Jurisprudence* and *Intro.10 Our Constitution Podcasts*—were added to the online *Constitution Annotated*. While these essay groups are not included in the 2024 supplement, readers can access them at the online

Constitution Annotated. Intro.9 The Supreme Court's Evolving Jurisprudence is available at https://constitution.congress.gov/browse/essay/intro.9-1/ALDE_00000071/ and provides synopses of current and recent cases concerning constitutional issues that are pending before the Supreme Court, beginning with the Supreme Court's October 2023 term. The holdings of the cases are discussed in the 2024 supplement essays explaining specific articles and amendments to the Constitution that those cases address. *Intro.10 Our Constitution Podcasts* is available at https://constitution.congress.gov/browse/essay/intro.10-1/ALDE_00000100/ and describes the Library of Congress's podcast series on the Constitution and how it has been interpreted over time.

THE
CONSTITUTION OF THE UNITED STATES
OF AMERICA
LITERAL PRINT

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

The Constitution provided here reflects the text, spelling and punctuation contained in the National Archives's High Resolution Downloads, <https://www.archives.gov/founding-docs/downloads>, of this document.

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

Article. I.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section. 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of

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the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

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

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

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

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

To establish Post Offices and post Roads;

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

To constitute Tribunals inferior to the supreme Court;

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

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

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

To provide and maintain a Navy;

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

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

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

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in

which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings;—And

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

Section. 9. The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.

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

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

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

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

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

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

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

Section. 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

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

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

Article. II.

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

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

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

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

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

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected. The President shall, at stated Times, receive for his Services, a Compensation, which shall neither be encreased nor diminished during the Period for which he shall have been elected, and he shall not receive within that Period any other Emolument from the United States, or any of them.

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

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

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

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

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

Section. 4. The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

Article. III.

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

Section. 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two

or more States; between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

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

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

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

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

Article. IV.

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

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

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

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

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

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

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

Article. V.

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

Article. VI.

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

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

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

Article. VII.

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

The Constitution of the United States of America—Literal Print

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

Attest William Jackson
Secretary

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

G^o Washington—Presidt
and deputy from Virginia

DELAWARE	{ Geo: Read Gunning Bedford jun John Dickinson Richard Bassett Jaco: Broom	NEW HAMPSHIRE	{ John Langdon Nicholas Gilman
MARYLAND	{ James McHenry Dan of St Thos. Jenifer Danl. Carroll	MASSACHUSETTS	{ Nathaniel Gorham Rufus King
VIRGINIA	{ John Blair— James Madison Jr.	CONNECTICUT	{ Wm. Saml. Johnson Roger Sherman
NORTH CAROLINA	{ Wm. Blount Richd. Dobbs Spaight Hu Williamson	NEW YORK	... Alexander Hamilton
SOUTH CAROLINA	{ J. Rutledge Charles Cotesworth Pinckney Charles Pinckney Pierce Butler	NEW JERSEY	{ Wil: Livingston David Brearley Wm. Paterson Jona: Dayton
GEORGIA	{ William Few Abr Baldwin	PENNSYLVANIA	{ B Franklin Thomas Mifflin Robt. Morris Geo. Clymer Thos. FitzSimons Jared Ingersoll James Wilson Gouv Morris

Ratification Resolution of Constitutional Convention

In Convention, Monday September 17th 1787.

Present
The States of

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

Resolved,

That the preceeding Constitution be laid before the United States in Congress assembled, and that it is the Opinion of this Convention, that it should afterwards be submitted to a Convention of Delegates, chosen in each State by the People thereof, under the Recommendation of its Legislature, for their Assent and Ratification; and that each Convention assenting to, and ratifying the Same, should give Notice thereof to the United States in Congress assembled.

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

By the unanimous Order of the Convention

W Jackson Secretary

G^o Washington – Presid^t.

**AMENDMENTS
TO THE
CONSTITUTION OF THE UNITED STATES
OF AMERICA**

LITERAL PRINT

**AMENDMENTS TO THE
CONSTITUTION
OF THE
UNITED STATES OF AMERICA**

The amendments to the Constitution provided here reflects the text, spelling and punctuation contained in the National Archives's High Resolution Downloads, <https://www.archives.gov/founding-docs/downloads>, of these documents.

Amendment I.

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

Amendment II.

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

Amendment III.

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

Amendment IV.

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

Amendment V.

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

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been

Amendments to the Constitution of the United States of America—Literal Print

committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VII.

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

Amendment VIII.

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

Amendment IX.

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

Amendment X.

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

Amendment XI.

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

Amendment XII.

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

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

Amendment XIII.

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

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

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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

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

Amendments to the Constitution of the United States of America—Literal Print

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

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Amendment XV.

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

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

Amendment XVI.

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

Amendment XVII.

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

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

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

Amendment XVIII.

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

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

Amendments to the Constitution of the United States of America—Literal Print

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XIX.

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

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

Amendment XX.

Section 1. The terms of the President and Vice President shall end at noon on the 20th day of January, and the terms of Senators and Representatives at noon on the 3d day of January, of the years in which such terms would have ended if this article had not been ratified; and the terms of their successors shall then begin.

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

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

Section 4. The Congress may by law provide for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.

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

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

Amendment XXI.

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

Amendments to the Constitution of the United States of America—Literal Print

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Amendment XXII.

Section 1. No person shall be elected to the office of the President more than twice, and no person who has held the office of President, or acted as President, for more than two years of a term to which some other person was elected President shall be elected to the office of the President more than once. But this Article shall not apply to any person holding the office of President when this Article was proposed by the Congress, and shall not prevent any person who may be holding the office of President, or acting as President, during the term within which this Article becomes operative from holding the office of President or acting as President during the remainder of such term.

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

Amendment XXIII.

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

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

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

Amendment XXIV.

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

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

Amendment XXV.

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

Section 2. Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.

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

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

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

Amendment XXVI.

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

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

Amendment XXVII.

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

NEW AND REVISED ESSAYS

INTRODUCTION

INTRO.7—BASIC PRINCIPLES UNDERLYING THE CONSTITUTION

Intro7.6 Application of the Bill of Rights to the States Through the Fourteenth Amendment and Selective Incorporation

The Bill of Rights, comprising the first ten amendments to the United States Constitution, protects certain rights against infringement by the federal government. A recurring question throughout U.S. history is whether state or local governments are bound by the proscriptions found in the Bill of Rights. Certain provisions—such as the First Amendment—specifically mention “Congress.”¹ Others, like the Second Amendment, contain no such explicit references.²

In the early 19th century, both Congress and the Supreme Court treated the Bill of Rights as applying only to the federal government and not to the states. In the 1833 case *Barron v. City of Baltimore*, Chief Justice John Marshall wrote that the amendments that make up the Bill of Rights “contain no expression indicating an intention to apply them to the state governments.”³ On that basis, the Court declined to apply the Fifth Amendment’s Takings Clause to a municipal government.⁴

Ratification of the Fourteenth Amendment in the aftermath of the Civil War altered the states’ role in the constitutional system by prohibiting states from “abridg[ing] the privileges or immunities of citizens of the United States” and “depriv[ing] any person of life, liberty, or property, without due process of law.”⁵ Litigants hoping to apply the Bill of Rights to the states argued that the rights secured by the amendments were components of the “privileges or immunities”⁶ or the right to “due process” protected by the Fourteenth Amendment against encroachment by the states.⁷

The Supreme Court, however, distinguished “privileges or immunities of citizens of the United States” that states cannot infringe under the Fourteenth Amendment from the rights that the federal government cannot infringe under the Bill of Rights. In the 1872 *Slaughter-House Cases*, the Supreme Court held that the Fourteenth Amendment’s “privileges or immunities” referred only to rights “which owe their existence to the Federal government, its National character, its Constitution, or its laws.”⁸ Examples of such rights the *Slaughter-House* Court gave included the right “to demand the care and protection of the Federal government over . . . life, liberty, and property when on the high seas or within the jurisdiction of a foreign government”; the right “to use the navigable waters of the United States”; and the right “to come to the seat of government to assert any claim [a citizen] may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions.”⁹ Three years after the *Slaughter-House Cases*, the Supreme Court held in *United States v. Cruikshank* that the Bill of Rights did not establish new rights

¹ U.S. CONST. amend. I (“Congress shall make no law . . .”).

² *Id.* amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”).

³ 32 U.S. (7 Pet.) 243, 250 (1833).

⁴ *Id.* at 250–51.

⁵ U.S. CONST. amend. XIV.

⁶ *E.g.*, *Spies v. Illinois*, 123 U.S. 131, 166 (1887).

⁷ *E.g.*, *Hurtado v. California*, 110 U.S. 516, 519 (1884).

⁸ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 79 (1873).

⁹ *Id.* (quoting *Crandall v. Nevada*, 73 U.S. (6 Wall.) 35, 44 (1867)).

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Intro.7—Basic Principles Underlying the Constitution

but rather secured such rights from federal government infringement.¹⁰ Because the rights set forth in the Bill of Rights do not “owe their existence to . . . the Constitution,” they do not constitute “privileges or immunities of citizens of the United States” under the Court’s *Slaughter-House* precedent.¹¹

The Supreme Court has been more amenable to arguments based on the Fourteenth Amendment’s Due Process Clause. In *Twining v. New Jersey*, the Court acknowledged that some of the Bill of Rights’ protections “may also be safeguarded against state action, because a denial of them would be a denial of due process of law”¹² The Supreme Court therefore accepted the possibility that the Due Process Clause might allow for some of the Bill of Rights’ provisions to constrain state governments.

The Supreme Court has rejected the notion that the protections of the Fourteenth Amendment encompass the entire Bill of Rights—an approach known as *total incorporation*.¹³ Instead, the Supreme Court’s approach since the late 19th century has been *selective incorporation* of the Bill of Rights against the state and local governments. In other words, the Court has held on a case-by-case basis whether a right safeguarded by the Bill of Rights against federal government action is also safeguarded against state government action. Absent incorporation, a state may take action that would be unconstitutional if taken by the Federal government. Conversely, incorporation of a particular provision of the Bill of Rights into the Fourteenth Amendment protects individuals from state infringement of the right. The Supreme Court’s controlling decisions incorporating provisions of the Bill of Rights almost entirely rely on the Fourteenth Amendment’s Due Process Clause, though some decisions refer only to the Fourteenth Amendment in general,¹⁴ and some individual members of the Court have expressed support for incorporation through the Privileges or Immunities Clause in concurrences.¹⁵ As of 2024, the Supreme Court has incorporated most of the protections of the Bill of Rights against the states, as detailed in the table below.

This table includes every commonly recognized provision from the first eight amendments to the United States Constitution. The Ninth and Tenth Amendments do not expressly enumerate substantive rights for protection and thus the Supreme Court has recognized that they are not subject to incorporation.¹⁶ The table does not include

¹⁰ *United States v. Cruikshank*, 92 U.S. 542, 552–53 (1876).

¹¹ *Slaughter-House Cases*, 83 U.S. (16 Wall.) at 79. *But see* *McDonald v. City of Chicago*, 561 U.S. 742, 855 (2010) (Thomas, J., concurring in part) (arguing that *Cruikshank* “is not a precedent entitled to any respect” and rejecting the holding of the *Slaughter-House Cases*).

¹² *Twining v. New Jersey*, 211 U.S. 78, 99 (1908), *overruled on other grounds*, *Malloy v. Hogan*, 378 U.S. 1 (1964).

¹³ *See* *Palko v. Connecticut*, 302 U.S. 319, 323 (1937) (“We have said that in appellant’s view . . . [w]hatever would be a violation of the original bill of rights (Amendments I to VIII) if done by the federal government is now equally unlawful by force of the Fourteenth Amendment if done by a state. There is no such general rule.”), *overruled on other grounds*, *Benton v. Maryland*, 395 U.S. 784 (1969).

¹⁴ *E.g.*, *Klopfer v. North Carolina*, 386 U.S. 213, 222–23 (1967) (holding that the right to the speedy trial is enforceable against the States under the Fourteenth Amendment, but not mentioning due process).

¹⁵ *E.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 806 (2010) (Thomas, J., concurring in part); *Timbs v. Indiana*, 586 U.S. 146, 157 (2019) (Gorsuch, J., concurring).

¹⁶ *Cf.* *Wolf v. Colorado*, 338 U.S. 25, 26 (1949) (speaking of the “specific requirements and restrictions placed by the Bill of Rights (Amendments I to VIII)”); *Palko*, 302 U.S. at 323 (describing a thesis of total incorporation as applying “the original bill of rights (Amendments I to VIII)” to the states). *See generally* Amdt9.1 Overview of the Ninth Amendment, Unenumerated Rights; Amdt10.1 Overview of Tenth Amendment, Rights Reserved to the States and the People.

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protections derived from the Bill of Rights that are not expressly provided for in the text of the amendments, such as the freedom of association.¹⁷ More information on incorporation of the Bill of Rights may be found in later essays.¹⁸

For purposes of this table, a provision is “formally incorporated” when a decision of the Supreme Court holds that the protections of the provision apply to states through the Fourteenth Amendment. A case listed in this table is either the earliest Supreme Court case to expressly hold that a provision has been incorporated or a Supreme Court case that has been commonly understood by the Supreme Court to incorporate the particular provision. Unless otherwise indicated, this table does not include cases that assume, affirm, or reject incorporation of a particular provision of the Bill of Rights when such was not necessary to the Court’s resolution of the case.

Table of the Provisions of the Bill of Rights Recognized by the Supreme Court as Incorporated by the Fourteenth Amendment and Applicable to State and Local Government:

FIRST AMENDMENT—FUNDAMENTAL FREEDOMS

- ESTABLISHMENT CLAUSE
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Everson v. Board of Education*, 330 U.S. 1, 8 (1947)
 - Notes: Incorporation assumed without deciding in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (incorporating the Free Exercise Clause)
- FREE EXERCISE CLAUSE
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940)
- FREE SPEECH CLAUSE
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Gitlow v. New York*, 268 U.S. 652, 666 (1925)
 - Notes: Right assumed incorporated in *Gitlow*; *Gitlow* later recognized as incorporating the right; see *McDonald v. City of Chicago*, 561 U.S. 742, 764 n.12 (2010)
- FREE PRESS CLAUSE
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 707 (1931)
 - Notes: Incorporation assumed without deciding in *Gitlow*, 268 U.S. at 666
- FREEDOM OF ASSEMBLY
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *De Jonge v. Oregon*, 299 U.S. 353, 364 (1937)

¹⁷ Cf. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) (holding that freedom of association is protected by the Fourteenth Amendment).

¹⁸ See generally Amdt14 Incorporation of Bill of Rights.

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- FREEDOM OF PETITION
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Edwards v. South Carolina*, 372 U.S. 229, 237–38 (1963)

SECOND AMENDMENT—RIGHT TO KEEP AND BEAR ARMS

- Formally Incorporated: Yes
- Decision Recognizing Incorporation: *McDonald v. City of Chicago*, 561 U.S. 742, 778 (2010)
- Notes: Plurality opinion incorporated through the Due Process Clause; Justice Thomas, concurring in part, would rely on Privileges or Immunities Clause

THIRD AMENDMENT—RIGHT AGAINST QUARTERING SOLDIERS

- Formally Incorporated: No
- Notes: Incorporation not considered by the Supreme Court; incorporation recognized by lower federal court in *Engblom v. Carey*, 677 F.2d 957, 961 (2d Cir. 1982); alluded to as a source of penumbral rights¹⁹ incorporated against the states in *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)

Fourth Amendment—Searches and Seizures

- RIGHT AGAINST UNREASONABLE SEARCHES AND SEIZURES
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949), *overruled in part on other grounds*, *Mapp v. Ohio*, 367 U.S. 643 (1961)
 - Notes: Exclusionary rule (exclusion of evidence obtained in violation of the Fourth Amendment)²⁰ not incorporated by *Wolf*; later incorporated in *Mapp v. Ohio*, 367 U.S. at 655
- WARRANT REQUIREMENT
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Aguilar v. Texas*, 378 U.S. 108, 110 (1964), *overruled in part on other grounds*, *Illinois v. Gates*, 462 U.S. 213 (1983)

FIFTH AMENDMENT—RIGHTS OF PERSONS

- GRAND JURY CLAUSE
 - Formally Incorporated: No
 - Notes: Incorporation rejected in *Hurtado v. California*, 110 U.S. 516, 534–35 (1884)
- DOUBLE JEOPARDY CLAUSE
 - Formally Incorporated: Yes

¹⁹ See generally Amdt14.S1.6.3.2 Historical Background on Noneconomic Substantive Due Process.

²⁰ See generally Amdt4.7.1 Exclusionary Rule and Evidence.

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Intro.7—Basic Principles Underlying the Constitution

- Decision Recognizing Incorporation: *Benton v. Maryland*, 395 U.S. 784, 794 (1969)
 - Notes: Incorporation assumed without deciding in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947)
- RIGHT AGAINST SELF-INCRIMINATION
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Malloy v. Hogan*, 378 U.S. 1, 6 (1964)
- DUE PROCESS CLAUSE
 - Formally Incorporated: No
 - Notes: Incorporation not considered by the Supreme Court; Fourteenth Amendment Due Process Clause recognized to be source of due process right against states in *Scott v. McNeal*, 154 U.S. 34, 45 (1894)
- TAKINGS CLAUSE
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Chicago, Burlington & Quincy Railroad v. City of Chicago*, 166 U.S. 226, 241 (1897)

SIXTH AMENDMENT—RIGHTS IN CRIMINAL PROSECUTIONS

- RIGHT TO A SPEEDY TRIAL
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Klopfer v. North Carolina*, 386 U.S. 213, 222–23 (1967)
- RIGHT TO A PUBLIC TRIAL
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *In re Oliver*, 333 U.S. 257, 273 (1948)
 - Notes: Right to a public trial recognized without explicit reliance on Sixth Amendment
- RIGHT TO A TRIAL BY JURY
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968)
- RIGHT TO AN IMPARTIAL JURY
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Irvin v. Dowd*, 366 U.S. 717, 721–22 (1961) (right recognized without reference to Sixth Amendment); *Parker v. Gladden*, 385 U.S. 363, 364 (1966) (right recognized with reference to the Sixth Amendment)
 - Notes: Predates incorporation of Sixth Amendment right to a trial by jury
- RIGHT TO LOCAL JURY/VICINAGE
 - Formally Incorporated: No
 - Notes: Incorporation not considered by the Supreme Court; incorporation rejected by lower federal courts in *Cook v. Morrill*, 783 F.2d 593, 594–95 (5th Cir. 1986); *Caudill v. Scott*, 857 F.2d 344, 345–46 (6th Cir. 1988); incorporation assumed not to apply by lower court in *Martin v. Beto*, 397 F.2d 741, 748 (5th Cir. 1968)
- NOTICE OF ACCUSATION
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *In re Oliver*, 333 U.S. 257, 273 (1948)

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- Notes: Right of “reasonable notice of a charge” recognized without explicit reliance on Sixth Amendment in *Oliver*
- CONFRONTATION CLAUSE
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Pointer v. Texas*, 380 U.S. 400, 403 (1965)
- COMPULSORY PROCESS
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Washington v. Texas*, 388 U.S. 14, 17–18 (1967)
- RIGHT TO COUNSEL
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (for capital cases); *Gideon v. Wainwright*, 372 U.S. 335, 343–44 (1963) (for all felony cases)

SEVENTH AMENDMENT—CIVIL TRIAL RIGHTS

- RIGHT TO A CIVIL JURY TRIAL
 - Formally Incorporated: No
 - Notes: Incorporation rejected in *Walker v. Sauvinet*, 92 U.S. 90, 92–93 (1876)
- REEXAMINATION CLAUSE
 - Formally Incorporated: No
 - Notes: Incorporation assumed not to apply in *Justices v. Murray*, 76 U.S. (9 Wall.) 274, 278 (1870)

EIGHTH AMENDMENT—CRUEL AND UNUSUAL PUNISHMENT

- EXCESSIVE BAIL CLAUSE
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Schilb v. Kuebel*, 404 U.S. 357, 365 (1971)
 - Notes: Right “assumed” incorporated in *Schilb*; *Schilb* later recognized as incorporating the right; see *McDonald v. City of Chicago*, 561 U.S. 742, 764 n.12 (2010)
- EXCESSIVE FINES CLAUSE
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Timbs v. Indiana*, 586 U.S. 146, 154 (2019)
 - Notes: Majority opinion incorporated through Due Process Clause; Justice Thomas, concurring, would rely on Privileges or Immunities Clause; Justice Gorsuch, concurring, suggests Privileges or Immunities Clause might be appropriate vehicle for incorporation
- CRUEL AND UNUSUAL PUNISHMENTS CLAUSE
 - Formally Incorporated: Yes
 - Decision Recognizing Incorporation: *Robinson v. California*, 370 U.S. 660, 666–67 (1962)
 - Notes: Incorporation assumed without deciding in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 462 (1947)

ARTICLE I

LEGISLATIVE BRANCH

ArtI.S1 Legislative Vesting Clause

ArtI.S1.5 Nondelegation Doctrine

ArtI.S1.5.4 Nature and Scope

ArtI.S1.5.4.1 Nature and Scope of the Intelligible Principle Standard

The “intelligible principle” standard is the Supreme Court’s primary test for assessing whether Congress has unconstitutionally delegated its legislative power to the other branches of the government. Under this lenient standard, the Supreme Court has repeatedly affirmed, “without deviation, Congress’s ability to delegate power under broad standards” to governmental entities.¹ As the Court has explained, “Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors.”² Under the “intelligible principle” standard, the Court has upheld, for example, delegations to administrative agencies to determine: “excessive profits” during wartime;³ “unfair and inequitable distribution of voting power” among securities holders;⁴ what are “fair and equitable” commodities prices;⁵ and “just and reasonable” rates that a natural gas company could charge.⁶ In perhaps the broadest delegation judicially challenged, the Court in *National Broadcasting Co. v. United States*, upheld a provision in the Communications Act of 1934 that authorized the Federal Communications Commission to regulate broadcast licensing as the “public interest, convenience, or necessity require.”⁷

With the rise of the modern administrative state, the Supreme Court did not impose many restrictions on Congress’s ability to delegate power to governmental entities. In embracing a pragmatic view of its role, the Court has been reluctant to interfere with Congress’s “practical” need and flexibility to delegate and rely on the duties and expertise of the other branches of the government.⁸ The Court noted that its “jurisprudence has been driven by a practical understanding” about “our increasingly complex society, replete with ever changing and more technical problems.”⁹ The Court has often explained that Congress lacks the technical expertise, resources, time, foresight, and the flexibility to address every detail of its policy decisions.¹⁰ Even when holding the

¹ *Mistretta v. United States*, 488 U.S. 361, 373 (1989).

² *Touby v. United States*, 500 U.S. 160, 165 (1991).

³ *Lichter v. United States*, 334 U.S. 742, 786 (1948).

⁴ *Am. Power & Light Co. v. Sec. & Exch. Comm’n*, 329 U.S. 90, 104 (1946).

⁵ *Yakus v. United States*, 321 U.S. 414, 427 (1944).

⁶ *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 602 (1944).

⁷ *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 226 (1943).

⁸ *See Wisconsin v. Illinois*, 278 U.S. 367, 414 (1929) (reasoning that Congress may delegate to the Secretary of War authority to issue construction permits for canals because such matters were “a peculiarly expert question . . . that is naturally within the executive function”).

⁹ *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

¹⁰ *See id.* at 379 (1989) (“Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.”); *Am. Power & Light Co. v. Sec. & Exch. Comm’n*, 329 U.S. 90, 105 (1946) (“The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”); *Yakus v. United States*, 321 U.S. 414, 424 (1944) (“The Constitution as a continuously operative

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delegation unconstitutional in *Panama Refining* and *Schechter*, the Court affirmed that the “Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality.”¹¹ In this vein, the Court has declared that “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”¹² Denying Congress the power to delegate, the Court noted, would “stop of the wheels of government’ and bring about confusion, if not paralysis, in the conduct of the public business.”¹³ As a result, the Supreme Court has often acknowledged that the practical need for coordination among the three branches of government does not violate separation-of-power principles that underpin the nondelegation doctrine.¹⁴

ArtI.S1.5.4.2 Permissible and Impermissible Delegations of Legislative Power

The Supreme Court’s application of the “intelligible principle” standard may also reflect the challenge in determining the appropriate line between permissible and impermissible delegations.¹ Since its early nondelegation decisions, the Court has recognized the difficulty in drawing the “line which separates legislative power to make laws, from administrative authority” to execute the laws enacted by Congress.² The “precise bound-

charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate.”); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–530 (1935) (recognizing “the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly”); *United States v. Grimaud*, 220 U.S. 506, 516 (1911) (“[I]t was impracticable for Congress to provide general regulations for these various and varying details of [forest reservation] management.”); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 694 (1892) (“The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.”).

¹¹ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529–30 (1935) (citing *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 421(1935)).

¹² *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

¹³ *Union Bridge Co. v. United States*, 204 U.S. 364, 387 (1907).

¹⁴ See *Loving v. United States*, 517 U.S. 748, 773 (1996) (“Separation-of-powers principles are vindicated, not disserved, by measured cooperation between the two political branches of the Government, each contributing to a lawful objective through its own processes.”); *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (per curiam) (“Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government.”); *Yakus v. United States*, 321 U.S. 414, 425–26 (1944) (“Nor does the doctrine of separation of powers deny to Congress power to direct that an administrative officer properly designated for that purpose have ample latitude within which he is to ascertain the conditions which Congress has made prerequisite to the operation of its legislative command. . . . Congress is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officers.”). The Court has noted that judicial review is available to help ensure that the administrative agencies discharge their delegated responsibilities and discretion in a reasoned manner consistent with the intelligible principles and statutory framework laid down by Congress. *Am. Power & Light Co. v. Sec. & Exch. Comm’n*, 329 U.S. 90, 105 (1946); *Yakus v. United States*, 321 U.S. 414, 423, 425–26 (1944). See also *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 953 n.16 (1983) (“That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.”).

¹ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825).

² *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

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ary of this [legislative] power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.”³

Rather than characterize the delegated power as legislative or administrative, the Court has looked to how the intelligible principles laid out by Congress constrain delegations to governmental entities. As explained in *Yakus v. United States*,

the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the [delegee] is to act so that it may be known whether he has kept within it in compliance with the legislative will.⁴

In *Yakus*, the Court upheld the delegation of authority to the Price Administrator to fix commodity prices that “will be generally fair and equitable and will effectuate the purposes” of the statute.⁵ The Court determined that standards in the statute were “sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards.”⁶ Only the absence of standards or boundaries for the delegated authority, the Court reasoned, would justify “overriding” Congress’s choice to effectuate its “legislative will.”⁷

This focus on statutory boundaries rather than the legislative character of the delegation is seen in the Supreme Court’s review of delegations of rulemaking authority.⁸ While acknowledging that regulations are “binding rules of conduct,”⁹ the Court has treated such regulations as “valid only as subordinate rules when found to be within the framework of the policy which the legislature has sufficiently defined.”¹⁰

³ *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). In attempts to draw the boundaries of legislative power, the Court has described Congress’s “essential legislative functions” or “law-making” powers under Article I, Section 1 in various ways. *See, e.g.*, *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 952, 954 (1983) (characterizing Congress’s legislative duties as “altering the legal rights, duties, and relations of persons” and determining policy); *United States v. Grimaud*, 220 U.S. 506, 516 (1911) (describing laws as “general rules with reference to rights of persons and property” that “create or regulate obligations and liabilities”); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935) (explaining that “positive law” “bind[s] equally those who assent and those who do not assent”).

⁴ *Yakus v. United States*, 321 U.S. 414, 425 (1944).

⁵ *Id.* at 457.

⁶ *Id.* at 425–26.

⁷ *Id.* at 426.

⁸ *See e.g.*, *United States v. Grimaud*, 220 U.S. 506, 517 (1911) (“From the beginning of the Government various acts have been passed conferring upon executive officers power to make rules and regulations—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power.”).

⁹ *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 428–29 (1935). *See also* *Batterton v. Francis*, 432 U.S. 416, 425 (1977) (“Congress . . . expressly delegated to the Secretary the power to prescribe standards for determining what constitutes “unemployment” . . . eligibility. In a situation of this kind, Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations with legislative effect.”).

¹⁰ *Panama Ref. Co.*, 293 U.S. at 428–29. *See also* *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (“It is axiomatic that an administrative agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.”).

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In addition, the extent to which Congress must constrain its policy judgments or explicitly define the scope of a delegatee’s discretion may depend on whether the delegatee possesses inherent authority related to the delegated matter. For delegated matters that are within the expertise or independent authority of the delegatee, the Supreme Court has not required that Congress provide detailed guidance or direction for the delegation.¹¹ For example, in *Loving v. United States*, the Court reviewed a challenge to Congress’s delegation to the President of the authority to prescribe aggravating factors for military capital murder cases.¹² The Court reasoned that “[o]nce delegated that power by Congress, the President, acting in his constitutional office of Commander in Chief, had undoubted competency to prescribe those factors without further guidance.”¹³ The Court, however, cautioned that if the delegation called for “the exercise of judgment or discretion that lies beyond the traditional authority of the President,” there may be a greater need to provide guiding principles to sustain the delegation.¹⁴

ArtI.S1.5.4.3 *Gundy* and the Intelligible Principle Doctrine

The broad deference the “intelligible principle” standard affords congressional delegations of authority to the other branches has met with growing skepticism from some members of the Court.¹ The 2019 case of *Gundy v. United States* highlighted an emerging split on the High Court with respect its nondelegation doctrine jurisprudence.² In that case, a criminal defendant challenged a provision of the Sex Offender Registration and Notification Act (SORNA) allowing, among other things, the Attorney General to “specify the applicability” of SORNA’s registration requirements to individuals convicted of a sex offense prior to the statute’s enactment.³ Writing for a four-Justice plurality, Justice Kagan interpreted this provision as limiting the Attorney General’s authority to “require pre-Act offenders to register as soon as feasible,”⁴ concluding that the delegation “easily passe[d] constitutional muster.”⁵ For the plurality,

¹¹ See, e.g., *United States v. Mazurie*, 419 U.S. 544, 556–557 (1975) (“Those limitations [on Congress’s authority to delegate its legislative power] are, however, less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.”).

¹² *Loving v. United States*, 517 U.S. 748, 759 (1996).

¹³ *Id.* at 768–69. See also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 324 (1936) (holding that where foreign affairs are concerned, Congress may “either leave the exercise of the power to [the President’s] unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs”).

¹⁴ *Loving v. United States*, 517 U.S. 748, 772 (1996).

¹ See, e.g., *Dep’t of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 77 (2015) (Thomas, J., concurring) (arguing that the Court should “return to the original understanding of the federal legislative power” and reject the “boundless standard the ‘intelligible principle’ test has become”); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) (noting “thoughtful” commentary questioning whether the current intelligible principle test serves “as much as a protection against the delegation of legislative authority as a license for it, undermining the separation between the legislative and executive powers that the founders thought essential”).

² See *Gundy v. United States*, 588 U.S. 128 (2019). While criticisms of the intelligible principle doctrine have become more pronounced in the beginning of the 21st century, some former members of the Court had argued for striking down legislation on nondelegation grounds. See, e.g., *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring); *Arizona v. California*, 373 U.S. 546, 626–27 (1963) (Harlan, J., dissenting).

³ 34 U.S.C. § 20913(d); see also *Gundy*, 588 U.S. at 133 (plurality opinion) (discussing SORNA’s “basic registration scheme”).

⁴ See *Gundy*, 588 U.S. at 146 (plurality opinion).

⁵ *Id.* at 132.

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the Attorney General’s authority under SORNA, when compared to other delegations the Court had previously upheld, was “distinctly small- bore.”⁶

Notably, Justice Kagan’s opinion was met by a dissent, authored by Justice Gorsuch and joined by Chief Justice Roberts and Justice Thomas, which argued that the statute unconstitutionally provided the Attorney General “unfettered discretion.”⁷ Further, the dissenters claimed that the modern intelligible principle standard has “no basis in the original meaning of the Constitution” or in historical practice.⁸ In response, the plurality, noting that delegations akin to the one in SORNA are “ubiquitous in the U.S. Code,” argued that as a matter of pragmatism the Court should afford deference to Congress’s judgments that such broad delegations are necessary.⁹ Providing a fifth vote to affirm the petitioner’s conviction was Justice Alito, who, while agreeing that the plurality correctly applied the modern nondelegation case law, indicated he would “support [the] effort” of the dissenting Justices to reconsider the intelligible principle test once a majority of the Court concurred in rethinking the doctrine.¹⁰ Accordingly, the Court in *Gundy* was evenly split on how deferential the Court should be with regard to congressional delegations to the other branches, raising questions as to whether the nondelegation doctrine would remain moribund.¹¹

ArtI.S1.5.5 Agency Discretion, Chevron Deference, and *Loper Bright Enterprises v. Raimondo*

Challenges to delegations of legislative power often raise concerns regarding an administrative agency’s discretion to interpret broad directives, ambiguities, or gaps in a statutory provision. An agency’s degree of discretion that may be constitutionally “acceptable” under the nondelegation doctrine appears to be fairly broad. In *Whitman v. American Trucking Associations*, the Supreme Court rejected a challenge to the U.S. Environmental Protection Agency’s (EPA’s) authority to set national air quality standards at a level “‘requisite’ . . . to protect the public health.”¹ The Court held that the “scope of discretion” given to the EPA under the Clean Air Act “fit[s] comfortably” and is “well within the outer limits of our nondelegation precedents.”² In reviewing previous nondelegation cases, the Court reasoned that even in “sweeping regulatory schemes”

⁶ *Id.* at 147.

⁷ *Id.* at 170 (Gorsuch, J., dissenting).

⁸ *Id.* at 164.

⁹ *Id.* at 147–48 (plurality opinion).

¹⁰ *Id.* at 148–49 (Alito, J., concurring). Justice Kavanaugh took no part in the consideration or decision in *Gundy*, as he was appointed to the Supreme Court after oral argument occurred in the case.

¹¹ See, e.g., Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1302 (2006) (“Commentators thus agree with near unanimity that the Constitution’s nondelegation norm goes essentially unenforced.”); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 331 (2002) (There is something very fundamental—indeed, almost primal—about the nondelegation doctrine that keeps resuscitating it when any rational observer would have issued a ‘code blue’ long ago.”); Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1630 (2009) (“[T]he nondelegation doctrine is largely moribund at the level of constitutional law.”).

¹ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475–76 (2001).

² *Id.* at 474, 476.

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that affect the entire economy, the Court has “never demanded . . . that statutes provide a ‘determinate criterion’ for saying ‘how much [of the regulated harm] is too much.’”³

Another consideration arising from delegations of legislative power is the degree of deference that courts should give interpretations by agencies of statutes that they administer. In June 2024, the Supreme Court, in *Loper Bright Enterprises v. Raimondo*, held that it is the role of courts to interpret ambiguities in the law, rather than to defer to reasonable agency interpretations of such ambiguities.⁴ In reaching this determination, Chief Justice Roberts, writing for six members of the Court, stressed that Article III of the Constitution assigns to the judicial branch “the responsibility and power to adjudicate ‘Cases’ and ‘Controversies,’” which entails the power to interpret the meaning of laws.⁵

In holding that courts should not defer to administrative agency determinations, the *Loper* Court overruled its 1984 decision *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.*,⁶ under which a court deferred to an administrative agency’s reasonable interpretation of statutory ambiguities within the agency’s delegated authority⁷ rather than “impose [the court’s] own construction of the statute.”⁸ In *Chevron*, the Court had upheld the EPA’s definition of the term “stationary source” in a regulation EPA had promulgated under the Clean Air Act,⁹ determining that the EPA’s definition was “a permissible construction of the statute.”¹⁰ In *Chevron*, the Court had reasoned that

If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.¹¹

Accordingly, the *Chevron* doctrine had essentially established a two-step process for courts to apply when considering agency interpretations of statutes.¹² If Congress’s intent in the statute was unambiguous, the court’s analysis was at an end as Congress’s

³ *Id.* at 457, 474.

⁴ *Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. June 28, 2024).

⁵ *Id.* at 7.

⁶ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984), *overruled by* *Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. June 28, 2024). Although overruling *Chevron*, the *Loper* Court clarified that “[t]he holdings of those cases that specific agency actions are lawful—including the Clean Air Act holding of *Chevron* itself—are still subject to statutory *stare decisis* despite our change in interpretive methodology.” *Loper*, slip op. at 34.

⁷ *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001).

⁸ *Chevron*, 467 U.S. at 842–43.

⁹ *Id.* at 840; 42 U.S.C. § 7502.

¹⁰ *Chevron*, 467 U.S. at 866.

¹¹ *Id.* at 844.

¹² As the *Loper* Court noted, this two-step process had been refined over the year to carve out various exceptions, including those major questions of “deep economic and political significance.” *Loper*, slip op. at 27 (internal quotations omitted).

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intent controlled. However, if Congress’s intent in the statute was ambiguous, the court would defer to the agency’s interpretation of the statute if such an interpretation was permissible. In *Loper*, the Court determined that *Chevron* contravened the judicial review provisions of the Administrative Procedure Act (APA), a federal statute that prescribes standards for judicial review of agency action and directs federal courts to “decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”¹³ Such a statutory command in the APA, the Court reasoned, could not be squared with the broad deference accorded to agencies under *Chevron*.¹⁴ Rather than defer to an agency’s reasonable interpretation of an ambiguous statute, the Court stated, courts “must exercise their independent judgment in deciding whether an agency has acted within its statutory authority”¹⁵

ArtI.S1.5.6 Major Questions Doctrine and Canons of Statutory Construction

Some legal scholars have suggested that delegations to governmental entities are interpreted through other “canons” of statutory construction and principles of statutory interpretation.¹ These canons and principles have helped the Court to define the constitutionally acceptable degree of discretion, deference, or direction given by Congress to a delegatee.

These complementary canons and principles have restricted the powers delegated by Congress, indirectly enforcing the separation-of-power principles of the nondelegation doctrine. For example, the Supreme Court has sometimes limited the scope of an agency’s delegated authority (and, historically, its *Chevron* deference²) under the so-called “major questions” doctrine.³ Under this doctrine, the Court has vacated admin-

¹³ *Id.*, slip op. at 13–14 (quoting 5. U.S.C. § 706).

¹⁴ *Id.* at 21.

¹⁵ *Id.* at 35.

¹ See Nat’l Fed’n of Indep. Bus. v. Dep’t. of Labor, Occupational Safety & Health Admin., Nos. 21A244 and 21A247, slip op. at 4 (2022) (per curiam) (Gorsuch, J. concurring) (“Both [the nondelegation and major question doctrines] are designed to protect the separation of powers and ensure that any new laws governing the lives of Americans are subject to the robust democratic processes the Constitution demands.”). See also Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19, 22 (2010) (explaining that “Ever since the [1980] *Benzene* case, the Court has sometimes construed statutes narrowly to avoid nondelegation concerns.”); Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 990–91 (2007) (describing as an alternative to enforcing the “intelligible principle” standard the doctrines of statutory interpretation and judicial canons); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316, 330 (2000) (explaining that “nondelegation canons” can “forbid administrative agencies from making decisions on their own” and “impose important constraints on administrative authority, for agencies are not permitted to understand ambiguous provisions to give them authority to venture in certain directions; a clear congressional statement is necessary”); Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1408 (2000) (“[The Supreme Court] has continued to identify and address delegation concerns through means other than the nondelegation doctrine.”).

² See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 531 (2007) (invoking major questions doctrine in not affording deference to the agency’s construction of the statute); *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 323–24 (2014) (same). See generally ArtI.S1.5.5 Agency Discretion, *Chevron* Deference, and *Loper Bright Enterprises v. Raimondo*.

³ See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (overruling administrative regulations on the ground that “Congress could not have intended to delegate a decision of such economic and political significance to an agency” without a clear statement of its intention); see also *id.* at 159 (citing Hon.

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istrative regulations on the ground that “Congress could not have intended to delegate a decision of such economic and political significance to an agency” without a clear statement of its intention.⁴

For matters that “affect the entire national economy” or go beyond the “traditional authority” of the delegee, Congress, in the Court’s opinion, must provide “substantial guidance.”⁵ This additional level of guidance appears to be a more stringent version of the “intelligible principle” standard that has been used by the Court for delegation challenges. For example, in *King v. Burwell*,⁶ the Court considered whether states participating in a federal health care exchange were eligible for tax credits under the Patient Protection and Affordable Care Act.⁷ The Court declined to apply the *Chevron* deference to the statutory interpretation of the Internal Revenue Service (IRS), holding that this was an “extraordinary case” in which the Court had “reason to hesitate before concluding that Congress” implicitly delegated to the IRS the authority to “fill in the statutory gaps.”⁸

The Supreme Court has also enforced nondelegation principles through the canon of constitutional avoidance, taking a narrow view of a statutory delegation in order to avoid potential constitutional conflicts with the nondelegation doctrine.⁹ In a 1974 case,

Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370 (1986) (“A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute’s daily administration.”)).

⁴ *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160; see also *King v. Burwell*, 576 U.S. 473, 485–87, 498 (2015) (holding that the Court had “reason to hesitate before concluding that Congress” implicitly delegated to the IRS the authority to “fill in the statutory gaps” in determining whether states participating in a federal health care exchange were eligible for tax credits under the Patient Protection and Affordable Care Act) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159); *Util. Air Regulatory Grp.*, 573 U.S. at 323–24 (holding that the Environmental Protection Agency’s (EPA’s) regulations represented an unreasonable reading of the authority delegated in the statute because the agency’s interpretation would have constituted “an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization”).

⁵ See *Util. Air Regulatory Grp.*, 573 U.S. at 324 (“We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’”) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160); *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 475 (2001) (“[Congress] must provide substantial guidance on setting air standards that affect the entire national economy.”). See also *Loving v. United States*, 517 U.S. 748, 772 (1996) (“Had the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving’s last argument that Congress failed to provide guiding principles to the President might have more weight.”).

⁶ 576 U.S. 473 (2015).

⁷ 42 U.S.C. § 18031; 26 U.S.C. §§ 36B(b)–(c).

⁸ *King*, 576 U.S. at 485–86 (quoting *Brown & Williamson*, 529 U.S. 120, 159 (2000)). As discussed in the previous essay, the Court overruled *Chevron* in 2024. *Loper Bright Enters. v. Raimondo*, No. 22-451 (U.S. June 28, 2024). For more discussion, see Art.I.S1.5.5 Agency Discretion, *Chevron Deference*, and *Loper Bright Enterprises v. Raimondo*.

⁹ See *Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989) (“[O]ur application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.”). See also *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (acknowledging that the “sweeping delegation of legislative power [to the Secretary of Labor to set worker exposure standards] . . . might be unconstitutional” under the nondelegation doctrine and imposing a “construction of the [Occupational Safety and Health Act] that avoids this kind of open-ended grant” that required the Secretary to find a “significant risk” to employee health before adopting a standard). See also RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 4.8(b) (5th ed. 2012) (“The Supreme Court sometimes interprets grants of powers to agencies narrowly, so as to avoid constitutional issues regarding the

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National Cable Television Association v. United States, the Court avoided potential delegation concerns in a challenge to the Federal Communications Commission’s (FCC’s) authority to assess fees against regulated parties to cover their operating costs.¹⁰ The Independent Offices Appropriations Act directed federal agencies to set fee levels by taking into consideration “direct and indirect cost[s] to the Government, value to the recipient, [and] public policy.”¹¹ Relying on *Schechter Poultry* and *J.W. Hampton*, the Court declined to read the statute as raising a constitutional delegation question of whether the Act delegated taxing authority to the FCC, determining that “the [delegation] hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems.”¹² The Court narrowly construed the statute to limit the FCC’s authority to set fees that reflect only the “value to the recipient” and not the full costs of regulating.¹³ While the Supreme Court later distanced itself from the reasoning of *National Cable Television* in *Skinner v. Mid-America Pipeline Company*, explaining that “the delegation of discretionary authority under Congress’s taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges,”¹⁴ the 1974 decision illustrates that the nondelegation doctrine may not be “dead” but continues to survive through judicial canons and principles that sustain the separation-of-powers roots of the doctrine.¹⁵

ArtI.S3 Senate

ArtI.S3.C7 Impeachment Judgments

ArtI.S3.C7.2 Doctrine

ArtI.S3.C7.2.1 Doctrine on Impeachment Judgments

Article I, Section 3, Clause 7—the Impeachment Judgment Clause—authorizes the Senate,¹ following an individual’s conviction in an impeachment trial, to bar an individual from holding office in the future, but it does not clearly indicate that a vote for disqualification from future office must be taken separately from the initial vote for conviction.² Instead, the potential for a separate vote for disqualification has arisen through the historical practice of the Senate.³ The Senate did not choose to disqualify an

scope of congressional power or constitutionality of the delegation to the agency.”); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223, 242–43 (2000) (“The nondelegation doctrine . . . now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions. . . . Despite the Court’s apparent refusal to enforce the nondelegation doctrine directly, cases such as *Brown & Williamson* illustrate the Court’s modern strategy of using the canon of avoidance to promote nondelegation interests. Where a statute is broad enough to raise serious concerns under the nondelegation doctrine, the Court simply cuts it back to acceptable bounds.”) (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)).

¹⁰ *National Cable Television Ass’n v. United States*, 415 U.S. 336, 337–41 (1974).

¹¹ *Id.* at 337.

¹² *Id.* at 342.

¹³ *Id.* at 343–44.

¹⁴ 490 U.S. 212, 221 (1989).

¹⁵ See generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223 (2000).

¹ For more on the background of the Constitution’s impeachment provisions, see ArtIII.S1.10.2.2 Historical Background on Good Behavior Clause; ArtI.S3.C6.2 Historical Background on Impeachment Trials; ArtII.S4.4.2 Historical Background on Impeachable Offenses.

² U.S. CONST. art. I, § 3, cl. 7.

³ See 6 CLARENCE CANNON, CANNON’S PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 512 (1936), <https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS->

impeached individual from holding future office until the Civil War era. Federal district judge West H. Humphreys took a position as a judge in the Confederate government but did not resign his seat in the United States government.⁴ The House impeached Humphreys in 1862. The Senate then voted unanimously to convict Judge Humphreys and voted separately to disqualify the Humphreys from holding office in the future.⁵ Senate practice since the Humphreys case has been to require a simple majority vote to disqualify an individual from holding future office, rather than the supermajority required by the Constitution’s text for removal, but it is unclear what justifies this result beyond historical practice.⁶

The second impeachment trial of Donald Trump saw the President’s attorneys argue that the dual punishments of removal and disqualification are linked. They asserted that removal and disqualification are not “separate or alternative punishment[s]” but instead that removal was a “condition precedent” to the “further penalty” of disqualification.⁷ As such, the President’s attorneys argued that as a textual matter, there can be no impeachment of former officials because the necessary punishment of removal is not available when the official has already left office. The House managers rejected this interpretation during the impeachment trial, arguing that the punishments are indeed separate and have been historically treated as such. Linking the two punishments “defies logic” the managers argued, for “[i]f a law sets out two possible penalties and one of them becomes unavailable, that does not mean that the offender is exempt from the penalty that remains.”⁸ Ultimately, the Senate’s decision to exercise jurisdiction over the second Trump impeachment appears to be an implicit rejection of the President’s position.⁹

ArtI.S3.C7.2.2 Impeachment and Criminal Prosecutions

The Senate’s power to convict and remove individuals from office, as well as to bar them from holding office in the future, does not overlap with criminal remedies for misconduct. Indeed, the unique nature of impeachment as a political remedy distinct from criminal proceedings ensures that “the most powerful magistrates should be amenable to the law.”¹ Rather than serving to police violations of strictly criminal activity, impeachment is a “method of national inquest into the conduct of public men” for “the abuse or violation of some public trust.”² Impeachable offenses are those that “relate

V6.pdf. *See, e.g.*, 49 CONG. REC. 1447–48 (1913) (vote to disqualify Judge Robert W. Archbald, thirty-nine years, thirty-five days).

⁴ EMILY F.V. TASSEL & PAUL FINKELMAN, IMPEACHABLE OFFENSES: A DOCUMENTARY HISTORY FROM 1787 TO THE PRESENT 87–88, 114–16 (1999).

⁵ ELEANORE BUSHNELL, CRIMES, FOLLIES, AND MISFORTUNES: THE FEDERAL IMPEACHMENT TRIALS 123 (1992); *see* U.S. CONST. art. I, § 3, cl. 7 (Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States.).

⁶ U.S. CONST. art. I, § 3, cl. 7.

⁷ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART II, 117TH CONG., S. DOC. NO. 117-2, at 141 (2021).

⁸ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART III, 117TH CONG., S. DOC. NO. 117-2, at 200–01 (2021).

⁹ 167 CONG. REC. S609 (daily ed. Feb. 9, 2021).

¹ James Wilson, *Lectures on Law*, reprinted in, 1 THE WORKS OF JAMES WILSON 425–26 (1791).

² *See* THE FEDERALIST NO. 65 (Alexander Hamilton).

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chiefly to injuries done immediately to the society itself.”³ Put another way, the purpose of impeachment is to protect the public interest, rather than impose a punitive measure on an individual.⁴

This distinction came to the fore in the criminal prosecution of former President Donald Trump for allegedly attempting to overturn the results of the 2020 presidential election while he was in office.⁵ President Trump argued that the Impeachment Judgment Clause requires both impeachment in the House of Representatives and conviction in the Senate before a President can be prosecuted for acts undertaken while in office.⁶ Because President Trump had never been convicted in the Senate, he contended that the charges must be dismissed.⁷

The Supreme Court rejected President Trump’s view, reasoning that impeachment is an inherently political process for removing a President, not a necessary first step in criminal law enforcement.⁸ The Impeachment Judgment Clause’s text limits the consequences of an impeachment judgment and clarifies that prosecution can continue after such a judgment, the Court explained, but it does not address when a President who was *never* impeached and convicted may be prosecuted.⁹ Nor does historical evidence support the former President’s view, the Court explained, and the practical consequences of his interpretation would allow a president who “evades impeachment for one reason or another” to avoid accountability permanently for criminal conduct.¹⁰

The distinction between impeachment and criminal prosecution was also highlighted in the impeachment trial of federal district judge Alcee Hastings. Judge Hastings had been indicted for a criminal offense, but was acquitted.¹¹ In 1988, the House impeached Hastings for much of the same conduct for which he had been indicted. Judge Hastings argued that the impeachment proceedings constituted “double jeopardy” because of his previous acquittal in a criminal proceeding.¹² The Senate rejected his motion to dismiss the articles against him.¹³ The Senate voted to convict and remove Judge Hastings on eight articles, but it did not disqualify him from holding office in the future.¹⁴ Judge Hastings was subsequently elected to the House of Representatives.

³ *See Id.*

⁴ 8 ANNALS OF CONG. 2251 (1798).

⁵ For additional background on the charges of the case and its constitutional implications, see ArtII.S3.5.4 Criminal Prosecution, Presidential Immunity and Former Presidents.

⁶ *Trump v. United States*, No. 23-939, slip op. at 32 (U.S. July 1, 2024). For further background on the case, see Intro.9.2.12 Does Former President Trump Enjoy Presidential Immunity from Criminal Prosecution for Conduct Alleged to Involve Official Acts During his Tenure in Office?

⁷ *Trump*, No. 23-939, slip op. at 32.

⁸ *Id.* at 34.

⁹ *Id.* at 33.

¹⁰ *Id.* at 33-34.

¹¹ H.R. RES. 499 (Aug. 9, 1988); H. COMM. ON THE JUDICIARY, IMPEACHMENT OF JUDGE ALCEE L. HASTINGS, REPORT OF THE COMM. ON THE JUDICIARY TO ACCOMPANY H. RES. 499, 100TH CONG., 2D SESS., H.R. REP. NO. 100-810, at 1-5 (1988).

¹² IMPEACHMENT OF JUDGE ALCEE L. HASTINGS, MOTIONS OF JUDGE ALCEE L. HASTINGS TO DISMISS ARTICLES I-XV AND XVII OF THE ARTICLES OF IMPEACHMENT AGAINST HIM AND SUPPORTING AND OPPOSING MEMORANDA, 101ST CONG., 1ST SESS., S. DOC. NO. 101-4, at 48-65 (1989).

¹³ *The Impeachment Trial of Alcee L. Hastings (1989) U.S. District Judge, Florida*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Impeachment_Hastings.htm (last visited Jan. 24, 2018).

¹⁴ 35 CONG. REC. S13,783-87 (daily ed. Oct. 20, 1989).

ArtI.S4 Congress

ArtI.S4.C1 Elections Clause

ArtI.S4.C1.2 States

ArtI.S4.C1.2.1 States and Elections Clauses

By its terms, Article I, Section 4, Clause 1, referred to as the Elections Clause, contemplates that state legislatures will establish the times, places, and manner of holding elections for the House of Representatives and the Senate subject to Congress making or altering such state regulations (except as to the place of choosing Senators).¹ The Supreme Court has interpreted the Election Clause expansively, enabling states “to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns.”² The Court has further recognized the states’ ability to establish sanctions for violating election laws³ as well as authority over recounts⁴ and primaries.⁵ The Elections Clause, however, does not govern voter qualifications, which under Article I, Section 2, Clause 1, and the Seventeenth Amendment must be the same as the “Qualifications requisite for Electors of the most numerous Branch of the State Legislatures.”⁶ Similarly, the authority of states to establish the “Times, Places and Manner of holding Elections for Senators and Representatives” does not include authority to impose additional qualification requirements to be a Member of the House of Representatives or a Senator, which are governed by the Constitution’s Qualification Clauses at Article I, Section 2, Clause 2 for Members of the House and at Article I, Section 2, Clause 3.⁷

State authority to regulate the times, places, and manner of holding congressional elections has been described by the Court as the ability “to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental rights involved.”⁸ The Court has upheld a variety of state laws designed to ensure that elections are fair and honest and orderly.⁹ But the

¹ U.S. CONST. art. I, § 4, cl. 1. *See Foster v. Love*, 522 U.S. 67, 69 (1997) (“[I]t is well settled that the Elections Clause grants Congress ‘the power to override state regulations’ by establishing uniform rules for federal elections binding on the States.” (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-33 (1995))).

² *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

³ *Id.* at 369.

⁴ *Roudebush v. Hartke*, 405 U.S. 15, 24-25 (1972).

⁵ *United States v. Classic*, 313 U.S. 299, 320 (1941).

⁶ U.S. CONST. art. I, § 2, cl. 1; U.S. CONST. amend. XVII. *See also Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 17 (2013) (“Prescribing voting qualifications, therefore, ‘forms no part of the power to be conferred upon the national government’ by the Elections Clause, which is ‘expressly restricted to the regulation of the times, the places, and the manner of elections.’” (quoting *THE FEDERALIST* No. 60 (Alexander Hamilton))).

⁷ U.S. CONST. art. I, § 2, cl. 2; U.S. CONST. art. I, § 3, cl. 3. *See United States Term Limits v. Thornton*, 514 U.S. 779 (1995).

⁸ *Smiley v. Holm*, 285 U.S. 355, 366 (1932).

⁹ *See, e.g., Storer v. Brown*, 415 U.S. 724 (1974) (restrictions on independent candidacies requiring early commitment prior to party primaries); *Roudebush v. Hartke*, 405 U.S. 15, 25 (1972) (recount for Senatorial election); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986) (requirement that minor party candidate demonstrate substantial support—1% of votes cast in the primary election—before being placed on ballot for general election). The Court, however, has held that courts should not modify election rules if the election is imminent and “[n]o bright line separates permissible election-related regulation from unconstitutional infringements.” *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006) (per curiam) (quoting *Timmons v. Twin Cities Area New*

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Court distinguished state laws that go beyond “protection of the integrity and regularity of the election process,” and instead operate to disadvantage a particular class of candidates¹⁰ or negate the need for a general election.¹¹ The Court noted that the Elections Clause does not allow states to set term limits, which the Court viewed as “disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clause,”¹² or ballot labels identifying candidates who disregarded voters’ instructions on term limits or declined to pledge support for them.¹³ In its 1995 decision in *U.S. Term Limits v. Thornton*, the Court explained: [T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints.”¹⁴

ArtI.S4.Cl.1.2.2 State Authority over Congressional Elections and Role of Courts and Congress

The Supreme Court has held that Article I, Section 4, Clause 1, provides for Congress, not the courts, to regulate how states exercise their authority over Senate and House elections,¹ although courts may hear cases concerning claims of one-person, one-vote violations and racial gerrymandering.² For example, in its 2019 *Rucho v. Common Cause* decision, the Court held that partisan gerrymandering claims—claims that one political party has gerrymandered congressional districts to the disadvantage of the other party—are not justiciable by courts because “the only provision in the Constitution [Article I, Section 4, Clause 1] that specifically addresses the matter assigns it to the

Party, 520 U.S. 351, 359 (1997)). In *Purcell v. Gonzalez*, the Court observed that “the imminence of the election and the inadequate time to resolve the factual disputes” required the Court to “of necessity allow the election to proceed without an injunction suspending the voter identification rules.” *Purcell*, 549 U.S. at 5-6. *See also* Republican Nat’l Comm. v. Democratic Nat’l Comm., No. 19A1016, slip op. (U.S. Apr. 2020) (per curiam) (noting that “lower federal courts should ordinarily not alter the election rules on the eve of the election”) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 574 U.S. 951 (2014)).

¹⁰ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 835 (1995)

¹¹ *Foster v. Love*, 522 U.S. 67, 69 (1997) (explaining that the Elections Clause “is a default provision; it invests the State with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices”); *see id.* at 74 (holding that a Louisiana statute that deemed the winner of the primary to be the winner of the general election void and preempted by federal law which set the date of the election for federal offices).

¹² *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832 (1995) (“Petitioners make the related argument that Amendment 73 merely regulates the “Manner” of elections and that the amendment is therefore a permissible exercise of state power under Article I, §4, cl. 1 (the Elections Clause) to regulate the “Times, Places and Manner” of elections. We cannot agree.”).

¹³ *Cook v. Gralike*, 531 U.S. 510 (2001).

¹⁴ *Thornton*, 514 U.S. at 833–34. *See also* *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (states have an interest in “seeking to assure that elections are operated equitably and efficiently”); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986) (“the power to regulate the time, place, and manner of elections does not justify, without more, the abridgment of fundamental rights.”); *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983) (states may adopt “generally applicable and evenhanded restrictions that protect the integrity and reliability of the electoral process itself.”).

¹ *Rucho v. Common Cause*, No. 18-422, slip op. (U.S. June 2019). *See also* *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1 (2013); *Ex parte Siebold*, 100 U.S. 371, 392 (1880) (“The power of Congress . . . is paramount, and may be exercised at any time, and to any extent which it deems expedient.”).

² *Shaw v. Reno*, 509 U.S. 630 (1993); *see also* *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Wright v. Rockefeller*, 376 U.S. 52 (1964); *Baker v. Carr*, 369 U.S. 186 (1962); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Colegrove v. Green*, 328 U.S. 549 (1946); *Wood v. Broom*, 287 U.S. 1 (1932).

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political branches”³ and such claims present political questions—“outside the courts’ competence and therefore beyond the courts’ jurisdiction”—that are not for courts to decide.⁴ Although noting that the “districting plans at issue here are highly partisan, by any measure,”⁵ the *Rucho* Court observed that partisan gerrymandering claims raise particular problems for courts to adjudicate. First, the Court noted that the Framers had expected partisan interests to inform how states drew district lines.⁶ Consequently, the Court reasoned that the problem is not whether partisan gerrymandering has occurred but when it has “gone too far.”⁷ Second, the Court observed that there is no obvious standard by which to assess whether a partisan gerrymander has gone too far.⁸ The Court stated: “The initial difficulty in settling on a ‘clear manageable and politically neutral’ test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of ‘unfairness’ in any winner-take-all system.”⁹ The Court in *Rucho* further emphasized that it did not condone partisan gerrymanders but that Congress is constitutionally authorized to address the issue.¹⁰ Likewise, in *Husted v. A. Philip Randolph Inst.*, the Court upheld a state law providing for removing voters from voting roles based on indicators that they had moved, noting, among other things, that the state law was consistent with federal law and that the Court had “no authority to dismiss the considered judgment of Congress and the Ohio Legislature regarding the probative value of a registrant’s failure to send back a return card.”¹¹

The Court addressed what constitutes regulation by a state “Legislature” for purposes of the Elections Clause in its 2015 decision in *Arizona State Legislature v. Arizona Independent Redistricting Commission*.¹² There, the Court rejected the Arizona legislature’s challenge to the validity of the Arizona Independent Redistricting Commission (AIRC) and AIRC’s 2012 map of congressional districts.¹³ The Commission had been

³ *Rucho v. Common Cause*, No. 18-422, slip op. at 29 (U.S. June 2019).

⁴ *Id.* at 7. The Court observed that “[a]mong the political question cases the Court has identified are those that lack ‘judicially discoverable and manageable standards for resolving [them].’” *Id.* (quoting *Baker v. Carr*, 369 U.S. 186 (1962)); see also *id.* (“This Court’s authority to act . . . ‘is grounded in and limited by the necessity of resolving according to legal principles, a plaintiff’s particular claim of legal right.’ The question here is whether there is an ‘appropriate role for the Federal Judiciary’ in remedying the problem of partisan gerrymandering—whether such claims are claims of *legal* right, resolvable according to *legal* principles, or political questions that must find their resolution elsewhere.” (quoting *Gill v. Whitford*, No. 16-1161, slip op. at 8, 13 (U.S. June 2018))).

⁵ *Id.* at 2.

⁶ *Id.* at 12.

⁷ *Id.* at 13 (citing *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality opinion)). See also *Hunt v. Cromartie*, 526 U.S. 541, 555 (1999) (Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering . . .).

⁸ *Id.* see also *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986); *Gaffney v. Cummings*, 412 U.S. 735 (1973)). In *Gill v. Whitford*, the Court observed that “this Court is not responsible for vindicating generalized partisan preferences. The Court’s constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.” *Gill v. Whitford*, No. 16-1161, slip op. at 21 (U.S. June 2018).

⁹ *Rucho*, slip op. at 17; see also *Vieth*, 541 U.S. at 291 (“‘Fairness’ does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than [fairness] seems to us necessary to enable the state legislatures to win the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts’ intrusion into a process that is the very foundation of democratic decisionmaking.”).

¹⁰ *Rucho*, slip op. at 9 (“Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering.”).

¹¹ *Husted v. A. Philip Randolph Inst.*, No. 16-960, slip op. at 25-26 (U.S. June 2018).

¹² No. 13-1314 (2015).

¹³ *Id.* at 2-3.

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established by a 2000 ballot initiative, which removed redistricting authority from the legislature and vested it in the AIRC.¹⁴ The legislature asserted that this arrangement violated the Elections Clause because the Clause contemplates regulation by a state “Legislature” and “Legislature” means the state’s representative assembly.¹⁵

The Court disagreed and held that Arizona’s use of an independent commission to establish congressional districts is permissible because the Elections Clause uses the word “Legislature” to describe “the power that makes laws,” a term that is broad enough to encompass the power provided by the Arizona constitution for the people to make laws through ballot initiatives.¹⁶ In so finding, the Court noted that the word “Legislature” has been construed in various ways depending upon the constitutional provision in which it is used, and its meaning depends upon the function that the entity denominated as the “Legislature” is called upon to exercise in a specific context.¹⁷ Here, in the context of the Elections Clause, the Court found that the function of the “Legislature” was lawmaking and that this function could be performed by the people of Arizona via an initiative consistent with state law.¹⁸ The Court also pointed to dictionary definitions from the time of the Framers;¹⁹ the Framers’ intent in adopting the Elections Clause;²⁰ the “harmony” between the initiative process and the Constitution’s “conception of the people as the font of governmental power;”²¹ and the practical consequences of invalidating the Arizona initiative.²²

ArtI.S8. Enumerated Powers

ArtI.S8.C1 General Welfare

ArtI.S8.C1.2 Spending Power

ArtI.S8.C1.2.5 Clear Notice Requirement and Spending Clause

The Court evaluates Spending Clause legislation by requiring Congress to state conditions attached to federal funds in unambiguous terms. This requirement derives from a

¹⁴ *Id.*

¹⁵ *Id.* at 2.

¹⁶ *Id.* at 18. The Court also found that the use of the commission was permissible under 2 U.S.C. § 2a (c), a statutory provision that the Court construed as safeguarding to “each state full authority to employ in the creation of congressional districts its own laws and regulations.” *Id.* at 19.

¹⁷ *Id.* at 18.

¹⁸ *Id.* See also *Ohio ex rel. Davis v. Hildebrant*, 241 U.S. 565, 568 (1916) (holding that a state’s referendum system to override redistricting legislation “was contained within the legislative power,” rejecting the argument that the referendum was not part of the “Legislature”).

¹⁹ *Arizona*, No. 13-1314, slip op. at 24 (noting that “dictionaries, even those in circulation during the founding era, capaciously define the word ‘legislature’ to include as “[t]he power that makes laws” and “the Authority of making laws”).

²⁰ *Id.* at 25 (“The dominant purpose of the Elections Clause . . . was to empower Congress to override state election rules, not to restrict the way States enact legislation. . . . [T]he Clause ‘was the Framers’ insurance against the possibility that a State would refuse to provide for the election of representatives to the Federal Congress.”).

²¹ *Id.* at 30 (“The Framers may not have imagined the modern initiative process in which the people of a State exercise legislative power coextensive with the authority of an institutional legislature. But the invention of the initiative was in full harmony with the Constitution’s conception of the people as the font of governmental power.”).

²² *Id.* at 31, 33 (noting that it would be “perverse” to interpret the term “Legislature” to exclude the initiative, because the initiative is intended to check legislators’ ability to determine the boundaries of the districts in which they run, and that a contrary ruling would invalidate a number of other state provisions regarding initiatives and referendums).

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distinction between legislation enacted pursuant to Congress's other enumerated powers and legislation enacted under the Spending Clause. When Congress legislates under its power to enforce the Fourteenth Amendment, for example, it can command action or proscribe conduct.¹ Spending Clause legislation, on the other hand, is akin to a contract.² Congress makes federal funds available, subject to stated conditions, and a recipient knowingly and voluntarily accepts the funds and the conditions.³ Knowing and voluntary acceptance is what lends Spending Clause legislation its legitimacy.⁴

Much of the Court's modern Spending Clause case law involves states as recipients, and that context has shaped the Court's clear-notice doctrine.⁵ In view of limits on Congress's ability to command action by states,⁶ the Justices have stressed that knowing and voluntary acceptance is "critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."⁷ In particular, the clear-notice requirement—along with the anti-coercion principle discussed below—ensure that state officials bear political accountability for only those funding conditions that the officials had a legitimate chance of rejecting.⁸

A funds recipient cannot knowingly accept a condition if the recipient is either not aware of the condition or unable to determine the recipient's obligations under the condition.⁹ To gauge whether Congress stated a condition with requisite clarity, the Court views Congress's offer from the perspective of a state official who is deciding whether to accept conditioned funds.¹⁰ The Court asks whether the statute that makes the funds available provided the state official with clear notice of a particular obligation imposed by the condition.¹¹

Questions of enforcement of funding conditions have implicated the clear-notice requirement. The Court has stated that, typically, the remedy for noncompliance with a funding condition is for the Federal Government to take action against a grantee.¹² Unless a statute provides otherwise, a state will not usually have clear notice that noncompliance with a funding condition would result in a suit brought by someone other than the

¹ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *see also* Amdt14.S5.4 Modern Doctrine on Enforcement Clause.

² However, the Court has stated that its contract analogy does not necessarily result in offers of federal funds made pursuant to Spending Clause legislation being viewed in all respects as a bilateral contract. *See, e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 188 n.2 (2002); *Bennett v. Ky. Dep't of Educ.*, 470 U.S. 656, 669 (1985).

³ *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

⁴ *Barnes*, 536 U.S. at 186.

⁵ *But see* *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1569 (2022) (applying clear-notice requirements to ascertain the scope of damages available against a private rehabilitation facility made subject to certain federal requirements by virtue of its participation in Medicare and Medicaid).

⁶ *See* Amdt10.4.2 Anti-Commandeering Doctrine.

⁷ *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (2012) (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

⁸ *See id.* at 578–79 (discussing *New York v. United States*, 505 U.S. 144, 169 (1992)).

⁹ *Id.*; *see also* *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981) (Though Congress's power to legislate under the spending power is broad, it does not include surprising participating States with post acceptance or 'retroactive' conditions.).

¹⁰ *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006).

¹¹ *See id.*

¹² *Pennhurst State Sch. & Hosp.*, 451 U.S. at 28; *see also* *Bell v. New Jersey*, 461 U.S. 773, 791 (1983) (explaining, in the context of an enforcement action by the Federal Government, a state has no sovereign right to retain funds without complying with valid conditions).

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Federal Government, such as an end beneficiary of the program supported with conditioned funds.¹³ However, the Court has found funding conditions enforceable by private parties when a statute conferred a specific monetary entitlement on a person bringing suit who lacked sufficient administrative procedures to challenge denial of that entitlement.¹⁴ The Court has also found that Spending Clause legislation may give rise to privately enforceable rights under 42 U.S.C. § 1983, which provides a cause of action for violations of the Constitution and laws by state actors, if Congress unambiguously conferred such individual rights under the statute.¹⁵

The Court has applied clear-notice principles to determine whether a funds recipient plainly knew it could be held liable for the particular conduct at issue in the suit.¹⁶ Congress must also speak with a clear voice regarding the scope of remedies authorized by statute.¹⁷ If a private suit is authorized but statute does not specify remedies, the Court has stated that the funds recipient is on notice that it may be subject to the usual remedies for a breach of contract action.¹⁸

ArtI.S8.C3 Commerce

ArtI.S8.C3.7 Dormant Commerce Clause

ArtI.S8.C3.7.1 Overview of Dormant Commerce Clause

Even as the Commerce Clause empowers Congress to pass federal laws, it has also come to limit state authority to regulate commerce. In contrast to the doctrine of preemption, which generally applies in areas where Congress has acted,¹ the so-called Dormant

¹³ See *Pennhurst State Sch. & Hosp.*, 451 U.S. at 28.

¹⁴ See *Gonzaga University v. Doe*, 536 U.S. 273, 280–83 (2002) (discussing *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418 (1987), and *Wilder v. Va. Hosp. Ass’n*, 496 U.S. 498 (1990)); see also *Suter v. Artist M.*, 503 U.S. 347, 363 (1992). The Court has also implied a private right of action to enforce certain statutes barring discrimination in federally financed programs. See, e.g., *Barnes v. Gorman*, 536 U.S. 181, 185 (2002).

¹⁵ *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, No. 21-806 (U.S. June 8, 2023). In *Talevski*, the Supreme Court considered whether Spending Clause statutes may be enforceable through 42 U.S.C. § 1983 (Section 1983), which provides a cause of action to any person deprived of “any rights . . . secured by the Constitution and laws . . .” 42 U.S.C. § 1983. Although “the typical remedy for state noncompliance with federally imposed conditions is not a private cause of action for noncompliance but rather action by the Federal Government to terminate funds to the State” (*Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002)), the Court held that a Spending Clause statute may be enforceable under Section 1983 if it “has ‘unambiguously conferred’ ‘individual rights upon a class of beneficiaries’ to which the plaintiff belongs” and “the provision in question is ‘phrased in terms of the persons benefited’ and contains ‘rights-creating, individual-centric language with an ‘unmistakable focus on the benefited class.’” *Talevski*, slip op. at 14 (quoting *Gonzaga*, 536 U.S. at 283, 284, 285–86, 287). The Court noted, however, that Section 1983 would not be available if Congress had created an incompatible enforcement scheme or otherwise indicated that it did not intend to provide for such relief. The Court stated “[e]ven if a statutory provision unambiguously secures rights, a defendant ‘may defeat t[he] presumption by demonstrating that Congress did not intend’ that § 1983 be available to enforce those rights.” *Id.* at 17 (quoting *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005)).

¹⁶ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287–88 (1998).

¹⁷ See *Sossamon v. Texas*, 563 U.S. 277, 286 (2011) (statutory authorization of “appropriate relief” did not unambiguously include a damages award against a state because states are usually immune from such suits); *Arlington Cent. Sch. Dist. Bd. of Educ.*, 548 U.S. at 300 (statutory reference to an “award of reasonable attorneys’ fees as part of the costs” of a suit did not clearly allow recovery of expert fees).

¹⁸ See *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576 (2022) (holding that a request for emotional distress damages failed clear-notice requirement because it was not a remedy usually available in breach of contract actions between private parties); *Barnes v. Gorman*, 536 U.S. 181, 187–88 (2002) (same conclusion with respect to punitive damages).

¹ See ArtVI.C2.3.3 New Deal and Presumption Against Preemption.

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Commerce Clause may bar state or local regulations even where there is no relevant congressional legislation. Although the Commerce Clause is framed as a positive grant of power to Congress and not an explicit limit on states' authority,² the Supreme Court has also interpreted the Clause to prohibit state laws that unduly restrict interstate commerce even in the absence of congressional legislation—i.e., where Congress is dormant. This negative or dormant interpretation of the Commerce Clause prevents the States from adopting protectionist measures and thus preserves a national market for goods and services.³

The Supreme Court has identified two principles that animate its modern Dormant Commerce Clause analysis. First, subject to certain exceptions, states may not discriminate against interstate commerce.⁴ Second, states may not take actions that are facially neutral but unduly burden interstate commerce.⁵

On May 11, 2023, the Supreme Court issued an opinion in *National Pork Producers Council v. Ross* affirming a lower court decision dismissing a lawsuit that California's Proposition 12, which forbids selling pork from certain pigs that are confined in a cruel manner, violates the Dormant Commerce Clause.⁶ In reaching its decision, the Court rejected an argument that Proposition 12 violated an extraterritoriality doctrine that would forbid[] enforcement of state laws that have the 'practical effect of controlling commerce outside the State,' even when those laws do not purposely discriminate against out-of-state economic interests.⁷ The Court also rejected an argument that Proposition 12 violated the Dormant Commerce Clause under the *Pike v. Bruce Church Inc.* line of cases, which the petitioners had argued provides that courts should assess 'the burden imposed on interstate commerce' by a state law and prevent its enforcement if the law's burdens are 'clearly excessive in relation to the putative local benefits.'⁸

² *Comptroller of Treasury of Md. v. Wynne*, 575 U.S. 542, 548–549 (2015).

³ *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019); *see also* *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 537–38 (1949) ("This principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy, including the vital power of erecting customs barriers against foreign competition, has as its corollary that the states are not separable economic units."); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935), ("What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation.").

⁴ *E.g.*, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2090–2091 (2018).

⁵ *Id.*

⁶ No. 21-468, slip op. (U.S. May 11, 2023).

⁷ *Id.* at 9.

⁸ 397 U.S. 137 (1970); *National Pork*, No. 21-468, slip op. at 15.

ArtI.S8.C3.9 Indian Tribes

ArtI.S8.C3.9.1 Scope of Commerce Clause Authority and Indian Tribes

Jurisdiction over matters in “Indian Country”¹ “is governed by a complex patchwork of federal, state, and tribal law.”² Since *Worcester v. Georgia* in 1832,³ the Supreme Court has recognized that Native American “tribes are unique aggregations possessing attributes of sovereignty over both their members and their territories.”⁴ They are no longer “possessed of the full attributes of sovereignty,”⁵ however, having relinquished some part of it by “[t]heir incorporation within the territory of the United States and their acceptance of its protection.”⁶ Accordingly, “[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance.”⁷

While previously “the subject of some confusion,” the source of federal authority over tribal matters is generally recognized to “derive[] from federal responsibility for regulating commerce with Indian tribes and for treaty making.”⁸ The Constitution’s so-called “Indian Commerce Clause” explicitly authorizes Congress to regulate commerce with

¹ “Indian Country” is statutorily defined in 18 U.S.C. § 1151 as: (a) “all land within the limits of any Indian reservation under the jurisdiction of the United States Government”; (b) “all dependent Indian communities within the borders of the United States”; and (c) “all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.”

² *Duro v. Reina*, 495 U.S. 676, 680 (1990) (citing *United States v. John*, 437 U.S. 634, 648–49 (1978)), *superseded by statute as recognized in* *United States v. Lara*, 541 U.S. 1931 (2004).

³ 31 U.S. (6 Pet.) 515 (1832). *See also* *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831). Under this doctrine, tribes possess sovereign immunity from suit in the same way as the United States and the states. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512–13 (1940). The Supreme Court has repeatedly rejected arguments to abolish or curtail tribal sovereign immunity. *See, e.g.*, *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 510 (1991).

⁴ *States v. Wheeler*, 435 U.S. 313, 323 (1978) (internal quotation marks and citation omitted), *superseded by statute as recognized in* *Lara*, 541 U.S. 1931.

⁵ *United States v. Kagama*, 118 U.S. 375, 381 (1886) (“[T]he Indian tribes residing within the territorial limits of the United States are subject to their authority, and where the country occupied by them is not within the limits of one of the States, Congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.”).

⁶ *Wheeler*, 435 U.S. at 323.

⁷ *Id.* *See also* *South Dakota v. Bourland*, 508 U.S. 679 (1993) (discussing abrogation of tribal treaty rights and reduction of sovereignty). Congress may also remove restrictions on tribal sovereignty. The Supreme Court has held, however, that absent authority from federal statute or treaty, tribes possess no criminal authority over non-Natives (with some limited exceptions). *Montana v. United States*, 450 U.S. 544 (1981); *see also* *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). In *United States v. Cooley*, No. 19-1414, slip op. at 1 (U.S. June 1, 2021), the Court applied the *Montana* Doctrine to hold that a “tribal officer possesses the authority . . . to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation.” As to members of other tribes, the Court held in *Duro v. Reina*, that a tribe has no criminal jurisdiction over members of other tribes who commit crimes on the reservation. Congress, however, later enacted a statute recognizing the inherent authority of tribal governments to exercise criminal jurisdiction over non-member Natives; the Court subsequently upheld congressional authority to do so in *United States v. Lara*.

⁸ *McClanahan v. State Tax Comm’n of Ariz.*, 411 U.S. 164, 172 n.7 (1973) (citing U.S. CONST. art. I, § 8, cl. 3; art. II, § 2, cl. 2; *Williams v. Lee*, 358 U.S. 217, 219 (1959); *Perrin v. United States*, 232 U.S. 478 (1914)). Article II, Section 2, Clause 2 of the Constitution gives the President the “Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur” For more on the treaty-making power, see ArtII.S2.C2.1.1 Overview of President’s Treaty-Making Power.

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the tribes.⁹ Congress's authority to regulate commercial activity in "Indian Country" is plenary,¹⁰ exclusive,¹¹ and broad,¹² and persists even though such activity may occur within a state's territorial boundaries.¹³

Using its Indian Commerce Clause authority, Congress may determine with whom and in what manner the tribes engage in commercial activity.¹⁴ Major areas where Congress has exercised its power to regulate include: tribal land; tribal gaming; hunting, fishing, and wildlife; and natural resources, such as minerals, oil and gas, and timber. Congress has also attempted to promote tribal political and economic development¹⁵ through legislation such as the Indian Reorganization Act of 1934¹⁶ and the Native American Business Development, Trade Promotion, and Tourism Act.¹⁷

The Supreme Court has increasingly recognized Congress's power under the Indian Commerce Clause as a source of authority to regulate tribal rights and obligations beyond matters of mere commerce.¹⁸ Although the power of Congress over tribal affairs is broad, it is not limitless.¹⁹ While "the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations."²⁰ The Court has articulated a standard of review that defers to legislative judgment "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians."²¹ A more searching

⁹ U.S. CONST. art. I, § 8, cl. 3. *See also* *Williams v. Lee*, 358 U.S. 217, 220 n.4 (1959) ("The Federal Government's power over Indians is derived from Art. I, s. 8, cl. 3, of the United States Constitution, and from the necessity of giving uniform protection to a dependent people." (citing *Perrin v. United States*, 232 U.S. 478 (1914))).

¹⁰ *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014); *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011).

¹¹ *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759 (1985); *Oneida Cnty. v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985); *Howard v. Ingersoll*, 54 U.S. 381, 410 (1851) ("Constitutionally [the United States] could alone regulate commerce with the Indian tribes.").

¹² *United States v. Lara*, 541 U.S. 193 (2004); *Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M.*, 458 U.S. 832 (1982); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

¹³ *United States v. Jackson*, 280 U.S. 183 (1930).

¹⁴ *Perrin v. United States*, 232 U.S. 478 (1914); *Tinker v. Midland Valley Mercantile Co.*, 231 U.S. 681 (1914).

¹⁵ 25 U.S.C. §§ 1451 et seq.

¹⁶ *Id.* §§ 461 et seq.

¹⁷ *Id.* §§ 4301 et seq. Other examples include the Indian Revolving Loan Fund, *id.* §§ 1461 et seq.; 25 C.F.R. §§ 101.1 et seq., Indian Loan Guaranties and Insurance, 25 U.S.C. §§ 1481 et seq.; 25 C.F.R. §§ 103.1 et seq., and Indian Business Grants, 25 U.S.C. §§ 1521 et seq.

¹⁸ In an early case, the Supreme Court rejected the Commerce Clause as a basis for congressional enactment of a system of criminal laws for Native Americans living on reservations. *United States v. Kagama*, 118 U.S. 375 (1886). Nonetheless, the Court sustained the laws on the grounds that the Federal Government had the obligation and thus the power to protect a "weak and diminished" people. *Id.* at 384. *Cf.* *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866); *United States v. Sandoval*, 231 U.S. 28 (1913). A special fiduciary responsibility between the Federal Government and tribes can also be created by statute. *See, e.g., United States v. Mitchell*, 463 U.S. 206 (1983) ("[T]he statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.").

¹⁹ "The power of Congress over Indian affairs may be of a plenary nature; but it is not absolute." *United States v. Alcea Bank of Tillamooks*, 329 U.S. 40, 54 (1946) (plurality opinion) (quoted with approval in *Del. Tribal Bus. Comm. v. Weeks*, 430 U.S. 73, 84 (1977)).

²⁰ *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119, 123 (1938).

²¹ *Morton v. Mancari*, 417 U.S. 535, 555 (1974). The Court applied this standard to uphold a statutory classification that favored employment of "qualified Indians" at the Bureau of Indian Affairs. In *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), the same standard was used to sustain a classification that favored, although inadvertently, one tribe over other tribes. While tribes are unconstrained by federal or

review is warranted when it is alleged that the Federal Government’s behavior toward a tribe contravenes its obligations, or when the government has taken property which it guaranteed to the tribe without compensating the tribe for the land’s full value.²²

On June 15, 2023, the Supreme Court issued a decision in *Haaland v. Brackeen*,²³ a case challenging the constitutionality of the Indian Child Welfare Act (ICWA). ICWA regulates child custody proceedings that involve Indian children by, among other things, establishing a preference for placing Indian children with Indian families or institutions ahead of unrelated non-Indians or non-Indian institutions.²⁴ The Court upheld ICWA as a valid exercise of Congress’s broad power to legislate with respect to Indian tribes under the Indian Commerce Clause.²⁵ In ruling that ICWA permissibly preempted aspects of state family law, the Court confirmed that Congress’s Indian Commerce Clause power allows it to regulate individual tribal members in addition to Indian tribes and embraces “not only trade but also Indian affairs.”²⁶ In other words, Congress’s power under the Indian Commerce Clause is not limited to the common perception of commerce as meaning trade or “economic transactions.”

ArtI.S8.C4 Uniform Laws

ArtI.S8.C4.2 Bankruptcy

ArtI.S8.C4.2.5 Constitutional Limits on Bankruptcy Power

In exercising its bankruptcy powers, Congress is subject to certain constitutional limitations.¹ Congress may not circumscribe the creditor’s right in property to such an unreasonable extent as to deny him due process of law or effect an unconstitutional taking.² Congress *may* impair the obligation of a contract or extend a federal bankruptcy

state constitutional provisions, Congress has legislated a “bill of rights” statute covering them. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

²² United States v. Sioux Nation, 448 U.S. 371 (1980). *See also* Solem v. Bartlett, 465 U.S. 463, 472 (1984) (stating there must be “substantial and compelling evidence of congressional intention to diminish Indian lands” before the Court will hold that a statute removed land from a reservation); Nebraska v. Parker, 577 U.S. 481, 494 (2016) (noting that “only Congress can divest a reservation of its land and diminish its boundaries,” but finding the statute in question did not clearly indicate Congress’s intent to effect such a diminishment of the Omaha Reservation); *McGirt v. Oklahoma*, No. 18-9526, slip. op. at 8 (U.S. July 9, 2020) (stating that to disestablish a reservation, Congress must “clearly express its intent to do so”). In *McGirt*, the Court held that Congress had not expressed a sufficiently clear intent to disestablish the Creek Reservation, concluding the reservation survived allotment and other intrusions “on the Creek’s promised right to self-governance.” *Id.* at 13.

²³ *Haaland v. Brackeen*, No. 21–376 (U.S. June 15, 2023).

²⁴ *Id.* at 5 (citing 25 U.S.C. § 1915).

²⁵ *Id.* at 11–12 (stating that Congress derives its “power to legislate with respect to the Indian tribes” from the Indian Commerce Clause, the Article II Treaty Power, “principles inherent in the Constitution’s structure,” and the “trust relationship between the United States and the Indian people.”).

²⁶ *Id.* at 14–15, 16 (citations and internal quotation marks omitted).

¹ *See, e.g.*, Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 589 (1935) (“The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment.”); *see also* Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 72–73 (1982) (plurality) (explaining that when the requirements of Article III of the Constitution are applicable, Congress’s Article I legislative powers—including the Bankruptcy Clause—are controlled by Article III).

² *Louisville Bank v. Radford*, 295 U.S. 555, 589, 602 (1935); *see* *Wright v. Union Cent. Life Ins. Co.*, 304 U.S. 502, 518 (1938).

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law to contracts already entered into at the time Congress passed the law.³ In 1935, the Court held that, under the Tenth Amendment,⁴ Congress was unable to subject the fiscal affairs of a political subdivision of a state to a federal bankruptcy court's control.⁵ A year later, however, the Court held that Congress may empower federal bankruptcy courts to entertain petitions by taxing agencies or instrumentalities for a composition of their indebtedness when the state has consented to the proceeding and the federal court is not authorized to interfere with the fiscal or governmental affairs of such petitioners.⁶

The Bankruptcy Clause provides that Congress may enact uniform bankruptcy laws.⁷ However, the Court has explained that the uniformity required is geographic, not personal.⁸ Thus, Congress may recognize state laws relating to dower, exemptions, the validity of mortgages, priorities of payment, and similar matters, even though such recognition leads to different results from state to state.⁹ And the Court has declared that the uniformity requirement does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems.¹⁰ Thus, in the *Regional Rail Reorganization Act Cases*, the Court denied a uniformity challenge to a railroad reorganization law that applied to railroads in one particular geographic region, because no other railroads were under reorganization at the time.¹¹ However, in *Railway Labor Executives' Association v. Gibbons*,¹² the Court held that a railroad reorganization law that applied to only one railroad was unconstitutional where there were other railroads engaged in reorganizations that were not subject to the law.¹³ The Court has also held that, while a disparity between the fees charged to debtors under the U.S. Trustee Program and the Bank-

³ *In re Klein*, 42 U.S. (1 How.) 277 (1843); *Hanover National Bank v. Moyses*, 186 U.S. 181, 188 (1902). For information on the Contract Clause, U.S. CONST. art. I, § 10, cl. 1, see ArtLS10.C1.6.1 Overview of Contract Clause.

⁴ U.S. CONST. amend. X. For information on the Tenth Amendment, see Amdt10.1 Overview of Tenth Amendment, Rights Reserved to the States and the People through Amdt10.4.4 Commerce Clause and Tenth Amendment.

⁵ *Ashton v. Cameron Cnty. Dist.*, 298 U.S. 513, 532 (1936).

⁶ *United States v. Bekins*, 304 U.S. 27, 51–53 (1938); see *Puerto Rico v. Franklin Cal. Tax-Free Trust*, 579 U.S. 115, 122 (2016) (“Critical to the Court’s constitutional analysis [in *Bekins*] was that the State had first authorized its instrumentality to seek relief under the federal bankruptcy laws.”).

⁷ U.S. CONST. art. I, § 8, cl. 4 (Congress is empowered “[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States”) (emphasis added); see *Perez v. Campbell*, 402 U.S. 637, 656 (1971) (explaining that “to legislate in such a way that a discharge in bankruptcy means one thing in the District of Columbia and something else in the States—depending on state law—[would be to reach] a result explicitly prohibited by the uniformity requirement in the constitutional authorization to Congress to enact bankruptcy legislation”).

⁸ *Hanover Nat’l Bank v. Moyses*, 186 U.S. 181, 189 (1902). “Personal uniformity” is the principle—rejected by the Supreme Court—“that the bankruptcy laws should apply identically to individual debtors, regardless of the state or locality in which the debtor resides.” *Schultz v. United States*, 529 F.3d 343, 350–51 (6th Cir. 2008).

⁹ *Stellwagon v. Clum*, 245 U.S. 605, 613 (1918); *Hanover National Bank*, 186 U.S. at 190; see *Wright v. Vinton Branch of Mountain Trust Bank of Roanoke, Va.*, 300 U.S. 440, 463 n.7 (1937) (“The problem dealt with may present significant variations in different parts of the country.”).

¹⁰ *Blanchette v. Connecticut General Ins. Corporations (Railroad Reorganization Act Cases)*, 419 U.S. 102, 159 (1974).

¹¹ *Id.* at 159–61.

¹² 455 U.S. 457.

¹³ *Id.* at 470; cf. *Warren v. Palmer*, 310 U.S. 132, 137 (1940) (“Railroad reorganization in bankruptcy is a field completely within the ambit of the bankruptcy powers of Congress.”)

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ruptcy Administrator violates the uniformity requirement of the Bankruptcy Clause,¹⁴ parity of the fees on a prospective basis is an appropriate remedy.¹⁵

Article III of the U.S. Constitution contains relevant limits on Congress’s exercise of the bankruptcy power.¹⁶ The Supreme Court has considered Congress’s power to vest the adjudication of claims in non-Article III bankruptcy courts in several decisions.¹⁷ In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,¹⁸ the Court invalidated portions of the Bankruptcy Reform Act of 1978 that impermissibly empowered non-Article III bankruptcy courts with “jurisdiction over all ‘civil proceedings arising under [the Bankruptcy Code] or arising in or related to cases under [the Bankruptcy Code],’” such as state law breach of contract claims and other claims unrelated to the restructuring of debtor-creditor relations.¹⁹ Later, in *Stern v. Marshall*,²⁰ the Court held a provision of the Bankruptcy Amendments and Federal Judgeship Act of 1984²¹ unconstitutional for authorizing bankruptcy courts to enter final judgments on certain actions whose existence are not attributable to bankruptcy proceedings—such as tortious interference counterclaims against creditors—but which are merely intended to “augment the bankruptcy estate.”²² The Court subsequently held that a bankruptcy court may issue proposed findings and conclusions of law, subject to de novo review by the district court, on claims statutorily denominated as within the bounds of bankruptcy courts’ “core” powers but which may only be constitutionally committed to an Article III adjudicator.²³ And in 2015, the Court held that a bankruptcy court may resolve such claims if a party consents to the bankruptcy court’s jurisdiction.²⁴

¹⁴ *Siegel v. Fitzgerald*, 596 U.S. 464 (2022) (holding that the Bankruptcy Judgeship Act of 2017 violated the constitutional requirement of uniformity by allowing the UST and BA jurisdictions to implement the new fees differently).

¹⁵ *United States Trustee v. John Q. Hammons Fall 2006, LLC*, No. 22-1238 (U.S. June 14, 2024).

¹⁶ *See* U.S. CONST. art. III.

¹⁷ For information on Congress’s power to establish non-Article III courts, see ArtIII.S1.9.1 Overview of Congressional Power to Establish Non-Article III Courts.

¹⁸ 458 U.S. 50 (1982).

¹⁹ *Id.* at 59, 71, 87 (plurality) (quoting 28 U.S.C. § 1471(b) (repealed) (emphasis omitted)); *see id.* at 91–92 (Rehnquist, J. concurring in the judgment). The plurality referred to the alteration of debtor-creditor relationships as “the core of the federal bankruptcy power.” *Id.* at 71 (plurality).

²⁰ 564 U.S. 462 (2011).

²¹ Pub. L. 98-353, 98 Stat. 333 (July 10, 1984).

²² 564 U.S. at 495, 503.

²³ *Exec. Bens. Insurance Agency v. Arkison*, 573 U.S. 25, 39–40 (2014); *see* 28 U.S.C. § 157(b), (c) (distinguishing between “core” and non-core proceedings in relation to the jurisdiction of bankruptcy courts).

²⁴ *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 686 (2015). The Court held that the required consent need not be expressed, but must be “knowing and voluntary.” *Id.* at 683, 685. *See also* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33 (1989) (concerning the Seventh Amendment right to jury trial in fraudulent conveyance action by bankruptcy trustee). (For other decisions concerning the Seventh Amendment and bankruptcy, *see* *Langenkamp v. Culp*, 498 U.S. 42 (1990) (per curiam); *Katchen v. Landy*, 382 U.S. 323 (1966). To read about the right to trial by jury in civil cases guaranteed by the Seventh Amendment, U.S. CONST. amend. VII, *see* Amdt7.2.1 Historical Background of Jury Trials in Civil Cases to Amdt7.2.5 Composition and Functions of a Jury in Civil Cases.

ArtI.S8.C8 Intellectual Property

ArtI.S8.C8.5 Federal Power Over Trademarks

Congress’s power over trademarks, another form of intellectual property, does not derive from the Intellectual Property (IP) Clause. In *The Trade-Mark Cases*,¹ decided in 1879, the Supreme Court held that Congress lacked power under the IP Clause to provide for trademark protection because trademarks need not be original, creative, novel, nor inventive.² As a result, the Court was “unable to see any such power [to protect trademarks] in the constitutional provision concerning authors and inventors, and their writings and discoveries.”³ In the twentieth century, however, courts have sustained federal trademark legislation as an exercise of Congress’s power under the Commerce Clause.⁴

As with other forms of intellectual property, Congress’s power over trademarks cannot be used in ways that infringe the constitutional rights of individuals. For example, because trademarks are considered private speech under the First Amendment, the government generally cannot engage in viewpoint discrimination in trademark registration decisions.⁵ However, the regulation of trademarks as source identifiers is generally consistent with the First Amendment, and the fact that trademarks may have “expressive” elements does not warrant any heightened First Amendment protection.⁶

ArtI.S8.C11 War Powers

ArtI.S8.C11.1 Congressional War Powers

ArtI.S8.C11.1.1 Overview of Congressional War Powers

When the Constitution’s Framers gathered in Philadelphia to draft the Constitution, one of their principal objectives was to improve the United States’ ability to ensure its peace and security through military protection.¹ In line with that aim, the Preamble

¹ *The Trade-Mark Cases*, 100 U.S. 82 (1879).

² *Id.* at 94 (“The ordinary trade-mark has no relation to invention or discovery . . . neither originality, invention, discovery, science, nor art is in any way essential to the [trademark] right . . .”).

³ *Id.*

⁴ *Dawn Donut Co. v. Hart’s Food Stores, Inc.*, 267 F.2d 358, 365 (2d Cir. 1959) (holding that Congress has power under the Commerce Clause to regulate trademarks used in commerce, even if the use is purely intrastate). The Supreme Court in the *Trade-Mark Cases* had declined to address whether the Commerce Clause might support federal trademark legislation, instead holding that the legislation at issue was not limited to interstate and foreign commerce and therefore the Commerce Clause was inapposite. *Trade-Mark Cases*, 100 U.S. at 95–97. For an overview of the scope of the Commerce Clause, see ArtI.S8.C3.1 Overview of Commerce Clause.

⁵ *Iancu v. Brunetti*, 588 U.S. 388, 390 (2019); *Matal v. Tam*, 582 U.S. 218, 239, 244 (2017). Content-based restrictions on trademark registration that are not also viewpoint-based may be permissible under the First Amendment. See *Vidal v. Elster*, 602 U.S. 286, 296 (2024) (observing that throughout the nation’s history, “the inherently content-based nature of trademark law has never been a cause for constitutional concern”).

⁶ *Jack Daniel’s Props., Inc. v. VIP Prods. LLC*, 599 U.S. 140, 145 (2023).

¹ See, e.g., *Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580, 594 (2022) (“The Framers ‘had emerged from a long struggle which had taught them the weakness of a mere confederation,’ so ‘they established a Union which could fight with the strength of one people under one government entrusted with the common defence.’”) (quoting *Lichter v. United States*, 334 U.S. 742, 780 (1948)); *Selective Draft Law Cases*, 245 U.S. 366, 381 (1918) (describing changes to congressional war powers as one of the “recognized necessities” of the Constitution’s adoption); *THE FEDERALIST* NO. 41 (James Madison) (“Security against foreign danger is one of the primitive objects of civil society. It is an avowed and essential object of the American union.”).

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makes securing the common defense one of the Constitution's principle purposes,² and the articles that follow allocate broad control over national security to the federal government while denying most war powers to the states.³

Although courts and commentators occasionally discuss the “war power” as if it were a unified authority,⁴ the Supreme Court has explained that “the Constitution spells out the war powers not in a single, simple phrase, but in many broad, interrelated provisions.”⁵ In Article I, the Constitution empowers Congress to “provide for the common defense” through a set of enumerated authorities concerning war and national security.⁶ Central among these powers is Clause 11 of Article I, Section 8, which authorizes Congress to declare war. Clause 11 also empowers Congress to issue letters of marque and reprisal, which are instruments that permit private citizens to capture or destroy enemy property, and permits Congress to authorize rules concerning captures of enemy property on land or at sea.⁷

Apart from Clause 11, other clauses in Article I, Section 8, grant Congress the power to define and punish offenses against the law of nations; raise and support armies; establish and maintain a navy; make rules for the armed forces; “provide for calling forth the Militia”; and “provide for organizing, arming, and disciplining, the Militia, and for governing” the militia when in the service of the United States.⁸ General congressional authorities, such as the power over appropriations⁹ and the Necessary and Proper Clause,¹⁰ supplement Congress's enumerated war powers. Finally, the Supreme Court has sometimes stated that the United States possesses inherent war powers that derive from its role as a sovereign country rather than from an affirmative grant in the Constitution.¹¹ Other times, however, the Court has expressed the view that the federal

² See U.S. CONST. pmbl. For analysis of the Preamble, see Pre. 1 Overview of the Preamble and subsequent essays.

³ See U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal”); *id.* art. I, § 10, cl. 2 (“No State shall, without the Consent of Congress, . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay.”). For additional background on limitations on states, see ArtI.S10.C3.2 States and Military Affairs. The Constitution also limits individuals' power to engage in war by defining treason as “levying War” against the United States. U.S. CONST. art. III, § 3, cl. 1.

⁴ See, e.g., *Trop v. Dulles*, 356 U.S. 86, 93 (1958); *Korematsu v. United States*, 323 U.S. 214, 217 (1944), *abrogated by* *Trump v. Hawaii*, 585 U.S. 667 (2018); *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1875).

⁵ *Torres*, 597 U.S. at 590.

⁶ See U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States . . .”). See also *Ex parte Quirin*, 317 U.S. 1, 25–26 (1942) (describing the common defense as one of the “common objects of the Constitution”).

⁷ U.S. CONST. art. I, § 8, cl. 11.

⁸ U.S. CONST. art. I, § 8, cls. 1, 10–16.

⁹ U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law”). For background on Congress's appropriations power, see ArtI.S9.C7.1 Overview of Appropriations Clause.

¹⁰ The Necessary and Proper Clause permits Congress to make laws “necessary and proper for carrying into execution” both its own powers and all other powers that the Constitution authorizes, including the President's war power under Article II of the Constitution. See U.S. CONST. art. I, § 8, cl. 18. For background on the Necessary and Proper Clause see ArtI.S8.C18.1 Overview of Necessary and Proper Clause.

¹¹ See *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 318 (1936) (“[T]he investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, [and] to conclude peace . . . if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of

governments' war powers, while expansive, "are only those which are to be derived from the Constitution"¹²

ArtI.S8.C11.1.2 Breadth of Congressional War Powers

Congress's collective war powers provide it with broad authority to support the country's war effort in a variety of ways. The Supreme Court has held that congressional war powers include the power to provide for compulsory military service,¹ protect servicemembers during and after active duty,² control domestic industry and means of production to support war needs,³ requisition property under certain conditions,⁴ close non-essential industries,⁵ impose rent and price controls,⁶ permit the government to renegotiate war contracts to recoup excessive profits,⁷ and enact other trade and economic restrictions.⁸ Although these powers are extensive, the Supreme Court has also observed that the Constitution applies in times of war and peace, and that there are constitutional limits on congressional war authority.⁹ For example, the Court has held that protections of individual rights in the Bill of Rights¹⁰ limit Congress's power to use military commissions to try American civilians when federal courts are open and

nationality."); *Hamilton v. Dillin*, 88 U.S. (2 Wall.) 73, 87 (1875) ("The war power vested in the government implied all this without any specific mention of it in the Constitution."). *See also* *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570, (1840) (opinion of Taney, C.J.) ("All the powers which relate to our foreign intercourse are confided to the general government."); *Penhallow v. Doane*, 3 U.S. (3 Dall.) 54, 80 (1795) (opinion of Paterson, J.) ("In every government, whether it consists of many states, or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy").

¹² *Lichter v. United States*, 334 U.S. 742, 782 (1948).

¹ *Selective Draft Law Cases*, 245 U.S. 366, 377 (1918).

² *See, e.g., Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580 (2022) (abrogating state sovereign immunity and upholding servicemembers' right to enforce employment discrimination law against a state agency); *Dameron v. Brodhead*, 345 U.S. 322, 324 (1953) (upholding constitutionality of federal legislation exempting servicemembers from taxation by local and state government where the servicemember is stationed); *McKinley v. United States*, 249 U.S. 397, 399 (1919) (holding that Congress had constitutional power to promote health, safety, and efficiency of servicemembers by prohibiting brothels near military posts); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) (upholding constitutionality of wartime prohibition of trafficking "in order to guard and promote the efficiency of the men composing the army and the navy and of the workers engaged in supplying them arms").

³ *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 305 (1942); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 183–88 (1919); *N. Pac. Ry. Co. v. North Dakota ex rel. Langer*, 250 U.S. 135, 149–52 (1919).

⁴ *Yakus v. United States*, 321 U.S. 414, 443 (1944); *United States v. Russell*, 80 U.S. 623, 627–28 (1871). War-time requisitions may be subject to a requirement that the government pay just compensation, see *Amdt5.9.1 Overview of Takings Clause*.

⁵ *United States v. Central Eureka Mining Company*, 357 U.S. 155, 168 (1958).

⁶ *Bowles v. Willingham*, 321 U.S. 503, 520–21 (1944); *Yakus*, 321 U.S. at 441–43.

⁷ *Lichter v. United States*, 334 U.S. 742, 778–88 (1948).

⁸ *See, e.g., Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 86–87 (1874) (imposing licensing fee on trade in cotton with Confederate states during the Civil War); *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 540–41 (1870) (upholding authorization of paper currency as a lawful exercise of congressional response to the economic crisis caused by the Civil War).

⁹ *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919) ("The war power of the United States, like its other powers and like the police power of the states, is subject to applicable constitutional limitations"); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 426 (1934) ("[E]ven the war power does not remove constitutional limitations safeguarding essential liberties."); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–21 (1866) ("The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances").

¹⁰ For background on the Bill of Rights, see *Intro.3.2 Bill of Rights of (First through Tenth Amendments)*.

functioning¹¹ and prohibit Congress from imposing cruel and unusual punishment on deserters from the military.¹²

ArtI.S8.C11.2 Declare War Clause

ArtI.S8.C11.2.1 Overview of Declare War Clause

The Declare War Clause is a central element of Congress’s war powers and its meaning is among those most heavily debated.¹ The Supreme Court has observed that only Congress has the power to declare war,² but the implications of this exclusive assignment are not well-settled. In particular, the relationship between Congress’s power to declare war and the President’s war powers granted under Article II of the Constitution is a subject of significant disagreement.³

The first draft of the Constitution considered in Philadelphia in 1787 would have given Congress the power to “make war,” but the Framers substituted the word “declare” in what James Madison described as an effort to ensure that the President was empowered to repel sudden attacks.⁴ Under Congress’s interpretation of the Constitution, the President may introduce troops into hostile circumstances if Congress has (1) declared war, (2) specifically authorized the President to use force, or (3) there is a national emergency created by an attack on the United States or its territories.⁵ The executive branch claims much broader authority and asserts that the Constitution empowers the President to initiate and engage in many types of military action without congressional authorization.⁶

While this interbranch debate remains active, other questions concerning the Declare War Clause have been settled by longstanding practice and judicial opinions. For example, the Supreme Court has recognized that Congress need not issue a formal declaration of war to authorize the United States to engage in military action.⁷ Congress

¹¹ *Ex parte Milligan*, 71 U.S. (4 Wall.) at 122; *See also* ArtI.S8.C11.2.5.4 Civil War, War Powers, and The Prize Cases and ArtI.S8.C11.2.5.5 Civil War, and Executive and Legislative Powers.

¹² *Trop v. Dulles*, 356 U.S. 86, 104 (1958) (holding that statute authorizing removal of American citizenship for those convicted of desertion exceeded congressional war powers).

¹ *See* ArtI.S8.C11.2.4 Legislative and Executive Branch Views on the Declare War Clause.

² *See, e.g.*, *The Prize Cases*, 67 U.S. (2 Black) 635, 668 (1862).

³ In 1836, then-Congressman and former President John Quincy Adams wrote that the “respective powers of the President and Congress of the United States, in the case of war with foreign powers are yet undetermined. Perhaps they can never be defined.” JOHN QUINCY ADAMS, *EULOGY ON THE LIFE AND CHARACTER OF JAMES MADISON* 47 (1836). More recently, in a 1971 hearing before a Senate subcommittee, then-Assistant Attorney General (and later-Chief Justice of the Supreme Court) William Rehnquist described the separation of war powers as “the most difficult area of the Constitution[.]” *Executive Impoundment of Appropriated Funds: Hearing Before the Subcomm. On Separation of Powers of the S. Comm. on the Judiciary*, 92d Cong. 251 (1971) (statement of W. Rehnquist).

⁴ *See* ArtI.S8.C11.2.2.3 “Make War” and “Declare War” at the Constitutional Convention.

⁵ *See* War Powers Resolution, Pub. L. No. 93-148 § 1(c), 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541(c)). For background on the 1973 legislation in which Congress articulated its interpreted the President’s war powers, including constitutional concerns with the legislation, *see* ArtI.S8.C11.2.4 Legislative and Executive Branch Views on the Declare War Clause and ArtII.S2.C1.1.12 Congressional Control Over President’s Discretion.

⁶ *See, e.g.*, April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities the President, 42 Op. O.L.C., slip op at 3 (2018), <https://www.justice.gov/olc/opinion/file/1067551/dl> (“[T]he President, as Commander in Chief and Chief Executive, has the constitutional authority to deploy the military to protect American persons and interests without seeking prior authorization from Congress.”).

⁷ *See* ArtI.S8.C11.2.3 Declarations of War vs. Authorizations for Use of Military Force (AUMF).

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also can, by statute, authorize the President to use force within defined parameters that do not rise to the level of a general declaration of war.⁸ The United States has issued declarations of war against eleven countries during five conflicts, but it has not formally declared war since World War II.⁹ As a result, statutory authorizations have become the predominant method for Congress to permit military action since the Second World War.¹⁰

The Supreme Court has also observed that the Declare War Clause confers broad authority upon Congress to pursue the war effort.¹¹ “The power to Declare War,” the Supreme Court stated in 1870, “involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.”¹² In line with this interpretation, Congress has enacted an extensive set of statutes that trigger a host of special wartime authorities concerning the military, foreign trade, energy, communications, alien enemies, and other issues if Congress declares war.¹³

ArtI.S8.C11.2.2 Historical Background

ArtI.S8.C11.2.2.1 War Powers Before the Constitution

Congress’s authority to declare war has its antecedents in Britain and in Colonial America. Under the British system of government, most essential war powers were lodged in a single individual—the monarch. The power of “making war or peace” was the sole prerogative of the Crown,¹ and the monarch was the first in command of British military forces.² Great Britain also traditionally allowed its monarchs to raise and support armies; however, by the end of the 17th century, Parliament controlled appropriations of funds for the military, and the Crown agreed not to maintain a standing army during peacetime without parliamentary consent.³

In pre-revolutionary America, many colonial charters granted certain war powers to colonial governments, such as the power to defend themselves from invasion or armed

⁸ *See id.*

⁹ The United States declared war upon Great Britain in the War of 1812; Mexico in the 1846 War with Mexico; Spain in the 1898 Spanish-American War; Germany and Austria-Hungary in the First World War; and Japan, Germany, Italy, Bulgaria, Hungary, and Rumania (now Romania) in the Second World War. *See* ArtI.S8.C11.2.7 Prizes of War and Congress’s War Powers.

¹⁰ *See* ArtI.S8.C11.2.3 Declarations of War vs. Authorizations for Use of Military Force (AUMF).

¹¹ *See, e.g.,* *Lichter v. United States*, 334 U.S. 742, 780–82 (1948); *Miller v. United States*, 78 U.S. (11 Wall.) 268, 305 (1870); Intro9.3.9 *Catholic Charities Bureau, Inc. v. Wisconsin Labor and Industry Review Commissions: Freedom of Religion and Tax Exemptions for Charitable Organizations*

¹² *Miller*, 78 U.S. at 305.

¹³ JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 44-68 (2014), <https://crsreports.congress.gov/product/pdf/RL/RL31133/17>.

¹ 1 WILLIAM BLACKSTONE, COMMENTARIES *249 (“[T]he king has also the sole prerogative of making war and peace.”). *See* JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1165 (“In Great Britain [declaring war] is the exclusive prerogative of the crown; and in other countries, it is usually, if not universally confided to the executive department.”).

² 1 WILLIAM BLACKSTONE, COMMENTARIES *249 (“THE king is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom.”).

³ *See* ArtI.S8.C12.2.1 The Early American Experience with Standing Armies (discussing development of restrictions on peacetime standing armies in Great Britain); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CA. L. REV. 167, 209–11 (1996) (discussing parliamentary control of appropriations for the military through annual Mutiny Acts).

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attack.⁴ When the American independence movement emerged in the 1770s, colonists formed militia at the local and state levels, and revolutionary state assemblies passed laws organizing militias and mandating service for some segments of the population.⁵ During this period, the Second Continental Congress coordinated militias at the national level.⁶ The Second Continental Congress also created a Continental Army,⁷ appointed George Washington as its Commander-in-Chief,⁸ and called upon Americans to take up arms and organize themselves into militia units.⁹ The Second Continental Congress also adopted a set of declarations and petitions culminating in the Declaration of Independence¹⁰—a document that shares elements in common with 18th century

⁴ See, e.g., The Charter of Maryland – 1632, in 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1669 (Francis Newton Thorpe ed., 1909) (granting authority “to wage War, and to pursue, even beyond the Limits of their Province, the Enemies and Ravagers aforesaid, infesting those Parts by Land and by Sea, and (if God shall grant it) to vanquish and captivate them, and the Captives to put to Death”); The Charter of Connecticut – 1662, 1 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 529 (Francis Newton Thorpe ed., 1909) (authorization to “Assemble . . . in warlike Posture the Inhabitants of the said Colony . . . to encounter, expulse, repel and resist by Force of Arms, . . . also to kill, slay, and destroy by all fitting Ways . . . every such Person or Persons as shall at any Time hereafter attempt or enterprise the Destruction, Invasion, Detriment, or Annoyance of the said Inhabitants or Plantation”); The Charter of Georgia – 1732, 2 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 765 (Francis Newton Thorpe ed., 1909) (authorization “to encounter, expulse, repel, resist and pursue by force of arms . . . and also to kill, slay and destroy, and conquer by all fitting ways . . . every such person or persons as shall at any time hereafter, in any hostile manner, attempt or enterprise the destruction, invasion, detriment or annoyance of our said colony”); Grant of the Province of Maine – 1674, 3 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 1641 (Francis Newton Thorpe ed., 1909) (granting the “Governor or Governors Deputies their Officers or Ministers . . . for their severall defence and safety encounter repulse and Expell and resist by force of armes as well by sea as by land”); Charter of Rhode Island and Providence Plantations – 1663, 6 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA 3211 (Francis Newton Thorpe ed., 1909) (providing authorization “to assemble, exercise in arms . . . the inhabitants of the sayd collonie . . . to encounter, expulse, expell and resist, by force of armes, as well by sea as by lance; and alsoe to kill, slay and destroy, by all fitting wayes, enterprises and meaner, whatsoever, all and every such person or persons as shall, aft any tyme hereafter, attempt or enterprize the destruction, invasion, detriment or annoyance of the sayd inhabitants or Plantations”).

⁵ See, e.g., Act of Apr. 3, 1778, ch. 33, 1778 N.Y. Laws 62 (regulating the militia of the State of New York); An Act for Regulating, Training, and Arraying of the Militia, and for Providing More Effectually for the Defence and Security of the State, ch. 13, 1781 N.J. Laws 12; An Act for establishing a Militia, 1785 Del. Laws § 7, at 59.

⁶ For background on the Continental Congresses, see Intro.6.1 Continental Congress and the Adoption of the Articles of Confederation.

⁷ Report (June 14, 1775), *reprinted* in 2 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, 89–90 (Gov’t Printing Office 1905).

⁸ Commission to George Washington (June 17, 1775), *reprinted* in 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 7, at 96.

⁹ Res. of July 18, Cont.’l Cong. (1775), *reprinted* in 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 7, at 188.

¹⁰ On July 6, 1775, the Second Continental Congress approved The Declaration of Causes and Necessity of Taking Up Arms, which defended the armed rebellion while expressing a desire to restore the union with the Great Britain. Declaration on Taking Arms, *reprinted* in 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 7, at 128. One delegate to the Second Continental Congress referred to that document a “manifesto or declaration or War.” Letter from Joseph Hewes to Samuel Johnston (July 8, 1775), *reprinted* in 1 LETTERS OF MEMBERS OF THE CONTINENTAL CONGRESS 160 (Edmund C. Burnett ed., Carnegie Inst. 1921). Later in July 1775, the Second Continental Congress sent a document known as the Olive Branch Petition to King George III suggesting a process for resolving the conflict. Petition to the King (July 8, 1775), *reprinted* in 2 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 7, at 158. King George III ultimately rejected that petition and declared the colonies in rebellion. By the summer of 1776, the Second Continental Congress resolved that the colonies

declarations of war,¹¹ and which some scholars describe as the functional equivalent of America's first written declaration of war.¹²

By November 1777, the Continental Congress had adopted the Articles of Confederation, which expressly allocated war-making authorities within the United States.¹³ The Articles of Confederation did not use the phrase “declare war,” and instead gave the national Congress, which became known as the Confederation Congress, the exclusive “right and power of determining on peace and war[.]”¹⁴ The Articles denied states the power to “engage” in war unless the Confederation Congress provided consent through a supermajority vote of nine of thirteen states.¹⁵ There were two exceptions to this requirement: a state could engage in war without congressional consent if it were “actually invaded by enemies” or if it learned of a planned invasion by a Native American tribe that presented a danger “so imminent as not to admit of a delay” until the Confederation Congress assembled.¹⁶

ArtI.S8.C11.2.2.2 Early Debates on War Powers in the Constitutional Convention

Concerns that the national government lacked sufficient power to protect the United States' national security was one of the primary reasons state assemblies called for the Constitutional Convention in Philadelphia in 1787.¹ As the delegates to the Convention worked out “an entire change in the first principles” of the Articles of Confederation,² some elements of the governments' new suite of war powers, such as the power to raise

“are and of right ought to be free and independent States,” setting in motion the process for drafting the Declaration of Independence. RESOLUTION OF INDEPENDENCE MOVED BY R.H. LEE FOR THE VIRGINIA DELEGATION (1776), <https://founders.archives.gov/documents/Jefferson/01-01-02-0159>; see *Lee Resolution (1776)*, National Archives, <https://www.archives.gov/milestone-documents/lee-resolution> (last visited Sept. 12, 2024).

¹¹ Like declarations of war of the era, for example, the Declaration of Independence contains a list of grievances justifying the United States' action. Compare THE DECLARATION OF INDEPENDENCE (listing a series of twenty-seven complaints justifying the armed rebellion and separation), *with, e.g.*, 11 COBBETT'S PARLIAMENTARY HISTORY OF ENGLAND 3–6 (1812) (Great Britain's 1739 declaration of war against Spain based on a list of identified grievances).

¹² See, e.g., Daniel J. Hulsebosch, *The Revolutionary Portfolio: Constitution-Making and the Wider World in the American Revolution*, 47 SUFFOLK U. L. REV. 759, 767–68 (2014); William Hall & Saikrishna Bangalore Prakash, *The Constitution's First Declared War: The Northwestern Confederacy War of 1790–95*, 107 VA. L. REV. 119, 143 (2021); Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy and Militia Clauses*, 19 GA. ST. U. L. REV. 1021, 1055 n.127 (2003).

¹³ ARTICLES OF CONFEDERATION OF 1781, art. IX; 9 JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 7, at 935 (Second Continental Congress agreeing upon Articles of Confederation). For further discussion of problems in the Articles of Confederation leading to the Constitutional Convention, see Intro.6.2 Weaknesses in the Articles of Confederation.

¹⁴ ARTICLES OF CONFEDERATION OF 1781, art. IX (emphasis added).

¹⁵ *Id.* arts. VI, IX.

¹⁶ See *id.* art. VI. The Articles also prohibited states from granting commissions to vessels of war and from granting letters of marque and reprisal unless the Confederation Congress declared war or the state was “infested by pirates,” in which case the war vessels could be maintained for so long as “the danger shall continue” or the Confederation Congress determined otherwise. *Id.*

¹ See, e.g., *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 591 (2022) (“The need to . . . establish[] a strong national power to raise and maintain a military was one of the ‘recognized necessities’ for calling the Constitutional Convention.”) (quoting *Selective Draft Law Cases*, 245 U.S. 366, 381 (1918)).

² See *id.* (quoting THE FEDERALIST No. 23, at 148 (Alexander Hamilton)).

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and support armies, were contentious and heavily debated.³ The Declare War Clause, on the other hand, was less controversial. The Articles of Confederation already gave the national government the “power of determining on peace and war,”⁴ and the Constitution’s Framers did not question whether the new central government should continue to possess the authority to determine when the United States goes to war.⁵

Although the grant of the war-making power to the federal government was not contentious, debate did arise at the Constitutional Convention over how to phrase the relevant text and integrate this power in the new constitutional system. Prior to the Constitution, all of the national government’s powers under the Articles of Confederation were lodged in a single, unicameral body—the Confederation Congress.⁶ Because the Constitution divided the federal government’s power between three distinct branches, questions arose as to which branch of government should receive the Confederation Congress’s power to “determin[e]” war and peace.⁷

Early in the Constitutional Convention, the plan for a new form of government submitted by Edmund Randolph on behalf of Virginia became the focal point of debate.⁸ The “Virginia Plan,” as it would come to be known, did not address the power to initiate war directly. Instead, it provided that the Confederation Congress’s “Legislative [r]ights” would be given to a “National Legislature,” and the “Executive rights” that the Confederation Congress exercised would be transferred to a newly created “National Executive.”⁹ Under the Virginia Plan, the executive would also possess “a general authority to execute the National laws.”¹⁰

Several delegates expressed reservations about how war powers would fit into this division of authority. Charles Pinckney of South Carolina stated that, although he supported creating a vigorous chief executive, he feared the Virginia Plan might give the executive the Confederation Congress’s power over “peace [and] war.”¹¹ To Pinckney, such an assignment “would render the Executive a Monarch, of the worst kind . . . an elect[ed] one.”¹² John Rutledge, also from South Carolina, echoed these concerns, observing that, while he was “for vesting the Executive power in a single person,” he did

³ See ArtI.S8.C12.2.2 Debate over the Army Clause at the Constitutional Convention and ArtI.S8.C12.2.3 Debate over the Army Clause in the State Ratifying Conventions.

⁴ ARTICLES OF CONFEDERATION OF 1781, art. IX. See also ArtI.S8.C11.2.2.1 War Powers Before the Constitution.

⁵ See, e.g., THE FEDERALIST NO. 41 (James Madison) (stating that the “[n]o man” could question whether the power to declare war is necessary, and it would be “superfluous therefore to enter into a proof of the affirmative”); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1164 (“That [the power to declare war] ought to exist in the national government, no one will deny, who believes, that it ought to have any powers whatsoever, either for offence or defence, for the common good, or for the common protection.”).

⁶ See ARTICLES OF CONFEDERATION OF 1781, art. V.

⁷ See 1 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 64–66, 70, 73–74 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

⁸ For background on the Constitutional Convention and the competing plans to organize the government, see Intro.6.3 Constitutional Convention.

⁹ 1 FARRAND’S RECORDS, *supra* note 7, at 21.

¹⁰ *Id.*

¹¹ *Id.* at 64–65. Earlier in the Convention, Charles Pickney had presented his own draft plan for the government, but the records of the Convention do not include debate of the Pickney plan other than to note that that it was eventually referred to the Committee of Detail. See 3 FARRAND’S RECORDS, *supra* note 7, at 595. The Pickney Plan would have vested all “executive [a]uthority” in a unitary president, but the plan did not directly address the power to initiate or declare war. 3 FARRAND’S RECORDS, *supra* note 7, at 606.

¹² 1 FARRAND’S RECORDS, *supra* note 7, at 65.

not favor “giving him the power of war and peace.”¹³ In early June 1787, the Convention debated whether the Confederation Congress’s powers over war and peace were legislative or executive in nature, but it did not reach a consensus.¹⁴

After William Paterson of New Jersey¹⁵ and Alexander Hamilton of New York¹⁶ presented alternative plans of government, a five-person Committee of Detail was formed to translate agreed-upon resolutions and the various proposals considered at the Convention into a draft constitution.¹⁷ The draft that emerged from the Committee of Detail would set the stage for a renewed debate on how to assign and structure the power over war and peace.¹⁸

ArtI.S8.C11.2.2.3 “Make War” and “Declare War” at the Constitutional Convention

In its report containing the first full draft of the Constitution considered at the Constitutional Convention, the Committee of Detail included a provision granting to Congress the power “To make war[.]”¹ The assignment of this power to Congress and the

¹³ *Id.*

¹⁴ At least one delegate countered the Pinckney-Rutledge position, asserting that the power to determine war and peace was legislative rather than executive in nature, but there are inconsistencies in historical records in attributing statements during this debate. According to two sets of notes—one drafted by James Madison and the other by Pierce Butler—Pennsylvania delegate James Wilson expressed the view that the power over war and peace was legislative in nature. *Id.* at 65–66 (Madison’s notes) (recording Wilson as stating that he did not consider the prerogatives of the British Monarch the “proper guide in defining Executive powers” because some of the Crown’s prerogatives, including powers of war and peace, were “of a Legislative nature”); *id.* at 73–74 (Butler’s notes) (recording Wilson as stating that “[m]aking peace and war are generally determined by Writers on the Laws of Nations to be legislative powers.”). In the notes of Rufus King of New York, on the other hand, it was James Madison who argued that “executive powers . . . do not include the Rights of war [and] peace . . .” *Id.* at 70.

¹⁵ Paterson’s plan, which would become known as the New Jersey Plan, would have carried over the Confederation Congress’s power to determine war and peace while creating a new plural executive with the power to “direct all military operations; provided that none of the persons composing the federal Executive shall on any occasion take command of any troops, so as personally to conduct any enterprise as General.” *Id.* at 244.

¹⁶ According to Madison’s notes, Hamilton presented a plan on June 18, 1787 that would have given the Senate the “sole power of declaring war.” *Id.* at 292 (Madison’s notes) (June 18). Robert Yates of New York recorded that Hamilton would have empowered the executive “to make war and peace, with the advice and consent of the senate . . .” *Id.* at 300 (Yates’s notes). At the close of the Constitutional Convention, Hamilton prepared and sent to James Madison a document that Hamilton described as “delineat[ing] the Constitution which he would have wished to be proposed by the Convention . . .” 3 FARRAND’S RECORDS, *supra* note 7, at 619. That later-prepared plan provided that the “Senate shall exclusively possess the power of declaring war.” *Id.* at 622.

¹⁷ See 2 FARRAND’S RECORDS, *supra* note 7, at 85–87, 117.

¹⁸ See ArtI.S8.C11.2.2.3 “Make War” and “Declare War” at Constitutional Convention.

¹ 2 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 182 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS]. Although the Committee of Detail did not record or take notes of its deliberations, drafts of its plans for a constitution in the handwriting of Edmund Randolph, the Committee chair, and James Wilson, one of its most influential figures, have been found. See *id.* at 137 n.6 (providing background on the Randolph draft), *id.* at 163 n.17 (discussing the Wilson draft). Both versions assign the power “to make war” to Congress. See *id.* at 143, 168. For background on Wilson’s influence on the Committee, see CLINTON ROSSITER, 1787: THE GRAND CONVENTION 202 (1966); Michael W. McConnell, *James Wilson’s Contributions to the Construction of Article II*, 17 GEO. J.L. & PUB. POL’Y 23, 36–46 (2019).

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clause's phrasing, which differed from its counterpart in the Articles of Confederation, prompted debate among the delegates.²

Charles Pinckney of South Carolina made the first remarks about the clause.³ He objected to including the House of Representatives in the power to make war because he believed it to be too large a body for the quick deliberations necessary for the task.⁴ The Senate alone would be the better option, Pinckney maintained, because it would be "more acquainted with foreign affairs, and most capable of proper resolutions."⁵ Pinckney also argued that, because both small and large states face existential risks from war, the composition of the Senate, with its equal representation of the states, made it a more appropriate body.⁶ Pierce Butler of South Carolina voiced an objection to *either* chamber of Congress being assigned the power to make war.⁷ Butler advocated instead for "vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it."⁸

After Butler's comment, James Madison of Virginia and Elbridge Gerry of Massachusetts moved to change the clause to give Congress the power to "declare" war rather than "make" war.⁹ According to Madison's notes, the change was intended to "leav[e] to the Executive the power to repel sudden attacks."¹⁰ Roger Sherman spoke in opposition to the motion, contending that substituting the term "declare" would narrow congressional authority too significantly.¹¹ Sherman argued that the original term "make" better captured the formulation in which the President was empowered to repel attacks but could not "commence war" on his own.¹²

At this point, Elbridge Gerry objected to Butler's earlier-raised proposition that the clause be shifted to a presidential power. Gerry remarked that he "never expected to hear in a republic a motion to empower the Executive alone to declare war."¹³ Oliver Ellsworth of Connecticut spoke next and highlighted the distinction between "making war, and making peace."¹⁴ To Ellsworth, it should be "more easy to get out of war, than into it."¹⁵ George Mason then responded to the several lines of argument that had been raised in response to the motion to substitute "declare" for "make." Mason maintained that the President could not be trusted with "the power of war," and that the Senate was

² The Convention turned its attention to the clause in August 1787, after spending two weeks addressing other provisions of the Committee of Detail's draft. 2 FARRAND'S RECORDS, *supra* note 1, at 313–14, (Journal); *id.* at 318–19 (Madison's notes).

³ *Id.* at 318.

⁴ *Id.*

⁵ *Id.*

⁶ *See id.* ("[T]he small have their all at stake in such cases [of war] as well as the large States.").

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See id.* (Madison's notes, discussing the statement of Roger Sherman) ("Mr. Sharman [sic] thought [the unamended clause] stood very well. . . . 'Make' better than 'declare' the latter narrowing the power too much.").

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 319. (emphasis in original).

¹⁵ *Id.* Ellsworth added that, whereas war results from "a simple and overt declaration[,] peace must be "attended with intricate [and] secret nego[t]iations." *Id.*

“not so constructed as to be entitled to it.”¹⁶ Mason endorsed the view that the Constitution should facilitate the process of making peace while making it more difficult to engage in war,¹⁷ and he concluded by stating that he preferred the phrase “declare war” over “make war.”¹⁸

The delegates then voted on the motion to substitute “declare” for “make.” Two rounds of votes were held, and, although the records of the Constitutional Convention provide inconsistent accounts of the first round of voting, the motion passed on the second vote with eight states in favor and one against.¹⁹

ArtI.S8.C11.2.2.4 Constitutional Convention Debates on the Power to End Wars

In addition to debating which branch of government should be empowered to bring the United States into war, the delegates to the Constitutional Convention considered which branch should have the power to end wars and make peace. The same day that the Constitutional Convention voted to grant Congress the power to “declare” rather than “make” war, the Convention held two additional votes on the Declare War Clause. Charles Pinckney of South Carolina moved to strike the Declare War Clause entirely, but his motion was rejected without a roll call of votes.¹ Pierce Butler of South Carolina then moved to add “and peace” after “war” in an attempt to “give the Legislature power of peace, as they were to have that of war.”² Butler’s proposal would have brought the Declare War Clause more in line with the Articles of Confederation, which allocated the power to determine “peace and war” in the same clause.³

Alluding to the possibility that wars would be ended through treaties that were approved by the Senate but not considered in the House of Representatives, Elbridge

¹⁶ *Id.* at 319.

¹⁷ *See id.* at 319 (Madison’s notes, discussing statement of George Mason) (“He was for clogging rather than facilitating war; but for facilitating peace.”).

¹⁸ *Id.*

¹⁹ According to James Madison’s notes, the motion passed in the first round of voting with seven states in favor and two against. *Id.* (Madison’s notes). Madison wrote that, after the initial vote, Rufus King of Massachusetts remarked that “‘make’ war might be understood to ‘conduct’ it which was an Executive function” and not a power that should be lodged in the legislative branch. *Id.* Following King’s comment, Oliver Ellsworth “gave up his objection[,]” according to the Madison, and the Connecticut delegation changed its vote so that the motion succeeded with the larger margin of eight to one in favor. *Id.* The official (but often less accurate) *Journal* of the Convention, however, provides that the motion initially failed by a vote of four to five, but later succeeded on a second vote. *Id.* at 313–14 (*Journal*). Scholars disagree on which account is accurate, but all agree motion to substitute “declare” for “make” passed in a second vote with eight votes in favor only one state, New Hampshire, in opposition. Compare Charles A. Lofgren, *War-Making Under the Constitution: The Original Understanding*, 81 YALE L.J. 672, 8–9 (1972) (contending that Madison’s notes are incorrect and the official *Journal* contains the correct tally), with John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CA. L. REV. 167, 264 (1996) (arguing that Madison’s notes are the more reliable source).

¹ 2 THE RECORDS OF THE CONSTITUTIONAL CONVENTION OF 1787, at 319 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS].

² *Id.*

³ Articles of Confederation of 1781, art. IX (“The united states, in congress assembled, shall have the sole and exclusive right and power of determining on peace and war . . .”). *See also* ArtI.S8.C11.2.2.1 War Powers Before the Constitution.

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Gerry seconded Butler’s motion.⁴ Gerry argued that the House should be included in peace-making because the Senate was more likely to succumb to foreign corruption than the full Congress, and a small number of Senators might cede part of United States territory in a peace treaty.⁵ The Constitutional Convention, however, unanimously rejected the motion to insert a peace-making power in the Declare War Clause.⁶

The Framers revisited the peace-making issue later in the Convention when James Madison put forward two proposals designed to make it easier to enter into treaties of peace.⁷ While this debate centered on Article II’s Treaty Clause,⁸ it also prompted a broader discussion of separation of powers over war and peace. For example, James Madison sought to remove the President from the process for making peace treaties because Madison believed the President “would necessarily derive so much power and importance from a state of war that he might be tempted . . . to impede a treaty of peace.”⁹ Pierce Butler agreed and argued that removing the President from the peace-making process would guard against corruption and excessive ambition in the presidency.¹⁰

Nathaniel Gorham of Massachusetts, by contrast, believed it unnecessary to exclude the President from the process for making peace treaties because Congress already controlled the power of the purse, and therefore the “means of carrying on war would not be in the hands of the President, but of the Legislature.”¹¹ Gouverneur Morris, a Pennsylvania delegate, also alluded to the possibility that Congress might end wars by withholding appropriations, but he described this prospect as a more “disagreeable mode” of concluding conflicts compared to peace treaties.¹² Ultimately, neither of Madison’s proposals to alter the process for concluding peace treaties was successful,¹³ and the Framers did not allocate an express peace-making power.

The absence of a peace-making clause has led to some debate over the proper constitutional method for terminating armed conflicts.¹⁴ Some argue that the Framers be-

⁴ 2 FARRAND’S RECORDS, *supra* note 1, at 319.

⁵ *Id.*

⁶ *See id.* at 313–14, 319.

⁷ *Id.* at 533–55. Madison first proposed exempting peace treaties from the requirement that a supermajority of two-thirds of Senators provide their advice and consent—meaning that only a majority of Senators’ approval would be necessary for peace treaties. *Id.* at 533, 540. He also put forward an alternative proposal in which the Senate alone, through a two-thirds supermajority vote, could conclude treaties of peace without presidential involvement. *Id.* at 533, 540.

⁸ For background on the Treaty Clause, see ArtII.S2.C2.1.1 Overview of the President’s Treaty-Making Power and subsequent essays.

⁹ 2 FARRAND’S RECORDS, *supra* note 1, at 540.

¹⁰ *Id.* at 540–41. Butler warned the Convention of recent European figures who sought to prolong wars for their own benefit. *Id.* at 541 (“He mentioned the late perfidious policy of the Statholder in Holland; and the artifices of the Duke of Marlbro[ough] to prolong the war of which he had the management.”).

¹¹ *Id.* at 540. *See also* Avery C. Rasmussen & Saikrishna Bangalore Prakash, *The Peace Powers: How to End a War*, 170 U. PA. L. REV. 717, 734 (2022) (interpreting Gorham’s statement as a reference to the power of the purse).

¹² 2 FARRAND’S RECORDS, *supra* note 1, at 548.

¹³ *Id.* at 544–46, 549–50.

¹⁴ Compare, e.g., John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CALIF. L. REV. 167, 265 (1996) (arguing that the Framers believed only a peace treaty signed by the President and approved by two-thirds of the Senate could formally terminate a war), and CLARENCE A. BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* 231 (1921) (contended that “a formal treaty of

lieved wars could only be concluded through peace treaties,¹⁵ but the Supreme Court stated in dictum in a 1948 case that a “state of war’ may be terminated by treaty or legislation or Presidential proclamation.”¹⁶ The Supreme Court has also reasoned that termination of a military conflict is a “political act,”¹⁷ and it historically has declined to exercise judicial review of the political branches’ determinations of when a conflict has official ended.¹⁸

ArtI.S8.C11.2.2.5 Declare War Clause and State Ratification Debates on the Constitution

During the debates over ratification of the Constitution, the states considered whether to give their assent to a new system of government in which the United States’ suite of war powers was divided between the legislative and executive branches, and Congress’s power to “declare War” had replaced its “right of determining on peace and war” under the Articles of Confederation.¹ Although many delegates to the state ratification conventions raised concerns about the broader centralization of military powers under the Constitution, the Declare War Clause’s meaning was not often discussed.² Instead, opponents of the Constitution, who became known as Anti-Federalists, frequently criticized the breadth of the federal government’s powers to *carry out* and *sustain* wars using its powers over standing armies, the militia, taxation, and other means, but they did not often attack its ability to *declare* them.³

A common Anti-Federalists critique was that, by giving a single branch of government the power to declare war and raise funds to support it, the Constitution combined the “sword” and the “purse” in a single branch, which made it too easy for the national

peace is the only method contemplated by the Constitution for the termination of a foreign war”), *with* Rasmussen & Prakash, *supra* note 11, at 717 (contending that the Constitution permits multiple pathways to peace, including treaties, armistices declared by the President, congressional defunding, and legislative termination).

¹⁵ See Yoo, *supra* note 14, at 265; BERDAHL, *supra* note 14, at 231. See also *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 236 (1796) (opinion of Chase, J.) (“A war between two nations can only be concluded by treaty.”).

¹⁶ *Ludecke v. Watkins*, 335 U.S. 160, 168 (1948). But see *Lee v. Madigan*, 358 U.S. 228, 230 (1959) (distinguishing *Ludecke*’s “generalized statements” about termination of war and concluding that an offense committed in 1949 was perpetrated “in time of peace” even though the President did not formally proclaim peace with Japan until 1952).

¹⁷ *Ludecke v. Watkins*, 335 U.S. 160, 169 (1947).

¹⁸ See *Baker v. Carr*, 369 U.S. 186, 213 (1962).

¹ For background on the transition from the power to “determin[e] on peace and war” under the Articles of Confederation to the “declare War” under the Constitution, see ArtI.S8.C11.2.2.1 War Powers Before the Constitution through ArtI.S8.C11.2.2.3. “Make War” and “Declare War” at the Constitutional Convention.

² Other war-related provisions, such as the power to raise and support armies, were heavily criticized and debated. See ArtI.S8.C11.2.2.5 Declare War Clause and State Ratification Debates on the Constitution.

³ For instance, the Declare War Clause was “read without any observation” in the North Carolina ratifying convention, even though that state found the Constitution sufficiently objectionable to delay its ratification. See 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 94 (Jonathan Elliot ed., 1836) [hereinafter ELLIOT’S DEBATES]. Some prominent Anti-Federalists objected to the Constitution’s overall centralization of war powers, but agreed that the power to declare war should reside with the central government. See, e.g., *Federal Farmer III* (Nov. 8, 1787), reprinted in 14 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 35 (John P. Kaminski et al. eds., digital ed. 2009) [hereinafter DOCUMENTARY HISTORY] (“[A]ll causes arising on . . . peace and war . . . can be lodged no where else, with any propriety, but in this government.”); *Agrippa*, XIII, MA. GAZETTE, Jan. 14, 1788, reprinted in ESSAYS ON THE CONSTITUTION OF THE UNITED STATES 1787–1788, 93 (1892) (P. Leicester Ford ed.) (“[Congress] should have the right of war and peace”).

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government to pursue ill-guided wars that did not benefit the general populace.⁴ The British model of government provided a better system of checks and balances, Anti-Federalists argued, by giving the Monarch the power to declare war and Parliament the power to choose whether to fund the Crown's military campaigns.⁵

Supporters of the Constitution, known as Federalists, responded that they had sufficiently separated the sword from the purse by making the President "Commander in Chief of the Army and Navy" while giving Congress control over war funding.⁶ Federalists argued that the dangers of the British system did not apply to the Constitution because a politically accountable body of representatives in Congress, rather than an unelected monarch, wields the power to declare war.⁷ When Anti-Federalists suggested that the powers over the sword and the purse should be retained by the states or the general populace,⁸ Federalists responded that the United States would lose an essential element of its sovereignty and be unable to defend itself if deprived of these core war powers.⁹

⁴ See, e.g., 2 ELLIOT'S DEBATES, *supra* note 3, 331, 375, 393 (statements of John Williams, John Lansing, John Smith to New York ratifying convention); 3 ELLIOT'S DEBATES, *supra* note 3, at 172, 379, 388, 611 (statements of Patrick Henry, George Mason, George Nicholas, and John Dawson to Virginia ratifying convention); 4 ELLIOT'S DEBATES, *supra* note 3, at 56, 202 (statements of William Goudy and William Lenoir to North Carolina ratifying convention); 4 DOCUMENTARY HISTORY, *supra* note 3, at 1287 (statement of Abraham White to the Massachusetts ratifying Convention) ("Congress, with the pursestrings in their hands, will use the sword."); 15 DOCUMENTARY HISTORY, *supra* note 3, at 273 (records of the Connecticut ratifying convention) ("Gen. Wadsworth objected against it, because it gave the power of the purse to the general Legislature; another paragraph gave the power of the sword; and that authority, which has the power of the sword and purse, is despotic."). See also Federal Farmer XVII (May 2, 1788), reprinted in 20 DOCUMENTARY HISTORY, *supra* note 3, at 1003 ("[T]he purse and sword ought not to be placed in the same hands in a free government."); Letter from Hugh Ledlie to John Lamb (Jan. 15, 1788), in 20 DOCUMENTARY HISTORY, *supra* note 3, at 611 ("[T]he new Constitution gives all the power both of the sword and purse into the hands of the Congress, our people reckon it leads to and opens a door for despotism, tyranny, anarchy, and confusion, and every evil work.").

⁵ See, e.g., 3 ELLIOT'S DEBATES, *supra* note 3, at 172 (statement of Patrick Henry to Virginia ratifying convention) ("[T]he king . . . will enter into no war that is unnecessary; for the commons, having the power of withholding the means, will exercise that power, unless the object of the . . . war be for the interest of the nation."); *id.* at 379 (statement of George Mason to the Virginia ratifying convention) ("How is this compared to the British constitution? Though the king may declare war, the Parliament has the means of carrying it on. It is not so here. Congress can do both."); *id.* at 611 (statement of John Dawson to Virginia ratifying convention) ("Congress, sir, have the power to declare war, and also to raise and support armies; and if we suppose them to be a representation of the states, the *nexus imperii* of the British constitution is here lost."); A Federal Republican, A Review of the Constitution Proposed by the Late Convention Held at Philadelphia, 1787 (Nov. 28, 1787), in 14 DOCUMENTARY HISTORY, *supra* note 3, at 255, 265; Federal Farmer XVII, in 17 DOCUMENTARY HISTORY, *supra* note 3, at 355 ("Our wise ancestors have carefully separated them — placed the sword in the hands of their king, even under considerable limitations, and the purse in the hands of the commons alone: yet the king makes peace and war . . .").

⁶ See, e.g., 3 ELLIOT'S DEBATES, *supra* note 3, at 201, 298, 393 (statements of Edmund Randolph, Edmund Pendleton, and James Madison to the Virginia ratifying convention); 4 ELLIOT'S DEBATES, *supra* note 3, at 172 (statement of Archibald Maclaine to the North Carolina ratifying convention); 4 ELLIOT'S DEBATES, *supra* note 3, 107–08 (statement of Iredell to North Carolina ratifying Convention).

⁷ See, e.g., 2 ELLIOT'S DEBATES, *supra* note 3, at 195 (statement of Oliver Ellsworth to Connecticut ratifying convention) ("[D]oes it follow, because it is dangerous to give the power of the sword and purse to an hereditary prince, who is independent of the people, that therefore it is dangerous to give it . . . to Congress, which is . . . appointed by yourselves, and dependent upon yourselves?"); *id.* at 345 (statement of R.R. Livingston to New York ratifying convention) ("Your state government has the unlimited power over the purse and the sword: why do you not fear that your rulers will raise armies, to oppress and enslave the citizens? Clearly, because you feel a confidence in the - men you elect; and that confidence is founded on the conviction you have that tyranny is totally inconsistent with their interest."); 3 ELLIOT'S DEBATES, *supra* note 3, at 201, 233 (statements of Edmund Randolph and John Marshall to Virginia ratifying convention).

⁸ See, e.g., 2 ELLIOT'S DEBATES, *supra* note 3, at 169 (statement of Patrick Henry to the Virginia ratifying convention) (questioning why "the sword and purse were given up from the people?"); 3 ELLIOT'S DEBATES, *supra*

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While much of the debate addressed the Declare War Clause's place within the Constitution's broader scheme of war powers, Anti-Federalists occasionally criticized the text of the clause itself. The pseudonymous Anti-Federalist author Cincinnatus observed that the Declare War Clause placed no limit on the type of wars that Congress could declare and did not prevent the United States from attempting to conquer other nations.¹⁰ Federalists, including Alexander Hamilton and James Madison, countered this line of reasoning by contending that limitations on congressional war powers would be unwise because it was impossible to predict which types of military action might be necessary to defend the United States and protect its interests in the future.¹¹

In the New York ratifying convention, Anti-Federalists suggested that Congress was too small a body to be trusted with the power to declare war and that a small number of elected officials could be induced to declare war through bribery or corruption.¹² The Federalist John Jay responded that the Constitution would *decrease* risks of corruption because an even smaller group of individuals already had the power to decide upon war and peace under the Articles of Confederation.¹³ The New York Convention was sufficiently concerned about the issue that it recommended an amendment to the Constitution requiring a two-thirds supermajority vote in both chambers of Congress before declaring war.¹⁴ Of the 124 amendments state ratifying conventions proposed to the Constitution, this was the only proposal to amend the Declare War Clause, but it was not adopted at the national level.¹⁵

note 3, at 277 (statement of William Grayson to Virginia ratifying convention) (arguing that national security justifications for allocating war powers to the federal government were greatly exaggerated).

⁹ See, e.g., 2 *ELLIOT'S DEBATES*, *supra* note 3, at 57 (statement of Rufus King to Massachusetts ratifying convention) ("It is an objection in some gentlemen's minds, that Congress should possess the power of the purse and the sword. But, sir, I would ask, whether any government can exist, or give security to the people, which is not possessed of this power."); *id.* at 195 (statement of Oliver Ellsworth to Connecticut ratifying convention) (arguing that, in Britain, "they have the sword and the purse. And they must have both; else, how could the country be defended?"); *id.* at 349 (statement of Alexander Hamilton to New York ratifying convention) ("All governments have possessed these powers: they would be monsters without them, and incapable of exertion."); *id.* at 386 (statement of R.R. Livingston to New York ratifying convention) (arguing that Congress could not defend the United States without the power over the "sword," and that Anti-Federalists would place this power in "thirteen hands" and cause it to wound itself); *id.* at 522 (statement of James Wilson to Pennsylvania ratifying convention) ("[W]hat free government he knows that has not the powers of both [the purse and the sword]?"); 4 *ELLIOT'S DEBATES*, *supra* note 3, at 202 (statement of James Iredell to North Carolina ratifying convention) ("There is a necessity of giving both the purse and the sword to every government, or else it cannot protect the people.").

¹⁰ Cincinnatus III: To James Wilson, Esquire, N.Y.J., Nov. 15, 1787, *reprinted in* 14 *DOCUMENTARY HISTORY*, *supra* note 3, at 124–28.

¹¹ See, e.g., *THE FEDERALIST* NO. 34 (Alexander Hamilton) ("There ought to be a CAPACITY to provide for future contingencies, as they may happen; and, as these are illimitable in their nature, it is impossible safely to limit that capacity."); *THE FEDERALIST* NO. 41 (James Madison) ("How could a readiness for war in time of peace be safely prohibited, unless we could prohibit in like manner the preparations and establishments of every hostile nation?").

¹² See 22 *DOCUMENTARY HISTORY*, *supra* note 3, at 1746–47 (statement of John Williams), *id.* at 1783 (statement of John Lansing).

¹³ See 2 *ELLIOT'S DEBATES*, *supra* note 3, at 284–85.

¹⁴ *Id.* at 407.

¹⁵ For background on the path from amendments proposed in the state ratifying conventions to the Bill of Rights, see Intro.3.2 Bill of Rights.

ArtI.S8.C11.2.3 Declarations of War vs. Authorizations for Use of Military Force (AUMF)

The Supreme Court has long construed the Declare War Clause to mean not only that Congress can issue formal declarations of war, but also that it can authorize the use of armed force for more limited operations short of a full-scale war.¹ Congress has, on various occasions, passed what have become known as authorizations for the use of military force (or AUMFs), which permit the President to use United States military forces in pursuit of set objectives and within defined parameters.² Early examples include congressional authorization to protect American commercial vessels from pirates and hostile foreign countries.³ Since the Second World War, Congress has not formally declared war, and AUMFs have become its predominant method to authorize hostilities. For example, Congress passed and the President signed into law statutory authorization during the Vietnam War, the Persian Gulf War of 1991, the post-September 11, 2001 invasion of Afghanistan, and the 2003 Iraq War.⁴

Several reasons account for the change in practice. Alexander Hamilton observed as early as 1787 that formal declarations of war had fallen into disuse in international practice.⁵ Other aspects of the change can be attributed to 20th century developments. For much of the United States' history, international law treated war as a legal and legitimate method for achieving foreign policy goals under certain conditions,⁶ but the Charter of the United Nations (UN) fundamentally restructured the international legal regime related to use of force.⁷ The UN Charter prohibits war as a foreign-affairs strategy by barring countries from using military force unless in response to armed attack or under an authorization from the U.N. Security Council.⁸ As a result of these and other international legal developments, declarations of war have become anachronistic in modern international law and relations.⁹

¹ See, e.g., *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801) (“[C]ongress may authorize general hostilities . . . or partial hostilities”); *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 43 (1800) (opinion of Chase, J.) (“Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time.”).

² See JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 5–18 (2014), <https://crsreports.congress.gov/product/pdf/RL/RL31133/17>.

³ Act of May 28, 1798, 2 Stat. 561; Act of July 9, 1798, 2 Stat. 578; Act of February 6, 1802, 2 Stat. 129; Act of March 3, 1815, 3 Stat. 230; Act of March 3, 1815, 3 Stat. 230.

⁴ See, e.g., Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁵ THE FEDERALIST NO. 25 (Alexander Hamilton) (“the ceremony of a formal denunciation of war as of late fallen into disuse”).

⁶ See, e.g., 2 CHARLES CHENEY HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 189, § 593 (1922) (“It always lies within the power of a State to endeavor to obtain redress for wrongs, or to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war.”); THE FEDERALIST NO. 3 (John Jay) (describing treaty violations as “just causes of war”). The movement to renounce war as instrument of foreign policy emerged after World War I. See CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 282 (1st ed. 2013); CRS Report RL31133, *supra* note 2, at 20–21.

⁷ UN Charter. See also ArtI.S8.C11.2.3 Declarations of War vs. Authorizations for Use of Military Force (AUMF).

⁸ See UN Charter, art. 2(4) (prohibiting the “threat or use of force against the territorial integrity or political independence of any state”); *id.* art. 42 (permitting the UN Security Council to “take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”); *id.* art. 51 (preserving UN member states “inherent right of individual or collective self-defense if an armed attack occurs”).

⁹ See CRS Report RL31133, *supra* note 2, at 20–21.

ArtI.S8.C11.2.4 Legislative and Executive Branch Views on the Declare War Clause

The legislative and executive branches have differed in their interpretation of their respective powers to initiate military action. In a joint resolution enacted in 1973 known as the War Powers Resolution, Congress stated that the Constitution permits the President to introduce troops into hostilities (or situations where hostilities are imminent) only after Congress has declared war, specifically authorized the President to use force, or there is a national emergency created by an attack on the United States or its territories.¹ This view echoes James Wilson’s position at the Pennsylvania ratifying convention, where he suggested that any presidential power to initiate conflicts would be limited:

Th[e] [Constitution’s] system will not hurry us into war; it is calculated to guard against it. It will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large: this declaration must be made with the concurrence of the House of Representatives: from this circumstance we may draw a certain conclusion that nothing but our national interest can draw us into a war.²

Some statements and practices of early U.S. presidents and government officials likewise suggest that these political figures understood that the power to initiate offensive military actions lay exclusively with Congress.³

The executive branch contends that it is not legally bound by Congress’s interpretation of the Declare War Clause and that the President possesses much broader constitutional authority than the congressional view would permit.⁴ As reflected by the opinions⁵ of the

¹ See War Powers Resolution, Pub. L. No. 93-148 § 1(c), 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541(c)). The War Powers Resolution also contains, among other provisions, mandatory troop withdrawal timelines for the President to follow if Congress does not declare war or authorize hostilities, which are discussed in more detail in ArtII.S2.C1.1.12 Constitutional Control Over President’s Discretion and MATTHEW C. WEED, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE (2019), <https://crsreports.congress.gov/product/pdf/R/R42699/16>.

² 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 528 (Jonathan Elliot ed., 1836).

³ For example, James Madison wrote in a 1789 letter to Thomas Jefferson that the Constitution “with studied care vested the question of war in the Legis[ature].” Letter from James Madison to Thomas Jefferson (Apr. 2, 1798), <https://founders.archives.gov/documents/Madison/01-17-02-0070>. Later that year, Jefferson wrote to Madison that the Constitution provides “one effectual check to the Dog of war by transferring the power of letting him loose from the Executive to the Legislative body.” Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 PAPERS OF THOMAS JEFFERSON 397 (J. Boyd ed. 1978). See also, e.g., Michael D. Ramsey, *Textualism and War Powers*, 69 U. CHI. L. REV. 1543, 1566 (2002) (“Madison, Hamilton, Jefferson, Wilson, Washington, Jay, Marshall, and an array of lesser figures indicated that war power lay primarily with Congress, and no prominent figure took the other side.”); Saikrishna Prakash, *Unleashing the Dogs of War: What the Constitution Means by “Declare War”*, 93 CORNELL L. REV. 45, 90–93 (2007) (examining early constitutional practice).

⁴ See Overview of the War Powers Resolution, 8 Op. O.L.C. 271, 274 (1984). See also Presidential Power to Use the Armed Forces Abroad Without Statutory Authorization, 4A Op. O.L.C. 185, 190 (1980) (stating that the War Power Resolution’s “policy statement” describing separation of war powers “is not to be viewed as limiting presidential action in any substantive manner”).

⁵ OLC’s opinions are “controlling” on questions of law within the executive branch subject to the ultimate authority of the President, but they are not law binding outside the executive branch. Compare, e.g.,

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Office of the Legislative Counsel (OLC) of the Department of Justice, the executive branch has generally taken the position that the Constitution's assignment to Congress of the power to declare war implies that no other branch of government can bring the United States into a "full-scale war" without congressional authorization.⁶ Under this view, military action cannot rise to the level of what OLC describes as "war in the constitutional sense" without congressional authorization.⁷

Although OLC's prevailing view is that the Declare War Clause limits presidential power, the executive branch has also reasoned that only "prolonged and substantial military engagements" rise to the level of what OLC calls war in the constitutional sense.⁸ The executive branch has never publicly concluded that a military operation crossed the threshold into an unconstitutional war, but it has opined that a variety of military operations do not reach this level.⁹ For example, OLC has concluded that deployments of 20,000 ground forces, a two-week air campaign including 2,300 combat missions, and an air campaign involving over 600 missiles and precision-guided munitions did not amount to wars in the constitutional sense.¹⁰ Although Congress enacted authorizations for use of military force in the Vietnam War, the Persian Gulf War of 1991, the post-September 11 conflict of Afghanistan, and the 2003 Iraq War, each presidential administration claimed that it possessed independent constitutional authority to engage in each of those conflicts even if Congress had not authorized it.¹¹ Accordingly, it is unclear whether any military action short of a "total war" akin to World Wars I and II would, in the executive branch's view, rise to the level of war in the constitutional sense that requires congressional authorization.

In addition, not every presidential Administration has accepted the view the Declare War Clause limits the President's power to deploy U.S. military forces. During the George W. Bush Administration, OLC took the position that the President has plenary authority to initiate military action in response to overseas threats, which is not limited by the Declare War Clause, and which Congress can only curtail by using the power of the purse.¹²

Memorandum from Steven G. Bradbury, Principal Deputy Asst. Att'y Gen., Office of Legal Counsel to Att'ys of the Office, Re: Best Practices for OLC Opinions 1 (May 16, 2005), <https://www.justice.gov/olc/page/file/1511836/dl>, with *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 285–86 (1960) (declining to follow an Attorney General opinion and noting that such opinions are entitled to some weight, but do not have the force of judicial decisions).

⁶ See, e.g., April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities the President, 42 Op. O.L.C., slip op. at 8 (2018).

⁷ See, e.g., *id.*; Deployment of United States Armed Forces into Haiti, 18 Op. O.L.C. 173, 173 (1994).

⁸ See, e.g., Authority to Use Military Force in Libya, 35 Op. O.L.C., slip op. at 8 (2011). Operations involving "exposure of U.S. military personnel to significant risk over a substantial period" are most likely to rise to the level war in the constitutional sense, according to OLC. *Id.*

⁹ See ArtI.S8.C11.2.5.8 Cold War Military Action, NATO, and the United Nations through ArtI.S8.C11.2.5.13 Presidential Power in 2003 Iraq War and Other 21st-Century Operations.

¹⁰ See April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities the President, 42 Op. O.L.C., slip op. at 10 (2018) (summarizing opinions addressing prior missions in Bosnia, Haiti, and Libya).

¹¹ See ArtI.S8.C11.2.5.10 Presidential and Congressional Power in the Vietnam War through ArtI.S8.C11.2.5.13 Presidential Power in 2003 Iraq War and Other 21st-Century Operations.

¹² The President's Constitutional Auth. to Conduct Military Operations Against Terrorists & Nations Supporting Them, 25 U.S. Op. O.L.C. 188, 193 (2001) ("Congress's power to declare war does not constrain the President's independent authority over the use of military force."). See also ArtI.S8.C11.2.5.12 September 11, 2001 Terrorist Attacks and War Powers. Although OLC withdrew other opinions related to post-September 11 military actions addressing issues such as criminal prohibitions on torture, it has not withdrawn the Bush

Despite the wide disagreement over how the Constitution allocates power to commit U.S. forces into hostile circumstances, the judicial branch in recent decades has generally refrained from resolving cases that require resolution of this dispute.¹³ Lower federal courts have often declined to decide challenges to presidential authority to deploy U.S. force into conflicts overseas, holding that the plaintiffs could not meet threshold constitutional standards¹⁴ required for federal court jurisdiction.¹⁵ Courts have based these decisions on several justiciability doctrines that limit federal court review,¹⁶ including standing,¹⁷ mootness,¹⁸ ripeness,¹⁹ and the political question doctrine.²⁰

ArtI.S8.C11.2.5 Supreme Court Jurisprudence and Interbranch Practice

ArtI.S8.C11.2.5.1 Overview of Supreme Court Jurisprudence and War Powers

Historically, many of the most prominent disputes over the Constitution's allocation of war powers centered on the federal government's war powers in their collective capacity and not the division of powers between the Congress and the President.¹ In the course of examining those constitutional questions, the Supreme Court has occasionally discussed the Constitution's division of war powers, but it has never decided a case that required it to resolve directly the modern interbranch debate over the power to initiate military action. Accordingly, the following essays examine the Supreme Court's juris-

Administration's interpretation of the Declare War Clause. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., for the Files, Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf>; Memorandum from David J. Barron, Acting Assistant Att'y General, Withdrawal of Office of Legal Counsel CIA Interrogation Opinions (Apr. 15, 2009), <https://www.justice.gov/olc/file/2009-06-11-wd-cia-interr-01/dl>.

¹³ *See* sources cited *infra* note 15. *See also* ArtI.S8.C11.2.5.10 Presidential and Congressional Power in the Vietnam War.

¹⁴ Threshold justiciability requirements are discussed in more detail in ArtIII.S2.C1.1 Overview of Cases and Controversies and subsequent essays.

¹⁵ *See, e.g.*, *Smith v. Trump*, No. 16-5377, 731 F. App'x 8, 9 (D.C. Cir., July 10, 2018) (per curiam) (dismissing as moot former servicemember's challenge to constitutionality of military operation against the Islamic State); *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011) (holding that ten Members of the House of Representatives and group of taxpayers lacked standing to challenge military operations in Libya); *Doe v. Bush*, 323 F.3d 133, 135 (1st Cir. 2003) (dismissing as unripe complaint by active-duty members of the military, parents of military personnel, and members of the U.S. House of Representatives seeking injunction against initiation of war against Iraq and challenge to the constitutionality of a 2002 authorization for use of military force); *Campbell v. Clinton*, 203 F.3d 19 (D.C. Cir. 2000) (affirming dismissal of suit by thirty-one Members of Congress challenging the legality of the air campaign in Yugoslavia), *cert denied*, 531 U.S. 815 (2000); *Conyers v. Reagan*, 765 F.2d 1124, 1125 (D.C. Cir. 1985) (dismissing as moot suit by eleven Members of the House of Representatives challenging as unconstitutional the 1983 military invasion of Grenada); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 210 (D.C. Cir. 1985) (dismissing as nonjusticiable political question claim by Members of Congress that executive branch officials assistance to "Contra" forces in Nicaragua violated the Declare War Clause); *Crockett v. Reagan*, 720 F.2d 1355, 1357 (D.C. Cir. 1983) (affirming dismissal of suit by twenty-nine Members of Congress challenging the legality of the United States' presence in, and military assistance to, El Salvador as presenting nonjusticiable political questions).

¹⁶ *See* sources cited *supra* note 15.

¹⁷ *See* ArtIII.S2.C1.6.1 Overview of Standing.

¹⁸ *See* ArtIII.S2.C1.8.1 Overview of Mootness Doctrine.

¹⁹ *See* ArtIII.S2.C1.7.1 Overview of Ripeness Doctrine.

²⁰ *See* ArtIII.S2.C1.9.1 Overview of Political Question Doctrine.

¹ *See, e.g.*, *The Prize Cases*, 67 U.S. 635 (1812); *Selective Draft Act Cases*, 245 U.S. 366 (1918).

prudence related to congressional war powers and highlights cases that addressed the interbranch debate over the power to initiate military action. Because courts have been reluctant to resolve interbranch disputes in this area, these essays also discuss the executive and legislative branch's practices that contribute to the constitutional understanding of these issues.²

ArtI.S8.C11.2.5.2 Quasi War with France from 1798-1800 and War Powers

A trio of cases arising out of the events known as the Quasi War with France provide some insight into early judicial views about separation of war powers.¹ Angered that the United States did not aid France in its late 18th century war with England, the French government ordered the seizure of American merchant ships.² While Congress did not declare war in response, it did pass a series of statutes abrogating the United States' treaties with France and authorizing limited hostilities against French vessels.³ In *Bas v. Tingy*, the Court addressed one such statute that authorized a financial award, known as prize money, to persons that re-captured U.S. vessels that had been seized by "the enemy."⁴ Several Justices in *Bas* reasoned that France fell within the meaning of "the enemy" because, although Congress had not formally declared war, it had exercised its constitutional power to authorize an "imperfect" and "limited" war against France through statutes.⁵

Talbot v. Seeman concerned another claim for monetary compensation following recapture of a vessel that had been seized by the French.⁶ In concluding that the U.S. commander's reclaiming of a neutral German ship was authorized by Congress, the Supreme Court stated that "[t]he whole powers of war being, by the constitution of the

² For background on reference to historical practices as a method of constitutional interpretation, see Intro.8.9 Historical Practices and Constitutional Interpretation.

¹ See *Bas v. Tingy*, 4 U.S. (4. Dall.) 37 (1800); *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1 (1801); *Little v. Barreme*, 6 U.S. (2 Cranch) 170 (1804). Scholars haven taken different views of the significance of the Quasi War cases. Some contend that the cases and the early American practice they discuss support a dominant congressional role in separation of powers over initiation of armed conflicts. See, e.g., MICHAEL GLENNON, CONSTITUTIONAL DIPLOMACY 5–8, 77, 116–17 (1991). Others assert that the practice was nuanced and the cases largely concern statutory interpretation and do not directly address the scope of the President's Article II powers. Gregory Sidak, *The Quasi War Cases—and Their Relevance to Whether "Letters of Marque and Reprisal" Constrain Presidential War Powers*, 28 HARV. J.L. & PUB. POL'Y 465, 480–93 (2005).

² See *The XYZ Affair and the Quasi-War with France, 1798–1800*, U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1784-1800/xyz> (last visited Sept. 10, 2024); Kat Eschner, *This Unremembered US-France 'Quasi War' Shaped Early America's Foreign Relations*, SMITHSONIAN MAG. (July 7, 2017), <https://www.smithsonianmag.com/smart-news/unremembered-us-france-quasi-war-shaped-early-americas-foreign-relations-180963862/>.

³ See Act of June 13, 1787, 1 Stat. 565; Act of June 28, 1798, 1 Stat. 574; Act of June 25, 1798, 1 Stat. 572; Act of July 7, 1798, 1 Stat. 578; Act of July 9, 1798, 1 Stat. 578; Act of July 16, 1798, 1 Stat. 611; Act of March 2, 1799, 1 Stat. 709.

⁴ 4 U.S. (4. Dall.) 37, 40 (1800) (opinion of Washington, J.) (interpreting 1 Stat. 709).

⁵ See *id.* at 40 (opinion of Washington, J.) ("[H]ostilities may subsist between two nations more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war[.]") (emphasis in original); *id.* at 43 (opinion of Chase, J.) ("Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects, and in time."); *id.* at 45 (opinion of Paterson, J.) ("An imperfect war, or a war, as to certain objects, and to a certain extent, exists between the two nations; and this modified warfare is authori[z]ed by the constitutional authority of our country.").

⁶ 5 U.S. (1 Cranch) 1, 1–3 (1801).

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United States, vested in congress, the acts of that body can alone be resorted to as our guides in this inquiry.”⁷

The Court’s last major Quasi War case, *Little v. Barreme*, addressed a more direct conflict between a congressional authorization and the executive branch’s military orders.⁸ The statute at issue in *Little* directed U.S. naval commanders to seize vessels on the high seas suspected of violating U.S. trade and travel restrictions if the vessels were sailing *to* French ports.⁹ The Secretary of the Navy’s instructions, by contrast, which were based on orders from the President, directed seizure of vessels bound *to* or *from* French ports.¹⁰ After a U.S. captain, following the Navy’s instructions, captured a ship traveling from a French port to Danish territory in the Caribbean, a lawsuit was filed seeking damages against the captain under the theory that the seizure was unlawful because the vessel was not sailing to French territory.¹¹

In an opinion by Chief Justice Marshall, the Supreme Court held that the naval instructions contravened the express provision of a statute, and therefore the captain’s seizure was unlawful—even though the instructions might have been a valid exercise of the President’s Article II powers in the absence of contradictory legislation.¹² Chief Justice Marshall “confess[ed]” that he was initially inclined to excuse the requirement for paying damages because the captain was following a superior officer’s order, but the Supreme Court ultimately concluded that the military order could not “change the nature of the transaction” or immunize the captain from liability for a seizure that violated federal law.¹³

After the Quasi War, the United States engaged in two similarly limited, largely naval wars, known as the Barbary Wars.¹⁴ In response to then-countries of Tripoli’s and Algiers’ piracy and aggression against American shipping in the Mediterranean, Presidents Jefferson and Madison sought approval from Congress before engaging in military aggression.¹⁵ In both cases, Congress authorized limited hostilities necessary to protect commerce, but did not issue a full declaration of war.¹⁶

⁷ *Id.* at 28.

⁸ 6 U.S. (2 Cranch) 170, 177 (1804).

⁹ *See id.* (analyzing Act of March 2, 1799, 1 Stat. 709).

¹⁰ *See id.* at 178. *See also id.* at 171 (reporter’s note).

¹¹ *See id.* at 176–78.

¹² *See id.* at 177–79.

¹³ *Id.* at 179.

¹⁴ The Barbary States, including Tripoli and Algiers, “were a collection of North African states, many of which practiced state-supported piracy in order to exact tribute from weaker Atlantic powers.” *Barbary Wars, 1801–1805 and 1815–1816*, U.S. DEPT OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1801-1829/barbary-wars> (last visited Sept. 12, 2024).

¹⁵ *See* President Thomas Jefferson, First Annual Message to Congress (Dec. 8, 1801), https://www.loc.gov/resource/mtj1.025_0179_0186/; Message from President James Madison to Congress (Feb. 18, 1815), <https://founders.archives.gov/documents/Madison/03-08-02-0523>.

¹⁶ An Act for the Protection of the Commerce and Seamen of the United States against the Tripolitan Cruisers, §§ 1–2, ch. 4, 2 Stat. 129, 129–130 (1802); An Act Further to Protect the Commerce and Seamen of the United States against the Barbary Powers, 2 Stat. 291 (1804); An Act for the Protection of the Commerce of the United States against the Algerine Cruisers, 3 Stat. 230 (1815).

ArtI.S8.C11.2.5.3 War of 1812, Mexican War, and War Powers

Congress issued its first formal declaration of war by declaring war against the United Kingdom of Great Britain and Ireland on June 18, 1812.¹ The War of 1812 had its roots in the British Navy's impressment of American sailors, disputes over trade, American westward expansion, and Native American policy.² In *Brown v. United States*, the Supreme Court considered whether the declaration of war against Great Britain created authority for the United States to condemn a cargo of timber in route to Great Britain.³ Congress had not passed a statute authorizing confiscation of enemy property, but the United States argued that, after the declaration of war, the executive branch had the power to "execut[e] the laws of war," which permit condemnation.⁴ In an opinion by Chief Justice John Marshall, the Supreme Court rejected this view, holding that only the legislative branch has the power of confiscating enemy property in wartime, and therefore Congress must enact legislation authorizing condemnation.⁵

The United States' next declaration of war came in the Mexican War (also called the Mexican-American war),⁶ which arose in the 1840s from a dispute over the United States' annexation of Texas.⁷ The United States placed portions of Mexico under military occupation during this conflict, which led to questions of how U.S. law would apply in American-occupied portions of Mexico. In *Fleming v. Page*, an importer of commercial goods argued that a statute imposing tariffs on imports from a "foreign country" did not apply to goods shipped from a U.S.-occupied port in Mexico.⁸ The Supreme Court declined to adopt this interpretation, reasoning that, while the port was governed by U.S. military authorities, it did not become part of the United States or cease to be a foreign country.⁹

In reaching its conclusion, the *Fleming* Court rejected the view that the President possesses broad authority to conquer territory akin to a British Monarch, stating

[T]here is a such a wide difference between the power conferred on the President of the United States, and the authority and sovereignty which belong to the English crown, that, it would be altogether unsafe to reason from any supposed resemblance between them, either as regards

¹ Act of June 18, 1812, ch. 102, 2 Stat. 755. Some scholars argue that Congress first "exercised its power to declare war and did, in fact, declare war, albeit without using that phrase" against Native American tribes in the Northwest Territory in the 1790s. See William Hall, Saikrishna Bangalore Prakash, *The Constitution's First Declared War: The Northwestern Confederacy War of 1790-95*, 107 VA. L. REV. 119 (2021).

² See *Introduction, War of 1812 Resource Guide*, LIBRARY OF CONGRESS, <https://guides.loc.gov/war-of-1812> (last visited Sept. 10, 2024); DAVID BARRON, *WAGING WAR* 84–85 (2016).

³ *Brown v. United States*, 12 U.S. (8 Cranch) 110, 122 (1814).

⁴ *Id.* at 128.

⁵ *Id.* at 129.

⁶ An Act Providing of the Prosecution of the Existing War Between the United States and the Republic of Mexico, 9 Stat. 9 (May 13, 1846).

⁷ *Introduction, Mexican War: A Resource Guide*, LIBRARY OF CONGRESS, <https://guides.loc.gov/mexican-war> (last visited Sept. 10, 2024); *The Annexation of Texas, the Mexican-American War, and the Treaty of Guadalupe-Hidalgo*, U.S. DEP'T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1830-1860/texas-annexation> (last visited Sept. 10, 2024).

⁸ 50 U.S. (9 How.) 603, 614 (1850).

⁹ *Id.*

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conquest in war, or any other subject where the rights and powers of the executive arm of the government are brought into question.¹⁰

The Court instead described presidential power as “purely military.”¹¹ Presidents are “authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual[,]” but their conquests cannot enlarge the boundaries of the United States or extend operation of U.S. law beyond its borders.¹²

Some aspects of the War of 1812 and the Mexican War raised constitutional questions that were not addressed in the Supreme Court. For example, after imposing martial law and suspending habeas corpus in New Orleans at the end of the War of 1812,¹³ then-General Andrew Jackson ordered the imprisonment of a newspaper editorialist who criticized Jackson’s actions and a federal judge who granted the editor’s petition for a writ of habeas.¹⁴ The editorialist was acquitted of wrongdoing in a military trial, and the judge, who was never tried, returned to the bench after news that the United States concluded a peace treaty with Great Britain reached New Orleans.¹⁵ The judge eventually tried Jackson for contempt of court, after which Jackson was found guilty and paid a \$1,000 fine.¹⁶ Decades later, after Jackson had served as President, Congress passed legislation reimbursing him for the fine.¹⁷

In the Mexican War, the United States used military commissions, then known as “councils of war,” extensively to prosecute offenses by and against U.S. soldiers in occupied Mexico.¹⁸ Some U.S. military officials questioned whether congressional legislation was necessary to give the executive branch authority to establish the military commissions, but Congress declined to provide new legislative authority.¹⁹ Both the writ of habeas corpus and military commissions would become a topic of several Supreme Court cases in later conflicts.²⁰

¹⁰ *Id.* at 618.

¹¹ *Id.* at 615.

¹² *Id.*

¹³ 3 THE PAPERS OF ANDREW JACKSON 205 (Harold D. Moser ed. 1991). For background on martial law under the Constitution, see ArtII.S2.C1.1.14 Martial Law Generally.

¹⁴ See 3 THE PAPERS OF ANDREW JACKSON, *supra* note 13, at 298-99; Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT’L L.J. 15, 21 (2006); Matthew Warshauer, *Andrew Jackson and the Battle of New Orleans*, in A COMPANION TO THE ERA OF ANDREW JACKSON 35-39 (2006).

¹⁵ See 3 THE PAPERS OF ANDREW JACKSON, *supra* note 13, at 298-99, LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 26-28 (2005).

¹⁶ See 3 THE PAPERS OF ANDREW JACKSON, *supra* note 13, at 340-43.

¹⁷ 5 Stat. 651 (1844).

¹⁸ See David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 36-37 (2005).

¹⁹ See, e.g., Letter from U.S. Sec’y of War, W. L. Marcy to General Winfield Scott (Feb. 15, 1863), in H. EXEC. DOC. No. 56, 30th Cong., 1st Sess. 64 (1848) (“I have had a conversation on [military commissions] with the chairman of the committee of the Senate, and understand from him that he did not consider legislation necessary, as the right to punish in such cases necessarily resulted from the condition of things when an army is prosecuting hostilities in an enemy’s country.”).

²⁰ See ArtI.S9.C2.1 Suspension Clause and Writ of Habeas Corpus; ArtII.S2.C1.1.19 Military Commission.

ArtI.S8.C11.2.5.4 Civil War, War Powers, and *The Prize Cases*

After the South Carolina militia fired on the United States army garrison at Fort Sumter in April of 1861, Congress did not formally declare war on the Confederate states because of the internal nature of the conflict, because Congress was not session at the conflict's onset, and because the war disrupted Congress's normal functioning.¹ Instead, President Lincoln took the initiative by issuing a set of proclamations in the spring of 1861 calling forth the militia, instituting a naval blockade of ports in states that had seceded from the Union, and calling for volunteers and enlistment in the military.² When Congress returned in session later that summer, it passed legislation authorizing the President to declare the inhabitants of rebelling states to be in a "state of insurrection"³ and stating that Congress "approved and in all respects legalized" the President's proclamations.⁴

The absence of a declaration of war led to some dispute over the legality of the Union military's actions. After Union forces seized neutral ships and their cargo to enforce the naval blockade of Confederate ports, a group of ship-owners filed suit challenging the seizures' lawfulness.⁵ A consolidated set of these challenges, known as *The Prize Cases*, reached the Supreme Court in 1863 in the midst of active conflict.⁶ The claimants argued that the President had no authority to order their ships' seizure without a declaration of war, especially during the period before Congress ratified the President's proclamations.⁷ The Supreme Court rejected this formalistic interpretation of the Constitution and reasoned that the primary issue was whether factual circumstances demonstrated that "a state of war existed" justifying use of force, not whether Congress had made a legislative pronouncement of war.⁸

Civil wars are "never solemnly declared[.]" the Supreme Court stated in *The Prize Cases*, and Congress has no constitutional power to declare war against a state of the union.⁹ Instead, civil wars arise when rebelling forces grow in such a size and power that they are able to hold territory, declare independence, and organize their own armed forces.¹⁰ The Supreme Court reasoned that it must defer to President Lincoln's conclusion that the Confederacy rose beyond an insurrection to a state of civil war.¹¹

¹ See, e.g., Hon. William O. Douglas, *The Grand Design of the Constitution*, 52 GONZ. L. REV. 373, 384 (2017); Thomas H. Lee & Michael D. Ramsey, *The Story of the Prize Cases: Executive Action and Judicial Review in Wartime*, in PRESIDENTIAL POWER STORIES 51, 56 (Christopher H. Schroeder & Curtis A. Bradley, eds., 2009).

² See 7 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 3214–16 (James D. Richardson ed., 1897). See also Louis Fisher, *Abraham Lincoln: Preserving the Union and the Constitution*, 3 ALB. GOV'T L. REV. 503, 520–21 (2010) (summarizing President Lincoln's early Civil War proclamations).

³ Act of July 13, 1861 § 5, 12 Stat. 257.

⁴ Act of Aug. 6, 1841 § 3, 12 Stat. 326.

⁵ See *The Prize Cases*, 67 U.S. (2 Black) 635, 665 (1863).

⁶ *Id.*

⁷ See *id.* at 646–47 (reporter's note).

⁸ *Id.* at 666.

⁹ *Id.* at 666, 668.

¹⁰ *Id.* at 667–67. But see *Luther v. Borden*, 48 U.S. (7 How.) 1, 71 (1849) ("Nor is it foreign war alone that Congress is to declare, but 'war,'—war of any kind existing legitimately or according to the law of nations.").

¹¹ *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1863) ("Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a

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Having determined that a state of war existed, the Supreme Court next addressed whether that state empowered the President to order and enforce a naval blockade. The Court observed that the President “has no power to initiate or declare a war[,]” but if war is brought to the United States by invasion or rebellion, the President is not merely “authorized but bound to resist force by force.”¹² The President does not initiate the war, the Supreme Court explained, “but is bound to accept the challenge without waiting for special legislative authority.”¹³ Based on this reasoning, the Court held that the President had authority for the blockade under the Constitution and existing statutes.¹⁴

ArtI.S8.C11.2.5.5 Civil War, and Executive and Legislative Powers

The Civil War prompted a number of Supreme Court cases concerning the breadth of the federal government’s war powers. In *Hamilton v. Dillin*, the Supreme Court addressed a challenge to licensing fees the executive branch imposed under a Civil War-era statute that authorized trade restrictions on commercial exchanges with states declared to be in an insurrection.¹ The Court stated “there can be no question” that the executive branch’s fees were “competent to the war power of the United States government to impose.”² According to *Hamilton*, the U.S. government possessed certain inherent rights to pursue the war effort, and this “war power vested in the government . . . without any specific mention of it in the Constitution.”³ The Court then discussed separation of war powers between the legislative and executive branch, stating that the power to declare war is confided in Congress, but the President “is constitutionally invested with the entire charge of hostile operations . . .”⁴ Ultimately, the Court concluded that it was not necessary to resolve any acute separation of powers dispute because the executive branch’s actions were statutorily authorized.⁵

The Supreme Court also upheld the constitutionality of other Civil War-era economic measures as valid exercises of congressional power. In *Miller v. United States*, the Supreme Court deemed constitutional a set of statutes authorizing seizure and confiscation of Confederate property without a jury trial, reasoning that “the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.”⁶ The Court also upheld the 1862 Legal Tender Act,⁷ in

question to be decided by him, and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted.”).

¹² *Id.* at 668.

¹³ *Id.*

¹⁴ *See id.* (citing statutes that authorized the President “to call[] out the militia and use the military and naval forces of the United States in case of invasion by foreign nations, and to suppress insurrection against the government of a State or of the United States”).

¹ 88 U.S. (21 Wall.) 73, 86–87 (1874) (discussing Act of July 13, 1861 § 5, 12 Stat. 257).

² *Id.*

³ *Id.* at 87.

⁴ *Id.*

⁵ *See id.* at 88. (“Whether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone . . . is not now necessary to decide, although it would seem that little doubt could be raised on the subject”).

⁶ *Miller v. United States*, 78 U.S. (11 Wall.) 268, 304–05 (1870).

⁷ 12 Stat. 345 (1862).

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which Congress authorized production of paper currency as a part of a response to the economic crisis caused by the Civil War.⁸

Although the Supreme Court upheld government action in several Civil War-era cases, not every exercise of the Union war effort withstood judicial scrutiny. In *Ex parte Milligan*, the Supreme Court addressed whether an Indiana man could be tried in a military commission created by presidential order, rather than a federal court, for conspiring to commit acts of sabotage and fomenting rebellion in states under Union control.⁹ The accused argued that he had been denied his constitutional rights to habeas corpus,¹⁰ trial before jury,¹¹ and to have his case heard in a judicial tribunal created under Article III of the Constitution.¹² The United States responded that the President possessed broad war-time emergency powers justifying trial in a military tribunal, even going so far as to argue that “[d]uring the war [the President’s] powers must be without limit.”¹³

The Supreme Court rejected the United States’ far-reaching assertion and held that the accused could not constitutionally be tried in a military commission, in part, because federal courts were not obstructed from operating in Indiana at the time of his trial.¹⁴ The *Milligan* Court also held that, even if Congress had passed legislation authorizing the military commission in question, Congress had no constitutional power to authorize trials of American civilians in areas where federal courts are open and unobstructed.¹⁵

Milligan marked a departure from an earlier Civil War case, *Ex parte Vallandigham*, in which the Supreme Court concluded that it did not have jurisdiction to resolve an Ohio civilian’s challenge to conviction in a military commission.¹⁶ In that case, a military commission had convicted Clement Vallandigham, a former Member of Congress and vocal opponent of Union participation in the Civil War, of violating a prohibition on

⁸ Legal Tender Cases, 79 U.S. (12 Wall.) 457, 540–41 (1870).

⁹ 71 U.S. (4 Wall.) 2, 107–09 (1866). For background on constitutional issues arising from military commissions, see ArtII.S2.C1.1.19 Military Commissions. For additional discussion of *Milligan* and its implication, see ArtII.S2.C1.1.14 Martial Law Generally and JENNIFER K. ELSEA, CONG. RSCH. SERV., R42337, DETENTION OF U.S. PERSONS AS ENEMY BELLIGERENTS 15 (2014), <https://crsreports.congress.gov/product/pdf/R/R42337>.

¹⁰ See ArtI.S9.C2.1 Suspension Clause and Writ of Habeas Corpus.

¹¹ See Amdt6.4.1 Overview of Right to Trial by Jury.

¹² For background on the relationship between military tribunals created under Article I of the Constitution and federal courts created under Article III, see ArtIII.S1.9.5 Non-Article III Military Courts.

¹³ Argument in the Supreme Court of the United States on the Side of the United States, *Ex parte Milligan*, 4 Wall. (reporter’s digest), reprinted in THE MILLIGAN CASE 90 (Da Capo Press ed. 1970). See also Curtis A. Bradley, *The Story of Ex Parte Milligan: Military Trials, Enemy Combatants, and Congressional Authorization*, in PRESIDENTIAL POWER STORIES 109–11 (Christopher H. Schroeder & Curtis A. Bradley, eds., 2009) (discussing executive branch arguments in *Milligan*).

¹⁴ See *Ex parte Milligan*, 71 U.S. (4 Wall.) at 121.

¹⁵ See *id.* at 122. Chief Justice Chase authored a concurring opinion, joined by three other Justices, which agreed that the detention was not lawful under existing statutory law, but disagreed with the majority that Congress lacked the constitutional power to authorize the commission, had it chosen to do so. See *id.* at 140 (“We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy.”). See also An Act Relating to Habeas Corpus and Regulating Judicial Proceedings in Certain Cases, 12 Stat. 755 (1863). Chief Justice Chase’s concurring opinion also elaborated on his view of the distinction between congressional and executive war powers, discussed in ArtII.S2.C1.1.2 Prize Cases and Commander in Chief Clause.

¹⁶ *Ex parte Vallandigham*, 68 U.S. 243, 251–52 (1863).

“declaring sympathies for the enemy.”¹⁷ President Lincoln commuted Vallandigham’s sentence and directed that he be sent beyond Union lines into Confederate-held territory.¹⁸ As a result of the transfer, Vallandigham presented his case in a different procedural posture than in *Milligan*, contributing to the differences in result.¹⁹

ArtI.S8.C11.2.5.6 From the Spanish American War to World War I and Total War

The United States declared war against Spain in April 1898 following a Cuban insurrection against Spanish rule and the sinking of the USS *Maine* in the harbor outside Havana.¹ Similar to the declarations of war in the War of 1812² and the Mexican War,³ Congress’s declaration of war in the Spanish American War authorized the President to “use the entire land and naval forces of the United States” to prosecute the war effort.⁴ Like those prior declared wars, and in contrast to the 20th century conflicts that would follow, the Spanish American War did not require nation-wide mobilization of personnel and economic resources and was fought with U.S. volunteer and militia forces rather than through broad national conscription.⁵

The Spanish American War did not give rise to Supreme Court decisions addressing the meaning of the Declare War Clause, but it did lead to other constitutional questions, such as how the Constitution would apply to territories that the United States acquired from Spain at the close of the war, including Guam, Puerto Rico, and the Philippines.⁶ Other elements of the war and its aftermath, such as the U.S. acquisition of a long-term land lease at Guantanamo Bay, Cuba, and interrogation techniques in American-annexed Philippines, would set the stage for later Supreme Court cases in the post-September 11, 2001 era.⁷

¹⁷ *Id.* at 244.

¹⁸ Order of the President to Major-General Burnside (May 19, 1863), reprinted in THE TRIAL OF HON. CLEMENT L. VALLANDIGHAM BY A MILITARY COMMISSION 34 (Cincinnati, Rickey & Carroll 1863).

¹⁹ Whereas the accused in *Milligan* sought a writ of habeas corpus challenging the lawfulness of federal custody, Vallandigham was no longer in federal custody after his transfer to Confederate territory. Vallandigham therefore sought to appeal the military commission’s verdict through a petition for a writ of certiorari, which the Supreme Court denied on jurisdictional grounds. Compare *Ex parte Vallandigham*, 68 U.S. at 254, with *Ex parte Milligan*, 71 U.S. (4 Wall.) at 69.

¹ Act of April 25, 1898, Pub. L. No. 55-69, 30 Stat. 364. See also *The Spanish American War*, <https://history.state.gov/milestones/1866-1898/spanish-american-war> (last visited Sept. 10, 2024).

² Act of June 18, 1812, 2 Stat. 755 (authorizing the President to “use the whole land and naval force of the United States” and to issue letters of marque and reprisal).

³ Act of May 13, 1846, 9 Stat. 9 (“The President be, and he is hereby, authorized to employ the militia, naval, and military forces of the United States, and to call for and accept the services of any number of volunteers.”).

⁴ Act of April 25, 1898, Pub. L. No. 55-69, 30 Stat. 364 (“The President of the United States . . . is . . . empowered to use the entire land and naval forces of the United States, and to call into the actual service of the United States the militia of the several States, to such extent as may be necessary to carry this Act into effect.”).

⁵ See generally 1 AM. MIL. HIST., THE U.S. ARMY AND THE FORGING OF A NATION, 1775-1917, at 131-94, 347-60 (2009), https://history.army.mil/Portals/143/Images/Publications/Publication%20By%20Title%20Images/A%20Titles%20PDF/CMH_Pub_30-21.pdf.

⁶ The acquisition of new U.S. territories led a set of cases collectively known as the *Insular Cases*, which address the extent to which individual rights guaranteed in the Constitution apply to inhabitants of the territories. For background on the *Insular Cases* and current jurisprudence on the territories, see Art.IV.S3.C2.3 Power over Territories.

⁷ After the Spanish-American War and Cuban independence in 1902, the United States acquired a long-term land lease for three parcels in Guantanamo Bay, Cuba. See JENNIFER K. ELSEA, CONG. RSCH. SERV., R44137,

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In World War I, Congress made two declarations of war: first against Germany in April 1917 and then against Austria-Hungary in December 1917.⁸ In these declarations, Congress pledged “all resources of the country” necessary to bring the conflict to a successful conclusion. This marked an expansion beyond earlier war declarations,⁹ which authorized the President to use land, naval, and military forces, but did not reference other domestic resources. Consistent with the new language, the First World War engaged far more of the nation’s resources and led to Supreme Court decisions challenging elements of the U.S. war effort.¹⁰

In line with the view that the United States must marshal nationwide resources to achieve victory, Congress passed a set of economic mobilization statutes that gave the President the authority to take control of private property for public use during the World War I.¹¹ Exercising statutory delegations, the Wilson Administration assumed control of many elements of the domestic economy, including privately owned transportation networks¹² and communications systems¹³ inside the United States.¹⁴ In response to legal challenges to the President’s seizure of railroads and telephone lines, the Supreme Court upheld the constitutionality of the statutory delegations, emphasizing the “completeness” of Congress’s war powers.¹⁵ The Supreme Court also upheld other wartime economic authorizations, including a statutory delegation to the President to regulate sale of enemy properties,¹⁶ war-related rent control requirements in the Dis-

NAVAL STATION GUANTANAMO BAY: HISTORY AND LEGAL ISSUES REGARDING ITS LEASE AGREEMENTS 3–4 (2022), <https://crsreports.congress.gov/product/pdf/R/R44137>. United States’ detention operations at Guantanamo Bay after the attacks of September 11, 2001 led to several constitutional questions concerning the President’s detention authority, which were addressed by the Supreme Court. See ArtII.S2.C1.1.18 Detention Authority. Legal issues concerning detainee interrogation methods in the Philippines, including a method called “water cure,” also arose after the Spanish-American War. See S. Doc. No. 57-213, at 18–29 (1903).

⁸ See Act of April 6, 1917, 40 Stat. 1; Act of Dec. 7, 1917, 40 Stat. 429.

⁹ See Act of June 18, 1812, 2 Stat. 755 (War of 1812); Act of April 25, 1898, Pub. L. No. 55-69, 30 Stat. 364 (Spanish-American War). See also Act of May 13, 1846, 9 Stat. 9 (Mexican War) (“The President be, and he is hereby, authorized to employ the militia, naval, and military forces of the United States, and to call for and accept the services of any number of volunteers.”).

¹⁰ Congress’s declaration of war against Austria-Hungary is also unique in that it is the only war 20th century war declaration that does not characterize the state of war as having been “thrust upon the United States.” See Act of Dec. 7, 1917, 40 Stat. 429.

¹¹ See REUBEN CLARK, EMERGENCY LEGISLATION PASSED PRIOR TO DECEMBER, 1917: DEALING WITH THE CONTROL AND TAKING OF PRIVATE PROPERTY FOR THE PUBLIC USE, BENEFIT, OR WELFARE (Washington, DC: GPO, 1918); CHRISTOPHER A. CASEY AND JENNIFER K. ELSEA, CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 2–3 (Jan. 30, 2024), <https://crsreports.congress.gov/product/pdf/r/r45618>.

¹² Act of August 29, 1916, Pub. L. No. 64-242 art. 112, 39 Stat. 619, 645 (authorizing the President, through the Secretary of War, “to take possession and assume control of any system or systems of transportation”).

¹³ Joint Resolution of July 16, 1918, 40 Stat. 904 (1918) (permitting the President “to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems”). See also Matthew C. Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613, 651 & n.214 (2017) (discussing World War I economic mobilization statutes); EDWARD S. CORWIN, TOTAL WAR AND THE CONSTITUTION 39 (1947) (outlining World War I era congressional delegations of power).

¹⁴ See *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 183–88 (1919); *N. Pac. Ry. Co. v. North Dakota ex rel. Langer*, 250 U.S. 135, 149–52 (1919).

¹⁵ See *Dakota Cent. Tel. Co.*, 250 U.S. at 183 (“[T]he completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him.”); *N. Pac. Ry. Co.*, 250 U.S. at 149 (“The complete and undivided character of the war power of the United States is not disputable.”).

¹⁶ *United States v. Chem. Found.*, 272 U.S. 1, 11–12 (1926) (interpreting the Trading with the Enemy Act). For additional background on the Trading with the Enemy Act, see CRS Report R45618, *supra* note 11, at 2–6.

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trict of Columbia,¹⁷ and a wartime prohibition on trafficking in liquor, which the Court described as a “an appropriate means of increasing our war efficiency.”¹⁸ The Court also held that Congress had constitutional power to enact a nationwide compulsory draft law.¹⁹

Congress’s power to direct the President to use “all resources of the country” in prosecuting World War I appears to have informed the Supreme Court’s reasoning regarding federal power to respond to the economic emergency created by the Great Depression. In *Home Bldg. & Loan Ass’n v. Blaisdell*, which addressed the constitutionality of a Minnesota debtor relief statute, the Supreme Court likened the emergency created by period of economic distress to a wartime emergency.²⁰ As part of this analogy, Chief Justice Charles Evans Hughes stated in his opinion for the Court that the “war power of the federal government . . . is a power to wage war suc[c]essfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation.”²¹

ArtI.S8.C11.2.5.7 World War II and the Use of War Powers

The attacks at Pearl Harbor led the United States to declare war against Japan on December 8, 1941.¹ Three days later, the United States declared war on Germany in response to Germany’s declaration against the United States.² Congress later declared war against Bulgaria, Hungary, and Rumania (now Romania) in June 1942³ after President Franklin D. Roosevelt determined they had become “instruments of Hitler.”⁴ Like the declarations against Germany and Austria-Hungary in World War I, the declarations in the Second World War authorized the President to use the United States’ military forces and “all of the resources of the country” to bring the conflict to a

¹⁷ *Block v. Hirsh*, 256 U.S. 135, 154 –58 (1921).

¹⁸ *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 156 (1919). Another World War I era statute, the Food and Fuel Control Act (also known as the Lever Act) gave the President broad power to regulate and ensure an adequate supply of domestic food and fuel production. Pub. L. No. 65-41 § 1, 40 Stat. 276 (1917). The Supreme Court held that executive branch regulations promulgated under this statute were unconstitutionally vague, leading the Court to strike down criminal convictions based on those regulations. In doing so, the Court did not suggest Congress lacked the power to authorize wartime food pricing restrictions. See *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92–93 (1921). For background on the void for vagueness doctrine, see Amdt5.8.1 Overview of Void for Vagueness Doctrine.

¹⁹ *Selective Draft Law Cases*, 245 U.S. 366, 378 (1917).

²⁰ See *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934). For further discussion of the *Blaisdell* decision, see ArtI.S10.C1.6.3 Evolution of the Contract Clause’s Use.

²¹ 290 U.S. at 426. Chief Justice Hughes’ description echoes a 1917 speech he gave to the American Bar Association in which he stated that the United States has a “[t]he power to wage war is the power to wage war successfully.” Hon. Charles E. Hughes, *War Powers Under the Constitution*, Address Before the American Bar Association at its Annual Meeting Held at Saratoga N.Y. on September 4, 5, and 6, 1917, *reprinted in* S. Doc. No. 65-105, at 7 (1st Sess. 1917). The Supreme Court would cite Hughes’ speech at length in later cases. See *Lichter v. United States*, 334 U.S. 742, 757 n.4, 767 n.9, 779 n.31, 780–82 (1948); *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943).

¹ Act of December 8, 1941, Pub. L. No. 77-328, 55 Stat. 795.

² Act of December 11, 1941, Pub. L. No. 77-331, 55 Stat. 796.

³ Act of June 5, 1942, Pub. L. No. 77-563, 56 Stat. 307 (Bulgaria); Act of June 5, 1942, Pub. L. No. 77-564, 56 Stat. 307 (Hungary); Act of June 5, 1942, Pub. L. No. 77-565, 56 Stat. 307 (Rumania).

⁴ Message to Congress on a State of War Between the United States and Hungary, Rumania, and Bulgaria, 88 Cong. 4787 (1942).

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successful termination.⁵ The federal government's exercise of this "total war" authority during World War II would raise questions about the extent of legislative and executive branch authority during wartime.

Before the United States entered the Second World War, French and British leaders had asked the Roosevelt Administration to declare war against Germany and to provide war material to support their defense, but the President responded that "[o]nly the Congress can make those commitments."⁶ Despite that reluctance, the Roosevelt Administration later transferred "over-age ships and obsolescent military materials" to Great Britain in exchange for long-term leases of British air and naval bases in what became known as the "Destroyers for Bases" agreement.⁷ The executive branch had previously interpreted a trade statute designed to ensure United States' neutrality to prohibit transfer of vessels requested by Great Britain.⁸ However, President Roosevelt's Attorney General (and later Supreme Court Justice) Robert Jackson concluded that the President could complete the destroyer-for-bases exchange based on a mix of statutory authority and the President's power to conduct "foreign relations which the Constitution vests in the President as a part of the Executive function."⁹

The United States' eventual entry into the Second World War generated interbranch debate over President Roosevelt's power to manage independently aspects of the domestic economy.¹⁰ In particular, President Roosevelt sought to modify the Emergency Price Control Act of 1942, which he believed impeded his ability to control domestic inflation that interfered with the war effort.¹¹ When Congress initially did not make the requested legislative changes, the President claimed constitutional authority to take measures he viewed as necessary for the war effort, and he publicly threatened to impose his own inflation stabilization regime.¹² Roosevelt's suggestion that the President could override economic legislation was never tested in court because Congress enacted legislation giving the President new price and wage stabilization authority,¹³ but the Supreme Court later rejected a similar view that President Truman advanced during the Korean War.¹⁴

⁵ See sources cited *supra* notes 1–3.

⁶ Reply of President Roosevelt to the Message of June 14 of Premier Reynaud of France, 51 DEP'T. ST. BULL. 639 (1940). See also DAVID REYNOLDS, FROM MUNICH TO PEARL HARBOR, ROOSEVELT'S AMERICA AND THE ORIGINS OF THE SECOND WORLD WAR 78 (2001).

⁷ Acquisition of Naval & Air Bases in Exch. for over-Age Destroyers, 39 U.S. Op. Atty. Gen. 484, 485 (1940).

⁸ See Neutrality Act of 1937, 50 Stat. 121. See also David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb - A Constitutional History*, 121 HARV. L. REV. 941, 1042–45 (2008) (discussing internal executive branch opinions on the Neutrality Act of 1937).

⁹ Acquisition of Naval & Air Bases in Exch. for over-Age Destroyers, 39 U.S. Op. Atty. Gen. at 486 (citing *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936)). For background on the President's foreign affairs authority, see Art.II.S1.C1.8 The President's Foreign Affairs Power, Curtiss-Wright, and Zivotofsky.

¹⁰ See, e.g., Edward Corwin, *Total War and the Constitution* 47–70 (1947).

¹¹ Message from the President of the United States Transmitting a Recommendation that Congress Pass Legislation Placing a Floor under Prices of Farm Products, in *Stabilizing the Cost of Living*, Hearings before the S. Comm. on Banking and Currency, 77th Cong. 1 (1942).

¹² 88 Cong. Rec. 7044 (1942). While the President's message to Congress appeared to be premised solely on his constitutional authority, recent commentators have observed that the executive branch had prepared a statutory argument for presidential action that was not made public. See David Barron, *Waging War* 267–77 (2016).

¹³ Stabilization Act of 1942, Pub. L. No. 77-729, 56 Stat. 765 (1942).

¹⁴ See Art.I.S8.C11.2.5.9 International Police Action and the Korean War.

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Other aspects of the government's action in support of its World War II efforts did reach the Supreme Court in the 1940s.¹⁵ In *Lichter v. United States*, the Court upheld the constitutionality of the Renegotiation Act, which allowed the government to renegotiate war supply contracts and to recoup excessive process.¹⁶ "In total war[.]" the Court reasoned, "it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security and life itself."¹⁷ The Court also elaborated on the Constitution's overall war powers scheme, explaining that all war powers are derived from the Constitution, and that the Constitution's mandates apply equally during war and war peace.¹⁸ Despite acknowledging these limits, the Court continued, the United States' war power should be interpreted as "an effective power to wage the war successfully" and to fulfill the purposes of the Constitution's Preamble to, among other things, provide for the common defense.¹⁹

After hostilities ended in World War II, Congress continued the draft and certain wartime economic measures, leading to litigation over whether the measures were lawful when active conflict was over.²⁰ In *Ludecke v. Watkins*, the Court upheld the President's continued use of statutory authority authorizing removing of alien enemies deemed to be dangerous to the public, reasoning that "[w]ar does not cease with a cease-fire order, and power to be exercised by the President . . . is a process which begins when war is declared but is not exhausted when the shooting stops."²¹ In *Woods v. Cloyd W. Miller Co.*, the Court held that continued rent controls were a constitutional exercise of Congress's war powers because construction shortages and U.S. soldiers returning home after demobilization caused a housing deficit.²² The *Woods* Court also cautioned, however, that continued use of war powers "in days of peace to treat all the wounds which war inflicts on our society . . . may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well."²³

¹⁵ Several elements of the Supreme Court's World War II-era jurisprudence are discussed in essays on the Commander-in-Chief Clause. See ArtII.S2.C1.1.7, Treatment of Enemy Combatants and Nazi Saboteurs; ArtII.S2.C1.1.8 World War II War Crimes Tribunals; ArtII.S2.C1.1.4 Evacuation of the West Coast Japanese; ArtII.S2.C1.1.6 Presidential Directives and Sanctions in World War II.

¹⁶ *Lichter v. United States*, 334 U.S. 742, 745–51 (1948). For additional analysis of *Lichter*, see ArtI.S8.C12.2.5 The Army Clause, Congressional Power, Conscription, and War Materials.

¹⁷ *Lichter*, 334 U.S. at 754.

¹⁸ *Id.* at 782.

¹⁹ See *id.* For background on the Preamble, see Pre.1 Overview of the Preamble.

²⁰ Similar issues arose after the end of the Civil War and the First World War. See *Stewart v. Kahn*, 78 U.S. 493, 507 (1870) ("[The war power] carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 161–63 (1919) (upholding prohibition legislation enacted after the World War I armistice due to its benefits for manpower during demobilization).

²¹ 335 U.S. 160, 167 (1948).

²² 333 U.S. 138, 142–32 (1948). See also *Ludecke*, 335 U.S. at 167 ("War does not cease with a cease-fire order, and power to be exercised by the President such as that conferred by the [Alien Enemy] Act of 1798 is a process which begins when war is declared but is not exhausted when the shooting stops.")

²³ *Woods*, 333 U.S. at 143–44. For background on the Ninth and Tenth Amendments, see Amdt9.1 Overview of Ninth Amendment, Unenumerated Rights and Amdt1.10.1 Overview of the Tenth Amendment, Rights Reserved to the States and the People.

ArtI.S8.C11.2.5.8 Cold War Military Action, NATO, and the United Nations

The end of World War II brought changes in U.S. policy and practice toward declarations of war and the exercise of military action more generally. Congress has not formally declared war since the Second World War and has instead relied solely on statutory authorizations for the use of military force when permitting the President to engage in armed conflict. The Second World War's conclusion also brought an end to a historical pattern in which the United States' buildup of forces for war was followed by extensive demobilization and return of troops to the homeland.¹ After World War II, the United States permanently stationed U.S. troops in foreign countries, assumed greater responsibility for global security, and made defense pacts and military commitments with its allies, such as those in the North Atlantic Treaty Organization (NATO).² Concerns over Soviet expansion and influence also led to the Cold War in which the United States adopted a strategy to contain Soviet power throughout the world.³

These dynamics undermined clear distinctions between states of war and periods of peace and led to interbranch debate over presidential power to deploy and station troops abroad.⁴ In what was called at the time the “Great Debate,” Congress engaged with Truman Administration over whether congressional authorization was necessary for the President to send 100,000 U.S. Army troops to Western Europe to demonstrate support for NATO and counter the threat of Soviet expansion.⁵ The Senate was considering a resolution prohibiting the assignment of forces until Congress formulated a policy on the troop transfer,⁶ but President Truman took the position that his constitutional power as Commander-in-Chief authorized him to send troops anywhere in the world.⁷ The debate was ultimately resolved through a compromise resolution that authorized the transfer but required congressional approval for troops beyond four divisions.⁸

¹ See, e.g., Matthew C. Waxman, *The Power to Wage War Successfully*, 117 COLUM. L. REV. 613, 677–78 (2017).

² See, e.g., Statement of Hon. Nicholas Katzenbach, Under Sec'y of State, to the S. Foreign Relations Comm. (Aug. 17, 1967), reprinted in *Congress, the President, and War Powers, Hearings before the Subcomm. on National Security Policy and Scientific Developments of the H. Comm. on Foreign Affairs*, 91st Cong. 553, 554 (1970) (discussing the “revolutionary change in the political structure of the world—and of the relative importance of foreign affairs to the United States.”); 2 AM. MIL. HIST., THE U.S. ARMY IN A GLOBAL ERA, at 201–10 (2d. ed. 2005), https://history.army.mil/html/books/030/30-22/CMH_Pub_30-22.pdf.

³ See NSC-68, A REPORT TO THE NAT'L SEC. COUNCIL BY THE EXECUTIVE SECRETARY ON THE UNITED STATES OBJECTIVES AND PROGRAMS IN NAT'L SEC. (Apr. 14, 1950), <https://www.jstor.org/stable/44641594>; 2 AM. MIL. HIST., *supra* note 2, at 218–19.

⁴ See, e.g., STEPHEN M. GRIFFIN, LONG WARS AND CONSTITUTION 6 (2013).

⁵ See *Assignment of Ground Forces of the United States to Duty in the European Area, Hearings before the S. Comm. on Foreign Relations and S. Comm. on Armed Services*, 82nd Cong. 56 (1952) [hereinafter *Assignment of Ground Forces Hearing*].

⁶ 82 CONG. REC. 94 (1951).

⁷ See *Foreign Relations of the United States, 1951, European Security and the German Question, Volume 3, pt. 1*, DEP'T OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/historicaldocuments/frus1951v03p1/d11> (last visited Sept. 20, 2024). See also *Assignment of Ground Forces Hearing*, *supra* note 5, at 9 (statement of U.S. Sec'y of State Dean Acheson) (“Not only has the President the authority to use the armed forces in carrying out the broad foreign policy of the United States implementing treaties, but it is equally clear that this authority may not be interfered with by the Congress in the exercise of powers which it has under the Constitution.”).

⁸ 82 CONG. REC. 3096, 3282 (1951).

The North Atlantic Treaty also gave rise to constitutional questions of whether the treaty's requirement for collective self-defense would usurp Congress's power to declare war. Under Article 5 of the treaty, "an armed attack against one more [NATO country] in Europe or North America shall be considered an attack against them all"⁹ During Senate hearings, Secretary of State Dean Acheson stated the view that Article 5 would not infringe on the declare war power because it commits NATO countries to take measures they deem necessary, but "does not mean that the United States would automatically be at war. . . ."¹⁰ With this assurance, the Senate gave its advice and consent to ratification of the North Atlantic Treaty, although the Senate declined to attach an understanding to its resolution of ratification confirming Acheson's interpretation.¹¹

The Charter of the United Nations (UN) also raised questions about how post-war international institutions would integrate into the constitutional system.¹² The creation of the UN Security Council, which was empowered to ensure global peace and security,¹³ prompted debate over whether a Security Council resolution can function as a constitutional substitute for a congressional declaration of war or authorization for use of military force.¹⁴ The Security Council's place in the Constitution's war powers scheme would come to the fore when later presidents, including President Truman during the Korean War, cited its resolutions as a part of the legal basis to initiate military action without first seeking congressional authorization.¹⁵

ArtI.S8.C11.2.5.9 International Police Action and the Korean War

President Truman ordered U.S. military intervention in the Korean peninsula after forces from the Democratic People's Republic of Korea (or North Korea) crossed the 38th parallel in June 1950 seeking to take over the portion of the peninsula under control of Republic of Korea (or South Korea).¹ The hostilities eventually evolved into a large-scale conflict between North Korea and the People's Republic of China, on one side, and South Korean and United Nations (UN) forces led by the United States, on the other.² The UN

⁹ North Atlantic Treaty art. V, Apr. 4, 1949, 63 Stat. 224, 34 U.N.T.S. 243.

¹⁰ North Atlantic Treaty (pt. 1): *Hearings Before the Senate Comm. on Foreign Relations*, 81st Cong. 11 (1949).

¹¹ 95 CONG. REC. 9916 (1949). For background on the Senate's ability to conditionally consent to treaties subject to reservations, understandings, and declarations, see STEPHEN P. MULLIGAN, CONG. RSCH. SERV., IF12208, RESERVATIONS, UNDERSTANDINGS, DECLARATIONS, AND OTHER CONDITIONS TO TREATIES (2022), <https://crsreports.congress.gov/product/pdf/IF/IF12208>.

¹² UN Charter. See also ArtI.S8.C11.2.3 Declarations of War vs. Authorizations for Use of Military Force (AUMF).

¹³ UN Charter art. 24(1).

¹⁴ Whereas some observers argue that Presidents are not required to obtain congressional authorization when the Security Council approves international use of force, others contend that the Security Council is not the functional equivalent to Congress and cannot supersede the Constitution's domestic legal processes. See, e.g., CURTIS A. BRADLEY, INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM 296–97 (1st ed. 2013) (summarizing the debate).

¹⁵ See ArtI.S8.C11.2.5.9 International Police Action and the Korean War; Military Force in Libya, 35 Op. O.L.C., slip op. at 10 (2011) (discussing the role of Security Council resolutions in past military interventions and in providing legal support for an air campaign in Libya).

¹ See, e.g., Korean War and Japan's Recovery, <https://history.state.gov/milestones/1945-1952/korean-war> (last visited Sept. 10, 2024).

² See *id.*; 2 AM. MIL. HIST., THE U.S. ARMY IN A GLOBAL ERA 223–26 (2d ed. 2005), https://history.army.mil/html/books/030/30-22/CMH_Pub_30-22.pdf.

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Security Council authorized the UN-based military response,³ but President Truman did not seek congressional authorization for the military action under domestic law, and Congress did not enact a declaration of war or authorization for use of military force.⁴

After some Members of Congress questioned whether the President had domestic legal authority for intervention,⁵ the Department of State prepared a memorandum defending the conflict as an “international police action” to enforce the UN Security Council resolutions rather than a war.⁶ Citing a list of 85 instances in which past presidents deployed forces overseas without express congressional authorization, the memorandum argued that historical practice demonstrated that the Constitution does not require congressional permission for the President to use military force to protect American interests abroad.⁷ The listed incidents ranged from the pursuit of pirates to multi-year overseas missions, but none approached the scale of conflict reached in the Korean War, which involved over 5.7 million American military personnel and over 36,000 American casualties.⁸ The Truman Administration’s constitutional theory was never challenged in court, and Congress ultimately extended the draft and appropriated funds for the war effort.⁹

One aspect of President Truman’s plans to support the war by managing the defense industrial base did reach the Supreme Court. In *Youngstown Sheet & Tube Co. v. Sawyer*, which is examined in more detail in the discussion of Article II of the Constitution,¹⁰ the Supreme Court deemed the Truman Administration’s plans to avoid a labor strike’s effects by seizing and operating private steel mills to be without statutory or constitutional basis.¹¹ In reaching its conclusion, the Supreme Court rejected the view, also asserted by President Roosevelt during World War II, that Presidents have constitutional power to contravene Congress’s economic legislation when a President believes

³ S.C. Res. 82 (June 25, 1950); S.C. Res. 83 (June 27, 1950); S.C. Res. 84 (July 7, 1950).

⁴ See, e.g., Mary L. Dudziak, *The Gloss of War: Revisiting the Korean War’s Legacy*, 122 MICH. L. REV. 149, 163–85 (2023) (providing an account of internal executive branch deliberations and communications in the lead up to American intervention in the Korean War).

⁵ See, e.g., 96 CONG. REC. 9319–23 (1950) (Senator Robert Taft questioning whether the President had legal authority to embark on “a de facto war . . . without consulting Congress and without congressional approval”).

⁶ U.S. Dep’t of State, Authority of the President to Repel the Attack in Korea (July 3, 1950), in H.R. REP. NO. 81-2495, at 65 (1950) (quoting JAMES GRAFTON ROGERS, *WORLD POLICING AND THE CONSTITUTION: AN INQUIRY INTO THE POWERS OF THE PRESIDENT AND CONGRESS, NINE WARS AND A HUNDRED MILITARY OPERATIONS, 1789–1945*, at 66–67 (1945)).

⁷ *Id.* at 64, 67–68. The State Department’s list had its roots in a 1912 memorandum discussing the President’s right to protect citizens in foreign countries. See ArtII.S2.C1.1.10 Use of Troops Overseas and Congressional Authorization. For a more current list of instances of U.S. armed forces overseas, see BARBARA SALAZAR TORREON & SOFIA PLAGAKIS, CONG. RSCH. SERV., R42738, INSTANCES OF USE OF UNITED STATES ARMED FORCES ABROAD, 1798–2023 (2023), <https://crsreports.congress.gov/product/pdf/R/R42738>.

⁸ For background on the number of American personnel serving in past conflicts and the level of American casualties, see DAVID A. BLUM, CONG. RSCH. SERV., RL32492, AMERICAN WAR AND MILITARY OPERATIONS CASUALTIES: LISTS AND STATISTICS (2020), <https://crsreports.congress.gov/product/pdf/RL/RL32492>.

⁹ See Selective Service Extension Act of 1950, Pub. L. No. 81-599, 64 Stat. 318; CONG. RSCH. SERV., RS22455, MILITARY OPERATIONS: PRECEDENTS FOR FUNDING CONTINGENCY OPERATIONS IN REGULAR OR SUPPLEMENTAL APPROPRIATIONS BILLS 3–4 (2006) (listing Korean War appropriations amounts); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 670–72 (1952) (Vinson, J., dissenting) (discussing appropriations and other legislation supporting the Korean war effort).

¹⁰ ArtII.S1.C1.5 The President’s Powers and *Youngstown* Framework.

¹¹ *Youngstown Sheet & Tube Co.*, 343 U.S. at 585–88.

following the law would diminish the United States' war effort and contribute to a national catastrophe.¹²

After the Korean War, concerns that communist governments might commit acts of aggression in Formosa (now Taiwan) and the Middle East led Congress to pass and President Eisenhower to sign authorizations for use of military force permitting the President to take military action in those regions. The Formosa authorization, which was repealed in 1974,¹³ permitted the President to “employ the Armed Forces of the United States as he deems necessary for the specific purpose of securing and protecting Formosa, and the Pescadores against armed attack”¹⁴ The Middle East authorization provides that the President may “undertake, in the general area of the Middle East, military assistance programs with any nation or group of nations of that area desiring such assistance.”¹⁵ That resolution also provides, among other things, that “the United States is prepared to use armed forces to assist . . . nations requesting assistance against armed aggression from any country controlled by international communism,” provided that the U.S. actions are consistent with its treaty obligations and the Constitution.¹⁶

ArtI.S8.C11.2.5.10 Presidential and Congressional Power in the Vietnam War

After North Vietnamese patrol boats reportedly attacked U.S. naval vessels in international waters in Southeast Asia in August 1964, Congress enacted a joint resolution, known as the Gulf of Tonkin Resolution, authorizing the President to “take all necessary measures to repel any armed attack against the forces of the United States and to prevent any further aggression.”¹ As the conflict unfolded and spread beyond Vietnam's borders, some Members of Congress questioned whether military operations had become so extensive that they exceed the Gulf of Tonkin Resolution's scope and required a declaration of war.² President Lyndon Johnson claimed the Constitution alone provided sufficient authority and would have done so even if Congress had never enacted the Gulf of Tonkin Resolution.³ Executive branch attorneys, on the other hand, relied on a combination of the President's Article II powers and the Gulf of Tonkin Resolution as

¹² See *id.* at 585–85. For discussion President Roosevelt's threat to ignore legislation, see ArtI.S8.C11.2.5.7 World War II and the Use of War Powers.

¹³ Pub. L. No. 93-475, 88 Stat. 1439 (1974).

¹⁴ Pub. L. No. 84-4, 69 Stat. 7 (1955).

¹⁵ Pub. L. No. 85-7, 71 Stat. 5 (1957).

¹⁶ *Id.*

¹ Pub. L. No. 88-408, 78 Stat. 384 (1964), repealed by 84 Stat. 2055 (1971). See also, *U.S. Involvement in the Vietnam War: the Gulf of Tonkin and Escalation, 1964*, U.S. DEPT OF STATE: OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1961-1968/gulf-of-tonkin> (last visited Sept. 10, 2024); 2 AM. MIL. HIST., THE U.S. ARMY IN A GLOBAL ERA 306 (2d ed. 2005), https://history.army.mil/html/books/030/30-22/CMH_Pub_30-22.pdf.

² See, e.g., *U.S. Commitments to Foreign Powers, Hearings before the S. Comm. on Foreign Relations*, 90th Cong. 121 (1967) [hereinafter *U.S. Commitments Hearing*].

³ See The President's News Conference (Aug. 18, 1967), in *U.S. Commitments Hearing*, *supra* note 2, at 126 (“We stated then, and we repeat now, we did not think the resolution was necessary to do what we did and what we are doing.”).

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domestic legal authorities.⁴ In an executive branch legal opinion addressing introduction of U.S. forces into Cambodia, then-Assistant Attorney General (and later Chief Justice of the Supreme Court) William Rehnquist took the view that the military action fell “short of war” and was “the sort of tactical decision traditionally confided to the Commander in Chief in the conduct of armed conflict.”⁵

In 1971, Congress passed and the President signed a bill repealing the Gulf of Tonkin Resolution⁶ and calling for the “prompt and orderly” withdrawal of U.S. troops at the “earliest practicable date.”⁷ U.S. troop presence diminished considerably during this period as the Nixon Administration carried out a policy to transfer control of the conflict to South Vietnamese forces, but the Nixon Administration continued aerial campaigns after the Gulf of Tonkin Resolution was rescinded.⁸ Congress eventually passed, and President Nixon signed, legislation prohibiting use of appropriated funds for military operations in Southeast Asia⁹ and setting a ceiling on U.S. civilian and military personnel in Vietnam.¹⁰ By 1973, Congress’s dissatisfaction with presidential use of armed forces without congressional authorization or consultation led it to enact the War Powers Resolution over President Nixon’s veto.¹¹

Federal courts considered several cases contesting the constitutionality of military action in Vietnam and Southeast Asia, but no case successfully challenged the conflict or permanently constrained presidential action. Some lower courts held that these cases presented nonjusticiable political questions,¹² and the Supreme Court affirmed one district court’s dismissal of a class action challenge to the constitutionality of the Vietnam War on that basis.¹³ Other lower courts took a different approach and concluded that the question of whether congressional authorization was required for military action could be justiciable in some scenarios.¹⁴ These courts either held that

⁴ See President and the War Power: South Vietnam and the Cambodian Sanctuaries, 1 Op. O.L.C. Supp. 321, 335–38 (1970); The Legality of United States Participation in the Defense of Viet-Nam, 54 DEPT ST. BULL. 474, 484 (1966). The State Department also cited the United States obligations under the South East Asian Collective Defense Treaty. *Id.* at 485.

⁵ President and the War Power: South Vietnam and the Cambodian Sanctuaries, 1 Op. O.L.C. Supp., at 322, 337.

⁶ Pub. L. No. 91-672 § 12, 84 Stat. 2055 (1971).

⁷ Pub. L. No. 92-156 § 601(a), 85 Stat. 430 (1971).

⁸ See JENNIFER K. ELSEA ET AL., CONG. RSCH. SERV., R41989, Congressional Authority to Limit Military Operations 21 (2013), <https://crsreports.congress.gov/product/pdf/R/R41989>.

⁹ See, e.g., Pub. L. No. 93-50 §§ 304-07, 87 Stat. 99 (1973); Pub. L. No. 93-52 § 108, 87 Stat. 130 (1973).

¹⁰ Foreign Assistance Act of 1974, Pub. L. No. 93-559 § 38(f)(1), 88 Stat. 1795.

¹¹ See Pub. L. No. 93-148 § 1(c), 87 Stat. 555 (1973) (codified at 50 U.S.C. § 1541(c)). For broader discussion of the War Powers Resolution and its troop withdrawal deadlines, see ArtII.S2.C1.1.12 Constitutional Control Over President’s Discretion and MATTHEW C. WEED, CONG. RSCH. SERV., R42699, THE WAR POWERS RESOLUTION: CONCEPTS AND PRACTICE, <https://crsreports.congress.gov/product/pdf/R/R42699/16>.

¹² See, e.g., *Luftig v. McNamara*, 373 F.2d 664, 665–66 (D.C. Cir. 1967), *cert. denied*, 387 U.S. 945 (1967); *Massachusetts v. Laird*, 451 F.2d 26, 32–33 (1st Cir. 1971); *DaCosta v. Laird*, 471 F.2d 1146, 1152–53 (2d Cir. 1973); *DaCosta v. Laird*, 471 F.2d 1146, 1150, 1152 (2d Cir. 1973); *Hopltzman v. Schlesinger*, 484 F.2d 1307, 1315 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974).

¹³ *Atlee v. Richardson*, 411 U.S. 911 (1973) (affirmed without written opinion). When the Supreme Court declined to adjudicate similar cases, Justice Douglass frequently dissented and contended that the Supreme Court should resolve the underlying separation of powers dispute. See, e.g., *DaCosta v. Laird*, 405 U.S. 979, 979 (1972) (Douglas, J., dissenting from denial of petition for certiorari); *Massachusetts v. Laird*, 400 U.S. 886, 886–99 (1970) (Douglas, J., dissenting from denial of motion for leave to file bill of complaint).

¹⁴ *Orlando v. Laird*, 443 F.2d 1039, 1042 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); *Mitchell v. Laird*, 488 F.2d 611, 614 (D.C. Cir. 1973).

Congress authorized military action by appropriating funds and extending the compulsory draft¹⁵ or that judicial intervention was not appropriate while the President was in the process of winding down the conflict.¹⁶

One district court issued an order, later reversed on appeal, that enjoined an air campaign in Cambodia on the grounds that the military action exceeded the President's authority.¹⁷ Following a complex series of rapidly issued opinions during an appeals process in which Supreme Court Justices served as judges on the United States Court of Appeals for the Second Circuit, the stay was implemented for less than twenty-four hours.¹⁸

ArtI.S8.C11.2.5.11 Post-Cold War Presidential Authority and Persian Gulf War of 1991

After the end of the Vietnam War and enactment of the War Powers Resolution, Presidents continued to claim constitutional authority to introduce troops into hostile circumstances without congressional authorizations. In the period between the close of the Vietnam War and the First Persian Gulf War, examples include:

President Gerald Ford's evacuation of individuals from Vietnam and Cambodia despite Vietnam-era appropriations restrictions;¹

¹⁵ See *DaCosta v. Laird*, 448 F.2d 1368, 1369 (2d Cir. 1971) (“[T]here was sufficient legislative action in extending the Selective Service Act and in appropriating billions of dollars to carry on military and naval operations in Vietnam to ratify and approve the measures taken by the Executive[.]”), *cert denied*, 405 U.S. 979 (1972); *Orlando*, 443 F.2d at 1043 (“Congress has ratified the executive’s initiatives by appropriating billions of dollars to carry out military operations in Southeast Asia and by extending the Military Selective Service Act with full knowledge that persons conscripted under that Act had been, and would continue to be, sent to Vietnam.”). *But see Mitchell*, 488 F.2d at 615 (describing as “unsound” the conclusion that “appropriation, draft extension, and cognate laws enacted with direct or indirect reference to the Indo-China war . . . constitute a constitutionally permissible form of [congressional] assent”).

¹⁶ In *Mitchell v. Laird*, the United States Court of Appeals for the D.C. Circuit stated that it was “persuaded” that, in some cases, courts may be able to resolve Members of Congress’s challenge to the President’s authority to take military action. 488 F.2d 611, 614 (D.C. Cir. 1973). The D.C. Circuit concluded that the timing and circumstances of that particular challenge, however, was not justiciable, in part, because “President Nixon’s duty did not go beyond trying, in good faith and to the best of his ability, to bring the war to an end as promptly as was consistent with the safety of those fighting and with a profound concern for the durable interests of the nation—its defense, its honor, its morality.” *Id.* at 616.

¹⁷ See *Holtzman v. Schlesinger*, 361 F. Supp. 553, 566 (E.D.N.Y. 1973), *rev’d*, 484 F.2d 1307 (2d. Cir. 1973), *cert. denied*, 94 S. Ct. 1935 (1974).

¹⁸ For discussion of this episode, see *Highlights of the Term*, 88 HARV. L. REV. 43–44 (1974); Eugene R. Fidell, *Why Did the Cambodia Bombing Continue?*, 13 GREEN BAG 2D 321, 321–24 (2010). For more general discussion of Vietnam-era war powers litigation, see Michael D. Ramsey, *War Powers Litigation After Zivotofsky v. Clinton*, 21 CHAP. L. REV. 177, 180–83 (2018); FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 247–50 (1989).

¹ Letter from President Gerald R. Ford to the Speaker of the House (Apr. 30, 1975), in *War Powers: A Test of Compliance Relative to the Danang Sealift, the Evacuation at Phnom Penh, the Evacuation of Saigon, and the Mayaguez Incident: Hearings Before the Subcomm. on International Security and Scientific Affairs of the H. Comm. on International Relations*, 94th Cong. 7 (1975) [hereinafter *Test of Compliance Hearings*]; Letter from President Gerald R. Ford to the Speaker of the House (May 15, 1975), in *Test of Compliance Hearings*, *supra*, at 76; Introduction & Summary of Opinions of the Off. of Legal Couns. Relating to the Iranian Hostage Crisis, 4A U.S. Op. O.L.C. 71, 74 (1984).

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President Jimmy Carter's order to rescue hostages held in the American Embassy in Tehran;²

President Ronald Reagan's introduction of 1,900 land forces into the Caribbean country of Grenada to protect American citizens during a violent transition in government;³ and

President George H.W. Bush's deployment of 11,000 ground forces into Panama resulting in U.S. forces' arrest of Panamanian leader Manuel Noriega.⁴

After President Reagan sent a contingent of U.S. forces to Lebanon in 1982 as part of a multinational peacekeeping mission, Congress passed the Multinational Force in Lebanon Resolution, which authorized participation in the mission, but limited that authorization for eighteen months.⁵ President Reagan signed the joint resolution, but noted in a statement that the law should not be interpreted to acknowledge that Congress could intrude on the President's power to use force beyond statutory timelines.⁶

When a contingent of Iraqi forces entered Kuwait in 1990, the U.N. Security Council issued a series of resolutions authorizing countries to take "all necessary means" to force Iraqi withdrawal.⁷ In January 1991, Congress authorized the President to use military force to achieve the Security Council resolutions' objectives, provided the President determined that diplomatic and other peaceful means were not successful in obtaining compliance with the Security Council's aims.⁸ Although President Bush requested the congressional authorization, he and officials in his Administration also expressed the view that the President possessed constitutional authority for the military action even if Congress had not enacted the resolution.⁹

President Clinton claimed authority for several military actions overseas, including deployment of up to 20,000 troops in Haiti,¹⁰ multi-year military intervention with air

² Letter from President Carter to Hon. Thomas P. O'Neill, Jr., Speaker of the U.S. House of Representatives (Apr. 26, 1980), *in* Use of U.S. Armed Forces in Attempted Rescue of Hostages in Iran: Communication from the President of the United States, H.R. Doc. No. 96-303, at 2 (1980).

³ Letter to the Speaker of the House and the President Pro Tempore of the Senate on the Deployment of United States Grenada (Oct. 25, 1983), <https://www.reaganlibrary.gov/archives/speech/letter-speaker-house-and-president-pro-tempore-senate-deployment-united-states-0>.

⁴ Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the United States Military Action in Panama (Dec. 21, 1989), <https://bush41library.tamu.edu/archives/public-papers/1364>.

⁵ Pub. L. No. 98-119 § 6, 97 Stat. 807 (1983).

⁶ Ronald Reagan, Statement on Signing the Multinational Force in Lebanon Resolution, 2 PUB. PAPERS 1444, 1444 (Oct. 12, 1983).

⁷ See S.C. Res. 678, ¶ 2 (Nov. 29, 1990). See *id.* pmbl. ¶ 1 (recalling prior UN Security Council Resolutions concerning the invasion).

⁸ Authorization for Use of U.S. Armed Forces Pursuant to UN Security Council Resolution 78 with Respect to Iraq, Pub. L. No. 102-1 § 2, 105 Stat. 3 (1991).

⁹ See The President's News Conference on the Persian Gulf Crisis, 1 PUB. PAPERS 17, 20 (Jan. 9, 1991) (statement of President George H. W. Bush) ("I still feel that I have the constitutional authority—many attorneys have advised me so."). See also *Crisis in the Persian Gulf Region: U.S. Policy Options and Implications*, Hearing the S. Comm. on Armed Services, 101 Cong. 701 (1990) (testimony of then-Secretary of Defense Richard B. Cheney) ("I do not believe the President requires any additional authorization from Congress before committing U.S. forces to achieve our objectives in the Gulf.").

¹⁰ Deployment of United States Armed Forces into Haiti, 18 U.S. Op. O.L.C. 173, 179 (1994).

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campaigns in Bosnia and Kosovo,¹¹ and a humanitarian relief mission in Somalia.¹² Among other legal rationales, Clinton Administration attorneys opined that these operations were not of sufficient significant nature, scope, and duration to interfere with Congress's power to declare war.¹³ In some cases, the executive branch argued that Congress provided funding or enacted other measures that authorized or contemplated military action.¹⁴ Congress also exerted some influence over these missions through limitations on appropriations of funds. For example, Congress passed, and President Clinton signed into law without constitutional objections, legislation that set specific end dates after which funds could no longer be used to support the action and limited the scope of some missions during this period.¹⁵

ArtI.S8.C11.2.5.12 September 11, 2001 Terrorist Attacks and War Powers

Shortly after the September 11, 2001 terrorist attacks on the United States, Congress passed and President George W. Bush signed into law a joint resolution authorizing the President to use force against the nations, organizations, and persons the President determines were responsible for the attacks.¹ The Bush Administration initially requested that Congress provide broader authorization to use force “to deter and pre-empt any future acts of terrorism or aggression against the United States[,]” but that language was not enacted.²

The Bush Administration did not view congressional authorization as necessary for its post-September 11 invasion of Afghanistan and other military actions.³ In late September 2001, the Office of Legal Counsel (OLC) in the Department of Justice opined that the President already possessed independent constitutional authority to respond to the

¹¹ Proposed Deployment of United States Armed Forces into Bosnia, 19 Op. O.L.C. 327, 336 (1995); Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. 327, 339 (2000) (relying on a combination of constitutional authorities and congressional appropriations).

¹² Authority to Use United States Military Forces in Somalia, 16 Op. O.L.C. 6, 6 (1992). *See also* April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities the President, 42 Op. O.L.C., slip op. at 6 (2018) (summarizing missions during the Clinton Administration).

¹³ Deployment of United States Armed Forces into Haiti, 18 U.S. Op. O.L.C. at 179; Deployment of United States Armed Forces into Bosnia, 19 U.S. Op. O.L.C. at 331–32.

¹⁴ *See* Authorization for Continuing Hostilities in Kosovo, 24 Op. O.L.C. at 346.

¹⁵ *See* Pub. L. No. 103-139 § 8141, 107 Stat. 1418 (1993) (approving use of armed forces for certain purposes, including combat forces in a security role to protect United Nations units in Somalia, but cutting off funding after March 31, 1994, except for a limited number of military personnel to protect American diplomatic personnel and American citizens, unless further authorized by Congress); Pub. L. No. 103-335 § 8135, 108 Stat. 2599 (“None of the funds appropriated by this Act may be used for the continuous presence in Somalia of United States military personnel, except for the protection of United States personnel, after September 30, 1994.”); Pub. L. No. 103-335 tit. IX, 108 Stat. 2599 (“[N]o funds provided in this Act are available for United States military participation to continue Operation Support Hope in or around Rwanda after October 7, 1994, except for any action that is necessary to protect the lives of United States citizens.”). *See also* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb - A Constitutional History*, 121 HARV. L. REV. 941, 1089–90 (2008).

¹ Pub. L. No. 107-40, 115 Stat. 224 (2001). *See also* ArtII.S2.C1.1.17 Response to the Terrorist Attacks of September 11, 2001.

² 147 CONG. REC. 18215 (2001).

³ The President's Constitutional Auth. to Conduct Military Operations Against Terrorists & Nations Supporting Them, 25 U.S. Op. O.L.C. 188, 212–14 (2001).

terrorist attacks.⁴ In OLC’s view, the joint resolution “confirmed” the President’s power, but was narrower than the constitutional authority under Article II that the President already possessed.⁵ Although Congress declined to adopt the proposal for a more comprehensive authorization to address future attacks, OLC opined that such congressional authorization was not legally necessary because Article II of the Constitution provided the President plenary authority to “pre-empt . . . terrorist threats from new quarters.”⁶

The Bush Administration OLC also opined that the Declare War Clause does not constrain presidential power or prohibit the President from initiating a full-scale war without a declaration of war or congressional authorization.⁷ This conclusion marked a departure from earlier OLC opinions, which analyzed whether proposed military actions were of a such a significant scale that they could rise to the level of a war, which only Congress has the power to declare.⁸ During the Obama and Trump Administrations, OLC reverted to the executive branch’s earlier interpretation that the Declare War Clause limits presidential power, at least in the case of a full-scale war with another country.⁹

As discussed in other essays, the Supreme Court also curtailed some of the Bush Administration’s conduct of its post-September 11, 2001 actions, particularly in the context of detainees and military trials.¹⁰

ArtI.S8.C11.2.5.13 Presidential Power in 2003 Iraq War and Other 21st-Century Operations

After the Bush Administration’s raised concerns over Iraq’s non-compliance with United Nations Security Council resolutions and possible acquisition of weapons of mass destruction, Congress passed and President George W. Bush signed into law a joint resolution authorizing the President to use force to (1) defend United States’ national security “against the continuing threat posed by Iraq,” and (2) enforce relevant Security

⁴ *Id.* at 212–13.

⁵ *Id.*

⁶ *Id.* at 213.

⁷ *Id.* at 193 (“Congress’s power to declare war does not constrain the President’s independent and plenary constitutional authority over the use of military force.”).

⁸ *See, e.g.*, Deployment of United States Armed Forces into Haiti, 18 U.S. Op. O.L.C. 173, 179 (1994) (concluding that the deployment of forces into Haiti did not interfere with congressional authority because the action did not rise to the level of a war within the meaning of the Declare War Clause based on its “anticipated nature, scope and duration”); Proposed Deployment of United States Armed Forces into Bosnia, 19 U.S. Op. O.L.C. 327, 331–32 (1995) (concluding that introduction of ground troops into Bosnia did not amount to “war” in the constitutional sense”).

⁹ April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities the President, 42 Op. O.L.C., slip op. at 3 (2018); Authority to Use Military Force in Libya, 35 Op. O.L.C., slip op. at 4, 22 (2011). Although OLC withdrew other opinions related to post-September 11 military actions addressing issues such as criminal prohibitions on torture, it has not withdrawn the Bush Administration’s interpretation of the Declare War Clause. *See* Memorandum from Steven G. Bradbury, Principal Deputy Assistant Att’y Gen., for the Files, Status of Certain OLC Opinions Issued in the Aftermath of the Terrorist Attacks of September 11, 2001 (Jan. 15, 2009), <https://www.justice.gov/sites/default/files/opa/legacy/2009/03/09/memostatusolcopinions01152009.pdf>; Memorandum from David J. Barron, Acting Assistant Att’y General, Withdrawal of Office of Legal Counsel CIA Interrogation Opinions (Apr. 15, 2009), <https://www.justice.gov/olc/file/2009-06-11-wd-cia-interr-01/dl>.

¹⁰ *See* ArtII.S2.C1.1.18 Detention Authority; ArtII.S2.C1.1.19 Military Commissions; ArtI.S9.C2.1 Suspension Clause and Writ of Habeas Corpus.

Council Resolutions.¹ While President Bush received congressional authorization,² executive branch attorneys also took the view that such authorization was not legally necessary because the President possessed independent constitutional authority for the military action.³

In more recent decades, Presidents Obama, Trump, and Biden have each claimed independent constitutional authority to conduct military operations without first seeking congressional authorization, albeit on a smaller scale than the Iraq War. These 21st-century conflicts include air assault campaigns in Libya during the Obama Administration;⁴ airstrikes against Syrian chemical weapons facilities during the Trump Administration;⁵ and air strikes targeting Iran-backed militant groups in Yemen and the Red Sea during the Biden Administration.⁶

ArtI.S8.C12 Army

ArtI.S8.C12.1 Overview of the Army Clause

The Army Clause¹ provides Congress with authority to raise and support armies—an essential element of the federal government’s suite of war powers.² The Clause’s structure reflects the Framers’ efforts to balance two competing concerns in the Founding era: a widespread mistrust of peacetime standing armies and the new nation’s desire to ensure security through military protection.³ The Framers sought to address both issues by authorizing Congress to raise and maintain armies, while requiring renewal of appropriations for that purpose every two years to ensure democratically elected representatives continued to support the army.⁴ Although congressional power to raise and support armies has sometimes come into tension with other constitutional rights and

¹ Pub. L. No. 107-243 § 3, 116 Stat. 1501 (2002).

² See JENNIFER K. ELSEA & MATTHEW C. WEED, CONG. RSCH. SERV., RL31133, DECLARATIONS OF WAR AND AUTHORIZATIONS FOR THE USE OF MILITARY FORCE: HISTORICAL BACKGROUND AND LEGAL IMPLICATIONS 13–14 (2014), <https://crsreports.congress.gov/product/pdf/RL/RL31133/17> (providing an account of the lead up to enactment of the joint resolution authority).

³ Authority of the President Under Domestic and International Law to Use Military Force Against Iraq, 26 Op. O.L.C. 143, 152 (2002) (“To the extent that the President were to determine that military action against Iraq would protect our national interests, he could take such action based on his independent constitutional authority; no action by Congress would be necessary.”).

⁴ Authority to Use Military Force in Libya, 35 Op. O.L.C., slip op. at 14 (2011).

⁵ April 2018 Airstrikes Against Syrian Chemical-Weapons Facilities the President, 42 Op. O.L.C., slip op. at 3 (2018).

⁶ See, e.g., Letter to the Speaker of the House and President pro tempore of the Senate Consistent with the War Powers Resolution (Pub. L. No. 93-148) (Jan. 12, 2024), <https://www.whitehouse.gov/briefing-room/presidential-actions/2024/01/12/letter-to-the-speaker-of-the-house-and-president-pro-tempore-of-the-senate-consistent-with-the-war-powers-resolution-public-law-93-148-10/>; JENNIFER K. ELSEA & KAREN SOKOL, CONG. RSCH. SERV., LSB11157, ASSESSING RECENT AIRSTRIKES IN THE MIDDLE EAST UNDER THE WAR POWERS FRAMEWORK 5 (2024), <https://crsreports.congress.gov/product/pdf/LSB/LSB11157>.

¹ U.S. CONST. art. I, § 8, cl. 12 (“[The Congress shall have Power . . . To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years. . . .”).

² See 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 475, at 413 (1st ed. 1833) (“The power to raise armies is an indispensable incident to the power to declare war; and the latter — would be literally *brutum fulmen* without the former, — a means of mischief without a power of defence.”). See also *Gilbert v. Minnesota*, 254 U.S. 325, 330-31 (1920) (“An army is an instrument of government, a necessity of its power and honor, and, it may be, of its security.”).

³ See ArtI.S8.C12.2.1 The Early American Experience with Standing Armies.

⁴ See ArtI.S8.C12.2.2 Debate Over the Army Clause at the Federal Convention.

principles,⁵ the Supreme Court has described this power as “broad and sweeping,”⁶ and it has rejected some claimed limits on Congress’s authority under the Army Clause.⁷

ArtI.S8.C12.2 Historical Background

ArtI.S8.C12.2.1 The Early American Experience with Standing Armies

The Constitution’s Framers inherited a longstanding tradition of opposition to standing armies that was rooted in both political philosophy and historical experience.¹ Many in the Framers’ generation believed peacetime standing armies were incompatible with republican values, and they viewed professional armies to be too far removed from the general populace to be trusted to defend it.²

Great Britain traditionally allowed its monarchs both to initiate wars and to raise and support armies;³ however, in the 17th century, Britain experienced three-quarters of a century of struggle over whether its army would be controlled by the Crown or the Parliament.⁴ In the 1628 Petition of Right, the English Parliament called on King Charles I to end the practice of dispersing “great companies of soldiers and mariners” throughout England.⁵ Charles I was eventually ousted from the throne, tried, and convicted of treason following the English Civil War, but the Crown again maintained a standing army after the monarchy was restored.⁶ In the Glorious Revolution of 1689, William and Mary agreed to the English Bill of Rights of 1689, which prohibited the Crown from raising or keeping a standing army in peacetime without Parliament’s consent.⁷

⁵ See ArtI.S8.C12.1.6 The Army Clause and Individual Rights and ArtI.S8.C12.2.7 Federalism and the Army Clause.

⁶ *Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580, 585 (2022) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

⁷ See ArtI.S8.C12.3 Conscription and Congressional Power Under the Army Clause and ArtI.S8.C12.2.7 Federalism and the Army Clause.

¹ See, e.g., 1 William Blackstone, *Commentaries* 395 (“In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms.”); *id.* at *400 (“[Armies] are to be looked upon only as temporary excrescences bred out of the distemper of the state, and not as any part of the permanent and perpetual laws of the kingdom.”). See also Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989*, at 81–82 (Richard H. Kohn ed., 1992).

² See Letter from Samuel Adams to James Warren (Jan. 7, 1776), in 3 *THE WRITINGS OF SAMUEL ADAMS* 250 (1907) (“A standing Army . . . is always dangerous to the Liberties of the People. Soldiers are apt to consider themselves as a Body distinct from the rest of the Citizens[.]”); George Washington, *Washington’s Sentiments on a Peace Establishment* (May 1, 1783) (“[A] large standing Army in time of Peace hath ever been considered dangerous to the liberties of a Country”), <https://founders.archives.gov/documents/Washington/99-01-02-11202>. See also *Perpich v. Dep’t of Def.*, 496 U.S. 334, 340 (1990) (“[T]here was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the separate States. . . .”). See also Robert Leider, *Federalism and the Military Power of the United States*, 73 VAND. L. REV. 989, 996–97 (2020); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 53 (2000).

³ See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *263; 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* § 1177 (1833).

⁴ See, e.g., RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, 3 (1975) [hereinafter KOHN, *EAGLE AND SWORD*].

⁵ PETITION OF RIGHT 1628, 3 Car. 1 c.1, ¶ VI.

⁶ See *The Restoration and the Birth of the British Army*, NAT’L ARMY MUSEUM, <https://www.nam.ac.uk/explore/restoration-and-birth-british-army> (last visited Mar. 8, 2024).

⁷ BILL OF RIGHTS 1689, 1 W. & M. 2d sess., c. 6.

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Sec. 8, Cl. 12—Enumerated Powers, Army

The British experience contributed to a commonly accepted view in colonial America that peacetime standing armies enabled abuse of power and were a threat to civil liberties and individual freedom.⁸ Despite this popular sentiment, the British maintained a standing army in the American colonies after the end of the Seven Years' War in 1763.⁹ When British troops shot into a crowd of civilians during the 1770 Boston Massacre, killing several men and injuring others, American hostility to the permanent military presence accelerated.¹⁰ By 1776, the complaint that King George III “kept among us, in times of peace, Standing Armies without the Consent of our legislatures” was included in the Declaration of Independence’s list of grievances justifying armed rebellion.¹¹ As the former colonies transitioned to independence, several adopted state constitutions that limited standing armies and described them as dangerous to liberty.¹²

Against this backdrop, the Articles of Confederation¹³ primarily focused on the militia rather than a professional army as the first line of national defense.¹⁴ The Supreme Court has described the militia as the “body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace”¹⁵ The Articles of Confederation required each state to maintain a well-regulated, disciplined, and armed militia and to have weaponry, ammunition, and equipment ready for its use.¹⁶ Despite the militia’s prominence, its limitations as a fighting force were evident as early as the Revolutionary War. In 1776, then-General George Washington and other military leaders complained that militia forces were unreliable and lacked necessary training and discipline.¹⁷ Washington later

⁸ See, e.g., Robert J. Delahunty, *Structuralism and the War Powers: The Army, Navy, and Militia Clauses*, 19 GA. S. L. REV. 1021, 1031–36 (2003). See also NAT’L ARMY MUSEUM, *supra* note 6.

⁹ See *British Reforms and Colonial Resistance, 1763–1766*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/american-revolution-1763-1783/british-reforms-1763-1766/> (last visited Mar. 12, 2024).

¹⁰ See, e.g., Delahunty, *supra* note 8, at 1031; *The Boston Massacre*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/march-05> (last visited Mar. 12, 2024).

¹¹ *Declaration of Independence: A Transcription*, NAT’L ARCHIVES, <https://www.archives.gov/founding-docs/declaration-transcript> (last visited Mar. 12, 2024).

¹² VA. CONST. of 1776, § 13; PA. CONST. of 1776, art. XIII; DEL. CONST. of 1776, § 19; MD. CONST. of 1867, art. 29; N.C. CONST. art. 1, § 30; VT. CONST. of 1793, art. 16; MASS. CONST. pt. 1, art. XVII; N.H. CONST. of 1784 pt. 1, art. 25.

¹³ For background on the Articles of Confederation that preceded the Constitution, see Intro5.1 Continental Congress and Adoption of the Articles of Confederation.

¹⁴ See ARTICLES OF CONFEDERATION OF 1781, art. VI. See also Morris J. MacGregor Jr., *The Formative Years, 1783–1812*, in 1 AMERICAN MILITARY HISTORY, THE UNITED STATES ARMY AND THE FORGING OF A NATION, 1775–1917, at 101, <https://history.army.mil/books/AMH/AMH-05.htm>; KOHN, EAGLE AND SWORD, *supra* note 4.

¹⁵ *Perpich v. Dep’t of Def.*, 496 U.S. 334, 328 (1990) (quoting *Dunne v. People*, 94 Ill. 120, 138 (1879)).

¹⁶ See ARTICLES OF CONFEDERATION OF 1781, art. VI, para. 4. While requiring each state to maintain its militia, the Articles of Confederation simultaneously prohibited the states from maintaining any permanent body of forces during peacetime, except as the Confederation Congress “deemed requisite to garrison the forts necessary for the defence of such state. . . .” *Id.*

¹⁷ See, e.g., Letter from George Washington to John Hancock, President of Congress (Dec. 20, 1776), in 4 THE WRITINGS OF GEORGE WASHINGTON 234 (J. Sparks, ed., 1834) (“[A] mistaken dependence upon militia, have been the origin of all our misfortunes [T]he militia, who come in, you cannot tell how, go, you cannot tell when, and act, you cannot tell where, consume your provisions, exhaust your stores, and leave you at last at a critical moment?”); Letter from George Washington to John Hancock (Sept. 25, 1776), <https://founders.archives.gov/documents/Washington/03-06-02-0305> (“To place any dependance upon Militia, is, assuredly, resting upon a broken staff. Men just dragged from the tender Scenes of domestic[] life—unaccustomed to the din of Arms—totally unacquainted with every kind of Military skill . . . timid, and ready to fly from their own Shadows.”); KOHN, EAGLE AND SWORD, *supra* note 4, at 9 (“To most of the higher-ranking officers of the

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warned in a letter from the battlefield that, unless the United States was vested with greater powers to raise armies, “our cause is lost.”¹⁸

Although the Articles of Confederation focused primarily on the militia, they also gave the national government some ability to build a professional army by granting the Confederation Congress¹⁹ the power to “agree upon the number of land forces” to be put in the service of the United States and “to make requisitions from each state” to supply them.²⁰ Like the militia, however, this system had shortcomings.²¹ The Confederation Congress could not raise armies directly; it was dependent upon states to supply, arm, and equip them.²² Requisitioning troops from the states suffered from delays, short enlistments, troop fluctuation, and uneven recruitment, especially in states that were less motivated to supply forces because they were far from active theaters of conflict.²³ Defects in the requisition system “nearly cost the Nation victory in the Revolutionary War[,]” and the need to fix the process for raising armies became one of the “recognized necessities” for calling the Federal Convention in Philadelphia.²⁴

ArtI.S8.C12.2.2 Debate over the Army Clause at the Federal Convention

At the Federal Convention, the Framers of the Constitution emphasized the militia as the primary guarantor of national defense,¹ but abandoned the Articles of Confederation’s system for raising armies by “mak[ing] requisitions from each state.”² During opening remarks at the Convention, Edmund Randolph observed that the Articles of Confederation “produced no security agai[nst] foreign invasion” because the Confederation Congress was not “permitted to prevent a war nor to support it by [its] own

Continental Army, the heads of the special branches and administrative departments, and Washington’s staff, the . . . militia were unreliable and inefficient.”).

¹⁸ Letter from George Washington to Joseph Jones (May 31, 1780), <https://founders.archives.gov/documents/Washington/03-26-02-0180>.

¹⁹ The term Confederation Congress distinguishes the congressional body that met under the Articles of Confederation, which had both legislative and executive functions, from the Congress formed under the Constitution as the legislative branch.

²⁰ See ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 5.

²¹ See, e.g., 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1174 (1833) (“The experience of the whole country, during the revolutionary war, established, to the satisfaction of every statesman, the utter inadequacy and impropriety of this system of requisition.”).

²² See ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 5. See also Selective Draft Law Cases, 245 U.S. 366, 380 (1918) (“Under the Articles of Confederation . . . [the Confederation Congress’s] authority was absolutely limited to making calls upon the states for the military forces needed to create and maintain the army . . .”).

²³ See, e.g., 3 STORY, *supra* note 21, §§ 1174–77.

²⁴ Selective Draft Law Cases, 245 U.S. at 381. See also 1 The Records of the Federal Convention of 1787, at 19 (Max Farrand ed., 1911).

¹ The Supreme Court has described the militia as the “body of armed citizens trained to military duty, who may be called out in certain cases, but may not be kept on service like standing armies, in time of peace . . .” *Perpich v. Dep’t of Def.*, 496 U.S. 334, 328 (1990) (quoting *Dunne v. People*, 94 Ill. 120, 138 (1879)). For discussion of the Constitution’s militia clauses, see ArtI.S8.C15.1 Congress’s Power to Call Militias and ArtI.S8.C16.1 Congress’s Power to Organize Militias. For discussion of the requisition system, see ArtI.S8.C12.2.1 The Early American Experience with Standing Armies.

² ARTICLES OF CONFEDERATION OF 1781, art. IX, para. 5.

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authority.”³ In light of this experience, the first draft of the Constitution prepared at the Federal Convention gave Congress authority to “raise armies” without state involvement.⁴

When the full Convention discussed this early draft of the Army Clause, the delegates voted to add the words “and support,” but they did not debate or discuss reasons for the change.⁵ Nor was there debate over which branch of government should possess this power.⁶ It was a widely held view in Founding-era America that English monarchs’ misuse of military forces demonstrated that the power to raise and support armies should reside in the legislative branch rather than with an executive head of state.⁷

The Army Clause quickly generated opposition from delegates who feared that it could lead to expensive and oppressive standing armies in peacetime.⁸ Immediately after the delegates agreed to the addition of language authorizing Congress to “support” armies, Massachusetts delegate Elbridge Gerry criticized the absence of a “check [against] standing armies in times of peace” in the Army Clause.⁹ Arguing that he “could never consent to a power to keep up an indefinite number” of troops, Gerry moved to add a limit on the number of peacetime forces, which he suggested should be no more than “two or three thousand.”¹⁰ New Jersey delegate Jonathan Dayton responded that “preparations for war are generally made in peace; and a standing force of some sort may . . . become unavoidable.”¹¹ One delegate supported Gerry’s proposal, but others voiced objections, and Gerry’s motion was defeated.¹²

Although Gerry’s motion for a numerical limit was quickly rejected, the delegates would continue to debate whether the Army Clause properly balanced distrust of standing armies with the need for a professional military force to provide security on American soil.¹³ Rather than place a ceiling on the number of troops, the delegates coalesced

³ See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., 1911) (first alteration in original) [hereinafter FARRAND’S RECORDS].

⁴ 2 FARRAND’S RECORDS, *supra* note 3, at 168.

⁵ See *id.* at 323, 329 (vote on motion by Massachusetts delegate Nathaniel Gorham).

⁶ *Id.* at 329–30.

⁷ See, e.g., 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1187 (1833).

⁸ See 2 FARRAND’S RECORDS, *supra* note 2, at 329–30 (discussion of motion to limit number of army troops during peacetime). See also *id.* at 326 (statement of George Mason) (“He hoped that there would be no standing armies in times of peace, unless it might be for a few garrisons.”); 1 FARRAND’S RECORDS, *supra* note 2, at 326 (statement of George Mason) (“[A] standing army . . . may turn its arms against the government which employs them.”); *id.* at 465 (statement of James Madison) (“A standing military force, with an overgrown Executive will not long be safe companions to liberty. The means of defense against foreign danger, have been always the instruments of tyranny at home. . . . Throughout all Europe, the armies kept up under the pretext of defending, have enslaved the people.”).

⁹ 2 FARRAND’S RECORDS, *supra* note 3, at 329.

¹⁰ *Id.*

¹¹ *Id.* at 330.

¹² *Id.* at 330. Luther Martin of Maryland supported Gerry’s motion. *Id.* Hugh Williams of North Carolina and John Langdon of New Hampshire joined Dayton in raising objections. *Id.*

¹³ Compare, e.g., *id.* at 388 (statement of James Madison) (“[A]s the greatest danger to liberty is from large standing armies, it best to prevent them by an effectual provision for a good Militia. . . .”), with 1 FARRAND’S RECORDS, *supra* note 2, at 414 (statement of Oliver Ellsworth) (questioning the security provided by state militias and stating “Massachusetts cannot support a government at the distance of one hundred miles from her capital, without an army; and how long Virginia and Pennsylvania will support their governments it is difficult to say”). See also *Perpich v. Dep’t of Def.*, 496 U.S. 334, 341 (1990) (“On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the

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around the idea of controlling the army's size and power by limiting congressional authority to appropriate funds to it. Delegate Hugh Williamson of North Carolina argued that limitations on appropriations would be the "best guard" against the dangers of a standing army.¹⁴ South Carolina Delegate Charles Pinckney later introduced a proposal that "no grants of money shall be made by the Legislature for supporting milit[ary] land forces for more than one year at a time[.]"¹⁵ Pinckney's proposed one-year limitation had its roots in English law and practice in which Parliament passed annual funding bills for the British army starting in the late 17th century.¹⁶

Later in the Convention, an eleven-person committee that had been formed to address postponed and unresolved issues in the Constitution circulated a report recommending that Congress be given the power to "raise and support armies," provided that "no appropriation of money to that use shall be for a longer term than two years[.]"¹⁷ Elbridge Gerry objected that "he could not conceive a reason" to appropriate funds for the army for two years instead of one.¹⁸ More broadly, Gerry argued that the American people would not accept an authorization of peacetime standing armies, which were dangerous to liberty and unnecessary, even in a large country with an expansive frontier like the United States.¹⁹

Roger Sherman of Massachusetts responded to both lines of argument. He countered that two-year appropriations would better align with the biannual election of legislators to the House of Representatives, and that it might be inconvenient to require annual appropriations because Congress might not be in session in the time necessary to renew funding.²⁰ As to Gerry's more fundamental criticisms, Sherman argued that the two-year appropriations limit was a "reasonable restriction on the number and continuance of an army in time of peace."²¹ Following this exchange, the Convention voted to approve the Army Clause in its final, substantive form.²²

Although it would not be modified, the Army Clause remained a controversial topic until the final days of the Convention. The day before the final vote to approve the Constitution, George Mason and two co-delegates from Virginia sought to add cautionary

sovereignty of the separate States, while, on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense."); Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989*, at 63–72 (Richard H. Kohn ed., 1992) (discussing competing desires to guard against the dangers of standing armies while ensuring American security).

¹⁴ 2 FARRAND'S RECORDS, *supra* note 3, at 330.

¹⁵ *Id.* at 341. Pinckney's proposal also would have modified the Army Clause to state "No troops shall be kept up in time of peace, but by consent of the Legislature. The military shall always be subordinate to the Civil power," but those changes were not adopted. *Id.*

¹⁶ See RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, 3–4 (1975); John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 CAL. L. REV. 167, 213, 275–76 (1996).

¹⁷ 2 FARRAND'S RECORDS, *supra* note 3, at 505, 508.

¹⁸ *Id.* at 509.

¹⁹ See *id.* at 509 ("Mr. Gerry objected . . . that [the Army Clause] implied there was to be a standing army which he inveighed against as dangerous to liberty, as unnecessary, even for so great an extent of Country as this. . . . The people would not bear it.").

²⁰ See *id.*

²¹ *Id.*

²² *Id.* at 505, 508.

language highlighting the importance of state militias to guard against “the danger of standing armies in time of peace[.]”²³ Even though James Madison was an ardent supporter of a strong federal government at the time, he favored the change, reasoning that the amendment would “not restrain Congress from establishing a military force in time of peace if found necessary; and as armies in time of peace are allowed on all hands to be an evil, it is well to discountenance them by the Constitution. . . .”²⁴ After New York delegate Gouverneur Morris argued that the proposal would set a “dishonorable mark of distinction on the military class[.]” opposition formed, and Mason’s motion was defeated.²⁵

Of the delegates who remained until the close of the Federal Convention, three declined to sign the Constitution.²⁶ All of these delegates mentioned the absence of checks against peacetime standing armies in their criticisms.²⁷ Their opposition would presage an even more vigorous debate in the state ratifying conventions where opponents to the Constitution would frequently raise concerns about standing armies, and the Constitution’s supporters would find themselves compelled to articulate a more fulsome defense of the Army Clause.²⁸

ArtI.S8.C12.2.3 Debate over the Army Clause in the State Ratifying Conventions

The Army Clause was a recurring concern during the state conventions that considered whether to ratify the Constitution.¹ Opponents of the Constitution, who would become known as Anti-Federalists, attacked the clause “with incredible zeal and pertinacity, as dangerous to liberty, and subversive of the state governments.”² The New York-based

²³ See *id.* at 616–17. Virginia delegates Edmund Randolph and James Madison supported the change. *Id.* at 617.

²⁴ *Id.* at 617.

²⁵ *Id.*

²⁶ Elbridge Gerry, George Mason, and Virginia delegate Edmund Randolph declined to sign the Constitution. *Id.* at 649. Other delegates left the Federal Convention early because they objected to the project of preparing a new plan of government rather than revising the Articles of Confederation. See Letter from Robert Yates and John Lansing to Governor George Clinton of New York (Dec. 21, 1787), in 3 FARRAND’S RECORDS, *supra* note 3, at 244–45.

²⁷ See *id.* at 563 (“Mr. Randolph took this opportunity to state his objections to the System. They turned on . . . the want of limitations to a standing army. . . .”); *id.* at 632–33 (“Mr. Gerry, stated his objections which determined him to withhold his name from the Constitution . . . [T]he general power of Legislature to . . . raise armies and money without limit.”); *id.* at 640 (Mason’s written Objections to this Constitution of Government) (“There is no declaration of any kind . . . against the danger of standing armies in time of peace.”).

²⁸ See ArtI.S8.C12.2.3 Debate over the Army Clause in the State Ratifying Conventions.

¹ See, e.g., 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 88 (Jonathan Elliot ed., 1836) [hereinafter, ELLIOT’S DEBATES] (written letter of objections from the New Jersey state legislature); *id.* at 371 (written letter from Luther Martin on the Genuine Information, Delivered to the Legislature of the State of Maryland, Relative to the Proceedings of the General Convention); 2 ELLIOT’S DEBATES, *supra*, at 73, 80, 97–98, 136–37 (objections concerning standing armies at the Massachusetts ratifying convention); 3 ELLIOT’S DEBATES, *supra*, at 611 (statement of John Dawson to Virginia Ratifying Convention) (discussing dangers of standing armies); *id.* at 588 (statement of Patrick Henry to Virginia Ratifying Convention) (arguing that the lack of checks on standing armies in the Constitution was a “fatal omission”); 4 ELLIOT’S DEBATES, *supra*, at 62–63 (statements of David Caldwell to North Carolina Ratifying Convention) (arguing that Congress, with the backing of a standing army, might extend its terms indefinitely).

² 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 118 (1833). See also BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 338 (15th Anniversary ed. 2017) (“[N]othing excited antifederalist passions more than Congress’ power, under Article I, Section 8, to ‘raise and support

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Anti-Federalist who wrote under the pseudonym “Brutus” argued that federal officials would use a permanent army to usurp power and “subvert the forms of the government, under whose authority they are raised.”³ Another pseudonymous Anti-Federalist, known as “Federal Farmer,” contended that the two-year appropriations limitation would not provide a meaningful check because, once Congress raised an army, it would continue to appropriate funds to support troops indefinitely.⁴ Other Anti-Federalists argued that the Army Clause and the constitutional allocation of war powers would lead to the recreation of a European-style monarch in America.⁵

Supporters of the Constitution, who became known as Federalists, responded by emphasizing the need for a professional military force to address security threats.⁶ Federalists argued that Native American tribes, British forces that refused to evacuate their American posts after the Revolutionary War, and the Spanish presence in Florida posed significant dangers that would require a permanent military establishment.⁷ After Massachusetts was forced to suppress a violent uprising known as Shays’ Rebellion without the aid of national forces, many American leaders concluded that a stronger centralized power to raise armies was necessary to address domestic uprisings.⁸

Federalists noted that, unlike most European systems, the Constitution placed the power to raise and support armies in a politically accountable legislative branch rather

armies’ . . . There is simply no way to measure the volume and fervor of the antifederalists’ denunciation of this provision . . .”); RICHARD H. KOHN, *EAGLE AND SWORD: THE FEDERALISTS AND THE CREATION OF THE MILITARY ESTABLISHMENT IN AMERICA, 1783–1802*, at 81–83 (1975) (summarizing Antifederalists’ arguments on the Army Clause).

³ Brutus, Essay X (Jan. 24, 1788), *reprinted in* 2 *THE COMPLETE ANTI-FEDERALIST* 413 (Herbert J. Storing ed., 1981). *See also* Brutus, Essay I, *supra* at 370 (Oct. 18, 1787) (“In despotic governments, as well as in all the monarchies of Europe, standing armies . . . have always proved the destruction of liberty, and [are] abhorrent to the spirit of a free republic.”).

⁴ Federal Farmer, Letter III (Oct. 10, 1787), *reprinted in* 2 *THE COMPLETE ANTI-FEDERALIST* 241 (Herbert J. Storing ed., 1981) (“When an army shall once be raised for a number of years, it is not probable that it will find much difficulty in getting congress to pass laws for applying monies to its support.”).

⁵ *See, e.g.*, *An Old Whig V*, *PHILA. INDEP. GAZETTEER*, Nov. 1, 1787; *reprinted in* 3 *THE COMPLETE ANTI-FEDERALIST* 34–38 (Herbert J. Storing ed., 1981); Cato, Essay IV, *reprinted in* Storing, *supra*, at 113–115; *Philadelphensis*, Essay IX, *PHILA. INDEP. GAZETTEER*, Feb. 6, 1788.

⁶ *See, e.g.*, *THE FEDERALIST* No. 24 (Alexander Hamilton); 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, 319 (Max Farrand ed., 1911) [hereinafter *FARRAND’S RECORDS*] (statement of Edmund Randolph to Virginia Ratifying Convention) (“With respect to a standing army, I believe there was not a member in the federal convention who did not feel indignation at such an institution. What remedy then could be provided? — Leave the country defenceless?”); 2 *ELLIOT’S DEBATES* *supra* note 1, at 26 (statement of James Wilson) (“[T]here is not one [world power] which has not the power of raising and keeping up standing armies. A government without the power of defence! [I]t is a solecism.”); James Wilson Address to the Pennsylvania Ratification Convention (Oct. 6, 1787), *in* *THE FEDERALIST AND OTHER CONTEMPORARY PAPERS ON THE CONSTITUTION OF THE UNITED STATES* 776 (E.H. Scott ed., 1894) (“[N]o man, who regards the dignity and safety of his country, can deny the necessity of a military force, under the control and restrictions which the new constitution provides.”).

⁷ *See, e.g.*, *THE FEDERALIST* No. 24 (Alexander Hamilton); 3 *ELLIOT’S DEBATES* *supra* note 1, at 382, 389; 3 *FARRAND’S RECORDS*, *supra* note 5, at 421.

⁸ *See, e.g.*, *THE FEDERALIST* No. 25, at 134–35 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The conduct of Massachusetts affords a lesson . . . that cases are likely to occur under our governments, as well as under those of other nations, which will sometimes render a military force in time of peace essential to the security of the society. . .”). *See also* Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers, in* *THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989*, at 67–80 (Richard H. Kohn ed., 1992); Morris J. MacGregor Jr., *The Formative Years, 1783–1812, in* 1 *AMERICAN MILITARY HISTORY, THE UNITED STATES ARMY AND THE FORGING OF A NATION, 1775–1917*, at 110–11, <https://history.army.mil/books/AMH/AMH-05.htm>.

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than with a monarch or other executive.⁹ Writing in the *Federalist Papers*, Alexander Hamilton and James Madison contended that, because appropriations for the army must be renewed every two years, democratic influence and political processes would prevent Congress from maintaining forces so large that they posed a threat to the American people.¹⁰ In the absence of a national army, Federalists asserted, small states would enter into hazardous military alliances with foreign countries, and each state would build its own permanent military force, thus compounding the very problem Anti-Federalists sought to avoid.¹¹ Madison also argued that “the State governments, with the people on their side, would be able to repel” any danger that a national army might present to Americans’ liberty.¹²

Federalists and Anti-Federalists frequently sparred over the relationship between standing armies and militias.¹³ Although most Federalists recognized that the militia was to play a critical role in national defense, many believed the militia alone to be inadequate to meet America’s greatest security needs.¹⁴ Anti-Federalists countered that the state militias were responsible for many successes during the Revolutionary War,¹⁵ and that, if a peacetime standing army was present, the militia would fall into disuse and deteriorate, leaving no body of citizen-soldiers equipped to protect the people from an overbearing or tyrannical government.¹⁶

⁹ See, e.g., THE FEDERALIST NO. 24 (Alexander Hamilton); Letter from Samuel Holden Parsons to William Cushing (Jan. 11, 1788), in 3 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 569, 570 (“Here the army . . . is the army of the people. It is they who raise and pay them; it is they who judge the necessity of the measure . . . It is therefore *our* Army . . . and not the sword . . . of a King . . .”).

¹⁰ See, e.g., THE FEDERALIST NO. 26 (Alexander Hamilton); THE FEDERALIST NO. 41 (James Madison).

¹¹ See, e.g., John Jay, An Address to the People of the State of New York (Spring 1788), <https://press-pubs.uchicago.edu/founders/documents/v1ch7s22.html> (last visited Mar. 12, 2024) (“[E]very State would be a little nation, jealous of its neighbour, and anxious to strengthen itself, by foreign alliances, against its former friends. . . Then would rise mutual restrictions and fears, mutual garrisons and standing armies, and all those dreadful evils. . .”); THE FEDERALIST NO. 8, at 35–36 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“[S]tanding armies . . . must inevitably result from a dissolution of the Confederacy. . . The weaker States or confederacies would first have recourse to them, to put themselves upon an equality with their more potent neighbors.”); THE FEDERALIST NO. 41, at 228 (James Madison) (Clinton Rossiter ed., 1961) (“[N]othing short of a Constitution fully adequate to the national defense and the preservation of the Union, can save America from as many standing armies as it may be split into States or Confederacies[.]”).

¹² See THE FEDERALIST NO. 46 (James Madison).

¹³ See, e.g., 3 ELLIOT’S DEBATES, *supra* note 1, at 379 (debate over standing armies and the militia in the Virginia Ratifying Convention).

¹⁴ See, e.g., THE FEDERALIST NO. 24 (Alexander Hamilton); 3 ELLIOT’S DEBATES *supra* note 1, at 382, 389; 3 FARRAND’S RECORDS, *supra* note 6, at 421.

¹⁵ See, e.g., Essay of Democratic Federalist, PA. HERALD, Oct. 17, 1787, reprinted in 3 THE COMPLETE ANTI-FEDERALIST 62 (Herbert J. Storing ed., 2008) (“Had we a standing army, when the British invaded our peaceful shores? Was it a standing army that gained the battles of Lexington, and Bunker’s Hill, and took the ill fated Burgoyne? Is not a well regulated militia sufficient for every purpose of internal defence? And which of you, my fellow citizens, is afraid of any invasion from foreign powers, that our brave militia would not be able immediately to repel?”).

¹⁶ See, e.g., 3 ELLIOT’S DEBATES *supra* note 1, at 379 (statement of George Mason to Virginia Ratifying Convention) (“Should the national government wish to render the militia useless, they may neglect them, and let them perish, in order to have a pretence of establishing a standing army.”); Letter from George Mason to Thomas Jefferson (May 26, 1788), in THE PAPERS OF THOMAS JEFFERSON, Vol. 13 (Mar.–Oct. 1788, ed.), <https://founders.archives.gov/documents/Jefferson/01-13-02-0117> (“There are many other things very objectionable in the proposed new Constitution; particularly the almost unlimited Authority . . . [to] disarm, or render useless the Militia, the more easily to govern by a standing Army.”); Louis Fisher, *The War Power: No Checks, No Balance*, in AMERICAN DEFENSE POLICY 100 (Paul Bolt et al., eds., 8th ed., 2005) (providing background on the constitutional debate).

These competing concerns were ultimately resolved through amendments to the Constitution in the Bill of Rights rather than through changes to the Army Clause.¹⁷ At the ratifying conventions, some states proposed to amend the Army Clause to require a supermajority vote in Congress to maintain peacetime standing armies, but these changes were not adopted.¹⁸ Instead, fears over standing armies were addressed through protections for individual rights rather than structural changes to Congress's power to raise and support armies. The Second Amendment, which recognizes the importance of the militia to national security and provides a right to bear arms,¹⁹ was an outgrowth of concerns over centralized military powers,²⁰ and the Third Amendment restricts one particularly objectionable military practice that Americans experienced while under British rule—the quartering of soldiers in private homes.²¹

ArtI.S8.C12.3 Time Limits on Army Appropriations

Although the Army Clause provides that no appropriation of money to raise and support armies “shall be for a longer term than two years[,]”¹ the executive branch has interpreted this restriction to allow the Army to make investments in military equipment and supplies using appropriations available for more than two years.² In 1904, the executive branch addressed whether it would violate the two-year appropriations restriction by contracting to pay patent royalties in exchange for construction of guns and other equipment if the royalty payment might continue beyond two years.³ The Solicitor General opined that the contract would be lawful because the Army Clause’s appropriations restriction is “confined to appropriations to raise and support armies in the strict sense of the word ‘support,’ and does not extend to appropriations for the various means which an army may use in military operations, or which are deemed necessary for common defense.”⁴ The Solicitor General reasoned that expenditures to “arm, equip, and

¹⁷ For background on the first ten amendments to the Constitution, known as the Bill of Rights, see Amdt1 Fundamental Freedoms through Amdt10 Rights Reserved to the State and the People.

¹⁸ See, e.g., 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 735 (Bernard Schwartz ed., 1971) (proposal of Maryland Ratifying Convention “[t]hat no standing army shall be kept up in time of peace, unless with the consent of two thirds of the members present of each branch of Congress.”); 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 758, 761 (Bernard Schwartz ed., 1971) (New Hampshire Ratifying Convention proposing to require three-fourths approval of the legislative branch for a peacetime standing army).

¹⁹ U. S. CONST. amend. II (“A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.”). For more information on the Second Amendment, see Amdt2.1 Overview of Second Amendment, Right to Bear Arms.

²⁰ See Amdt2.2 Historical Background on Second Amendment.

²¹ U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner; nor in time of war, but in a manner to be prescribed by law.”). For background on the Third Amendment, see Amdt3.1 Overview of the Third Amendment, Quartering Soldiers.

¹ For historical background on the motivations for the two-year appropriations restriction, see ArtI.S8.C12.2.2 Debate over the Army Clause at the Federal Convention.

² See, e.g., Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, Title III, 123 Stat. 3409 (2009) (providing appropriations for construction, procurement, production, and modification of ammunition for a period exceeding two years); Const. Prohibition – Appropriation for Armies, 25 Op. Att’y Gen. 105 (1904) (analyzing contract for royalty payment beyond two years); Appropriations for Air Force, 40 Op. Att’y Gen. 555 (1948) (addressing a request for appropriations for aircraft and aeronautical equipment procurement beyond two years).

³ See Constitutional Prohibition – Appropriation for Armies, 25 Op. Att’y Gen. at 105-06.

⁴ *Id.* at 105.

render effective” armies that Congress has previously raised are not subject to the two-year restriction.⁵

In 1948, the Attorney General relied on the 1904 opinion in concluding that Congress could appropriate funds for aircraft and aeronautical equipment procurement beyond two years.⁶ Congressional committees have also advanced the view that the Army Clause’s appropriation restriction does not apply to defense articles or equipment.⁷ The Supreme Court has not addressed the constitutionality of this interpretation of the appropriations restriction,⁸ although it has addressed the scope of Congress’s power under the Army Clause in other contexts.⁹

ArtI.S8.C12.4 The Army Clause, Congressional Power, Conscription, and War Materials

The Supreme Court has often described Congress’s power under the Army Clause in expansive terms, and it has rejected a variety of claimed limits on congressional power to raise and support armies.¹ One early, high-profile dispute concerning the Army Clause arose when Congress enacted a compulsory draft law after the United States entered World War I.² In the *Selective Draft Law Cases*, a group of individuals prosecuted for failing to register for the draft argued that the federal government could only call forth volunteer enlistments and that it lacked the constitutional power to compel enforced military duty through a draft.³ The Supreme Court rejected this position in

⁵ See *id.* at 107.

⁶ Appropriations for Air Force, 40 U.S. Op. Att’y’s Gen. 555, 555-56 (1948).

⁷ See, e.g., Promoting the Defense of the United States, S. REP. NO. 77-45, at 7 (1941) (“Article I, section 8, clause 12 of the Constitution . . . was intended to make impossible the maintenance of a large standing Army except under the recurring surveillance of the Congress (The Federalist, No. XXVI). It does not apply, by its terms or interpretation, to the procurement of defense articles . . .”).

⁸ See, e.g., Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 165-67 (2021) (criticizing the executive branch’s interpretation of the two-year appropriation restriction and noting the dearth of judicial opinions on the issue).

⁹ See *infra* ArtI.S8.C12.2.5 The Army Clause, Congressional Power, Conscription, and War Materials.

¹ See, e.g., *Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580, 585 (2022) (“Congress has ‘broad and sweeping’ power ‘to raise and support armies.’”) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968); *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 58 (2006)) (“[J]udicial deference . . . is at its apogee” when Congress legislates under its authority to raise and support armies.”) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981); *Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp.*, 468 U.S. 841, 859 (1984) (upholding denial of federal financial assistance to those who fail to register for the draft and denying constitutional challenges under the Bill of Attainder Clause and Fifth Amendment self-incrimination grounds); *Rostker v. Goldberg*, 453 U.S. 57, 73-74, 83 (1981) (rejecting Equal Protection challenge to male-only draft registration requirement enacted under the Army Clause); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975) (discussing the “broad constitutional power” under the Army Clause and related war powers); *United States v. Oregon*, 366 U.S. 643, 648-49 (1961) (holding that the Tenth Amendment does not limit congressional authority under the Army Clause to provide for intestate succession when a veteran dies without a will or heirs); *Lichter v. United States*, 334 U.S. 742, 755 (1948) (describing the Army Clause as “broad rather than restrictive”); *McKinley v. United States*, 249 U.S. 397, 398-99 (1919) (rejecting argument that Congress exceeded its constitutional authority in enacting criminal legislation prohibiting brothels from operating in close proximity to military installations); *Cox v. Wood*, 247 U.S. 3, 6 (1918) (holding that the Army Clause and Declare War Clause “were not qualified or restricted by the provisions of the militia clause”); *Selective Draft Law Cases*, 245 U.S. 366, 382-83 (1918) (providing that the Constitution conferred “complete authority” to Congress over the “army sphere”); *In re Tarble*, 80 U.S. (13 Wall) 397, 408 (1871) (stating that Congress’s control over the power under the Army Clause is “plenary and exclusive”).

² See *Selective Draft Law Cases*, 245 U.S. at 377.

³ See *id.*

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strong terms, describing it as “so devoid of foundation that it leaves not even a shadow of ground upon which to base its conclusion.”⁴ The Court was similarly dismissive of the claim that compulsory military service violated the Thirteenth Amendment’s prohibition on “involuntary servitude,”⁵ which the Court stated was “refuted by its mere statement.”⁶

The *Selective Draft Law Cases* also addressed the Army Clause’s relationship with the Militia Clauses.⁷ In Article 1, Section 8, Clause 15—the first of two Militia Clauses⁸—the Constitution allows Congress to provide for calling forth the militia to execute federal law, suppress insurrections, and repel invasions.⁹ The draftees in the *Selective Draft Law Cases* argued that congressional authority to raise armies was limited to the same three purposes, but the Supreme Court interpreted Congress’s Army Clause power as a distinct from its power over militias.¹⁰ Because the two powers operated independently, the Militia Clauses did not qualify or restrict congressional authority under the Army Clause, the Court held.¹¹

With congressional authority to *raise* armies through conscription was firmly established in the *Selective Draft Law Cases*, the Supreme Court’s next major Army Clause case addressed congressional power to *support* armies by providing supplies and equipment. In *Lichter v. United States* the Court addressed a constitutional challenge to the Renegotiation Act—a World War II-era statute that allowed the government to renegotiate contracts for war supplies and to recoup excessive process.¹² In upholding the statute as a valid exercise of Congress’s war powers,¹³ the Supreme Court elaborated on the Army Clause and described its authority as “broad rather than restrictive.”¹⁴ The Court viewed the Renegotiation Act as part of the United States’ policy to rely partly on private industry to ensure production of equipment and supplies necessary to the war effort.¹⁵ Just as Congress has broad power to conscript individuals under the Army Clause, the *Lichter* Court explained, congressional authority to ensure that military has the material needed to wage war successfully is “no less clear and sweeping.”¹⁶

⁴ *Id.* at 378.

⁵ U. S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, shall exist within the United States, or any place subject to their jurisdiction.”). For background on the Thirteenth Amendment, see Amdt13.1 Overview of the Thirteenth Amendment, Abolition of Slavery.

⁶ See *Selective Draft Law Cases*, 245 U.S. at 390.

⁷ See *id.* at 381-84. See U.S. CONST. art. I, § 8, cls. 15-16.

⁸ For additional background on the Militia Clauses, see ArtI.S8.C15.1 Congress’s Power to Call Militias and ArtI.S8.C16.1 Congress’s Power to Organize Militias.

⁹ U.S. CONST. art. I, § 8, cl. 15.

¹⁰ See *Selective Draft Law Cases*, 245 U.S. at 381-84.

¹¹ See *id.*; see also *Cox v. Wood*, 247 U.S. 3, 6 (1918) (summarizing and reiterating the Court’s holding in the *Selective Draft Law Cases* in response to a service member’s request to be discharged from military duty on the grounds that his compulsory service was unconstitutional).

¹² *Lichter v. United States*, 334 U.S. 742, 745-51 (1948). Several business-owners argued that the statute was an unconstitutional delegation of legislative authority, discussed in ArtI.S1.5.1 Overview of Nondelegation Doctrine and a violation of the rights to due process, discussed in Amdt5.5.1 Overview of Due Process.

¹³ For background on congressional collective war powers, see ArtI.S8.C11.1 Congressional War Powers.

¹⁴ *Lichter*, 334 U.S. at 755.

¹⁵ See *id.* at 755-56.

¹⁶ *Id.* at 756.

ArtI.S8.C12.5 The Army Clause and Individual Rights

Congressional power under the Army Clause has sometimes come into tension with individual rights guaranteed under the Constitution.¹ For instance, Congress has sought to accommodate individuals with religious objections to participating in armed conflict through a statute exempting those “conscientiously opposed to participation in war in any form” from the draft.² Although the conscientious objector statute states that it only applies to objections derived from “religious training and belief” and not those based upon “political, sociological, or philosophical views,” the Supreme Court has interpreted the exemption to apply to both theistic and non-theistic opposition.³

In the context of freedom of speech and expression, the Supreme Court addressed an anti-war protestor’s First Amendment challenge to his conviction for violating a federal statute that prohibited knowing destruction of draft cards in the 1968 case, *United States v. O’Brien*.⁴ Observing that Congress’s power to “classify and conscript manpower for military service is ‘beyond question[.]’”⁵ the Court in *O’Brien* concluded that the government’s interest in insuring the continuing availability of draft cards was sufficiently substantial to overcome the First Amendment objections of the protestor who burned his draft card during an anti-war demonstration.⁶

In *Rostker v. Goldberg*, decided in 1981, the Supreme Court rejected a suit contending the requirement that males but not females register for potential military service violated the Constitution’s Equal Protection principles.⁷ The Court reasoned that the judicial branch should defer to Congress’s choices on which portions of the population should be subject to military service because, “[n]ot only is the scope of Congress’s power in this area broad, but the lack of competence on the part of the courts is marked.”⁸

In another case implicating congressional power to raise armies through conscription, the Supreme Court addressed a provision in the Military Selective Service Act that denied certain federal financial assistance for higher education to students that failed to register for the draft.⁹ In *Selective Service System v. Minnesota Public Interest Research Group*, a 1984 case, a group of students contended that the law violated their

¹ For background on the individual rights guaranteed in the Constitution, see Intro7.4 Individual Rights and the Constitution.

² 50 U.S.C. § 3806(j). See also DEP’T OF DEF., DoD Instruction 1300.06, Conscientious Objectors (July 12, 2017), https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/130006_dodi_2017.pdf.

³ See *United States v. Seeger*, 380 U.S. 163, 165–66 (1965); *Welsh v. United States*, 398 U.S. 333, 344 (1970). The Supreme Court also rejected the argument that the statute violated the Establishment Clause by protecting objectors whose religious beliefs opposed all wars but not accommodating those opposed only to specific wars. See *Gillette v. United States*, 401 U.S. 437, 450–54 (1971). For more analysis of Supreme Court jurisprudence related to the conscientious objector statute, 50 U.S.C. § 3806(j), see ArtIII.S2.C1.10.7 Constitutional-Doubt Canon and Amdt1.3.5.3 Purpose and Effect Test Before Lemon.

⁴ *United States v. O’Brien*, 391 U.S. 367, 369–70 (1968). For additional information on First Amendment protections, see Amdt1.1 Overview of First Amendment-Fundamental Freedoms.

⁵ See *Selective Serv. Sys.*, 391 U.S. at 377 (quoting *Lichter v. United States*, 334 U.S. 742, 756 (1948)).

⁶ See *id.* at 377–80.

⁷ *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981). For discussion of relevant principles, see Amdt14.S1.8.8.3 General Approach to Gender Classifications and Amdt5.7.3 Equal Protection.

⁸ *Rostker*, 453 U.S. at 65.

⁹ *Selective Serv. Sys. v. Minn. Pub. Int. Rsch. Grp.*, 468 U.S. 841, 843 (1984) (evaluating section 12(f) of the Military Selective Service Act, 96 Stat. 748, 50 U.S.C. § 3811(f)). For discussion of limits on Congress’s power

Fifth Amendment right against self-incrimination¹⁰ and was an unconstitutional bill of attainder.¹¹ The Supreme Court rejected the Fifth Amendment argument based upon the reasoning that the students were “under no compulsion to seek financial aid” and could have avoided self-incrimination issues by declining to apply for aid that required certification about draft registration.¹² The Court likewise rejected the bill of attainder claim on the grounds that bills of attainder punish individuals without a judicial trial, but the purpose of the Military Selective Service Act provision was to encourage registration for the draft, not punish non-registrants.¹³

The Supreme Court addressed another federal funding restriction in a 2006 case, *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*¹⁴ *Rumsfeld* concerned a federal law that denies certain funding to higher education institutions that do not provide military recruiters the same access to recruitment events as other potential employers.¹⁵ An association of law schools and faculties challenged the law, arguing that the funding restriction violated its members’ First Amendment freedoms of speech and association because some members wished to bar on-campus military recruiters due to objections over the government’s now-repealed “don’t ask, don’t tell” policy on homosexual servicemembers in the military.¹⁶ Observing that “[j]udicial deference . . . is at its apogee’ when Congress legislates under its authority to raise and support armies[,]”¹⁷ the *Rumsfeld* Court held that Congress could require law schools to provide equal access to military recruiters without infringing on First Amendment freedoms.¹⁸

ArtI.S8.C12.6 Federalism and the Army Clause

The Supreme Court has occasionally addressed disputes over how principles of federalism interact with Congress’s authority to raise and support armies.¹ An early case on the issue arose in 1871 after the father of an Army servicemember filed a *habeas corpus* petition² with Wisconsin state court officials seeking the release of his son, who had been accused of desertion.³ A Wisconsin court ordered the son’s release under the theory that he was a minor at the time of enlistment and joined the Army without his father’s

of the purse and unconstitutional restrictions on federal funding, see ArtI.S8.C1.2.4 Modern Spending Clause Jurisprudence Generally and subsequent essays.

¹⁰ For background on the privilege of against self-incrimination, see Amdt5.4.3 General Protections Against Self-Incrimination Doctrine and Practice.

¹¹ For discussion of the constitutional prohibition on bills of attainder, see ArtI.S9.C3.2 Bills of Attainder Doctrine.

¹² *Selective Serv. Sys.*, 468 U.S. at 855–58.

¹³ *See id.* at 851–56.

¹⁴ *Rumsfeld v. F. for Acad. and Institutional Rts., Inc.*, 547 U.S. 47 (2006).

¹⁵ *See* Solomon Amendment, 10 U.S.C. § 983 (2000 ed. and Supp.IV).

¹⁶ For background on the “don’t ask, don’t tell” policy and its repeal, see KRISTY N. KAMARCK, CRS REPORT R44321, DIVERSITY, INCLUSION, AND EQUAL OPPORTUNITY IN THE ARMED SERVICES: BACKGROUND AND ISSUES FOR CONGRESS, at 33–39 (2019).

¹⁷ *Rumsfeld*, 547 U.S. at 58 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

¹⁸ *See id.* For discussion of the First Amendment aspects of this case, see Amdt1.7.14.1 Overview of Symbolic Speech.

¹ For more discussion of federalism principles underlying the Constitution, see Intro7.3 Federalism and the Constitution.

² For background on the writ of habeas corpus, see ArtI.S9.C2.1 Suspension Clause and Writ of Habeas Corpus.

³ *See In re Tarble*, 80 U.S. (13 Wall) 397, 398–400 (1871) (statement of the case).

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consent, but the Supreme Court held that state officials lacked jurisdiction to grant the request.⁴ The federal government's power under the Army Clause is "plenary and exclusive," the Supreme Court reasoned, and it would undermine federal primacy and the military's ability to function if state courts could question the legality of military custody in habeas corpus proceedings.⁵

In the *Selective Services Cases*, the Supreme Court addressed a direct federalism-based challenge to Congress's power to raise armies.⁶ A group of individuals convicted of failing to register for the draft during World War I argued that "under the Constitution as originally framed state citizenship was primary[,] and a nation-wide, all-male draft would invert this constitutional structure by causing the federal government to dominate the states."⁷ The Supreme Court concluded that this view did not comport with the drafting history, intent, or text of the Constitution.⁸ The United States' inability to raise an army without relying on the states was one of the "recognized necessities" for adopting the Constitution, the Court reasoned, and the text and intent of the Constitution give complete control over the power to raise armies to Congress while purposely denying it to the states.⁹

While the federal government has broad power under the Army Clause, the Supreme Court has held that states still possess some ability to legislate in areas related to conscription and raising armies, provided federal law does not preempt the state law at issue.¹⁰ In a 1920 case, *Gilbert v. Minnesota*, the Supreme Court upheld the constitutionality of a state statute that made it unlawful to interfere with or discourage enlistment in the military.¹¹ In response to the argument that the state law intruded on exclusive federal power, the Supreme Court reasoned that "the states as well as the United States are intimately concerned" with the national defense, and both federal and state government occasionally must "be animated as one" in order to prevail against "the enemies of all."¹²

In a 1961 decision, *United States v. Oregon*, the Supreme Court rejected a Tenth Amendment¹³ challenge to a federal law providing different inheritance rules for U.S. servicemembers than those that applied under state law.¹⁴ When a person died without a will or legal heirs under Oregon law, the deceased's property escheated to (i.e., became

⁴ See *id.* at 399–412.

⁵ See *id.* at 408–09.

⁶ *Selective Draft Law Cases*, 245 U.S. 366, 377 (1918). For additional discussion of the *Selective Draft Law Cases*, see ArtI.S8.C12.2.5 The Army Clause, Congressional Power, Conscription, and War Materials.

⁷ See *Selective Draft Law Cases*, 245 U.S. at 377.

⁸ See *id.* at 380–81.

⁹ See *id.* at 381. See also U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress . . . engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."). For analysis of constitutional restrictions on states' ability to wage war, see ArtI.S10.C3.2 States and Military Affairs.

¹⁰ For background on preemption, see ArtVI.C2.1 Overview of the Supremacy Clause.

¹¹ See *Gilbert v. Minnesota*, 254 U.S. 325, 326 (1920).

¹² See *id.* at 328–29.

¹³ U. S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). For background on the Tenth Amendment, see Amdt10.1 Overview of the Tenth Amendment, Rights Reserved to the States and the People.

¹⁴ 366 U.S. 643, 644–49 (1961).

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the property of) the state.¹⁵ Federal law, on the other hand, provided that when a servicemember died in a veteran’s hospital without a will or heirs, the servicemember’s estate became the property of a U.S. veteran’s fund.¹⁶ Even though estate and property law are “normally left to the States,” the Supreme Court held that this background principle was displaced when in conflict with a law passed under Congress’s “constitutional powers to raise armies” and other war powers.¹⁷ When the Supreme Court adopted a broader view of state sovereignty under the Tenth Amendment in a 1976 decision, it added a caveat that “[n]othing we say in this opinion addresses the scope of Congress’s authority under its war power.”¹⁸

More recently, in *Torres v. Texas Department of Public Safety*, decided in 2022, the Supreme Court stated that the Army Clause provides “broad and sweeping” authority, which Congress may use to encourage military service in a variety of ways.¹⁹ *Torres* concerned a federal law that, among other things, gives servicemembers returning from duty the right to reclaim their prior employment with state governments and to sue those governments if they refuse accommodations.²⁰ The law was designed to smooth servicemembers’ reentry into civilian life and allow them to enforce their statutory right to re-employment through private damages suits against uncooperative state employers.²¹ Texas argued that it was immune from such suits under the Eleventh Amendment²² and the doctrine of state sovereign immunity.²³ The Supreme Court, however, denied the state immunity under the reasoning that, when states joined the Union, they “implicitly agreed that their sovereignty would yield to federal policy to build and keep a national military” and therefore the states “renounced their right’ to interfere with national policy in this area.”²⁴

ArtI.S9 Powers Denied Congress

ArtI.S9.C2 Habeas Corpus

ArtI.S9.C2.1 Suspension Clause and Writ of Habeas Corpus

This Clause is the only place in the Constitution in which the Great Writ is mentioned, a strange fact in the context of the regard with which the right was held at the time the

¹⁵ See *id.* at 643–44, 644 n.1 (discussing OR. REV. STAT. § 120.010 (1957) (repealed by Oregon Laws 1969, ch. 591 § 305)).

¹⁶ See *id.* at 644 644 n.2 (evaluating 38 U.S.C. § 17 (1952)).

¹⁷ *Id.* at 648.

¹⁸ Nat’l League of Cities v. Usery, 426 U.S. 833, 854–55, 855 n.18 (1976), *overruled on other grounds*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985). For more information on the Supreme Court’s relevant Tenth Amendment jurisprudence, see Amdt10.3.4 State Sovereignty and the Tenth Amendment.

¹⁹ *Torres v. Tex. Dep’t of Pub. Safety*, 597 U.S. 580, 585 (2022) (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

²⁰ See *id.* at 584 (discussing the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301–4335).

²¹ See *id.* at 585.

²² See U.S. CONST. amend XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”). For background on the Eleventh Amendment, see Amdt11.2 Historical Background on the Eleventh Amendment.

²³ For additional discussion of state sovereign immunity, see Amdt11.5.1 General Scope of State Sovereign Immunity and subsequent essays.

²⁴ *Torres*, 597 U.S. at 584, 590 (quoting *PennEast Pipeline Co. v. New Jersey*, 594 U.S. 482, 502 (2021)).

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Constitution was written¹ and stranger in the context of the role the right has come to play in the Supreme Court's efforts to constitutionalize federal and state criminal procedure.²

Only the Federal Government and not the states, it has been held obliquely, is limited by the Clause.³ The issue that has always excited critical attention is the authority in which the Clause places the power to determine whether the circumstances warrant suspension of the privilege of the Writ.⁴ The Clause itself does not specify, and although most of the clauses of Section 9 are directed at Congress not all of them are.⁵ At the Convention, the first proposal of a suspending authority expressly vested "in the legislature" the suspending power,⁶ but the author of this proposal did not retain this language when the matter was taken up,⁷ the present language then being adopted.⁸ Nevertheless, Congress's power to suspend was assumed in early commentary⁹ and stated in dictum by the Court.¹⁰ President Abraham Lincoln suspended the privilege on his own motion in the early Civil War period,¹¹ but this met with such opposition¹² that he sought and received congressional authorization.¹³ Three other suspensions were subsequently ordered on the basis of more or less express authorizations from Congress.¹⁴

When suspension operates, what is suspended? In *Ex parte Milligan*,¹⁵ the Court asserted that the Writ is not suspended but only the privilege, so that the Writ would issue and the issuing court on its return would determine whether the person applying

¹ R. WALKER, *THE AMERICAN RECEPTION OF THE WRIT OF LIBERTY* (1961).

² See ArtIII.S1.6.9 Habeas Review.

³ *Gasquet v. Lapeyre*, 242 U.S. 367, 369 (1917).

⁴ In form, of course, Clause 2 is a limitation of power, not a grant of power, and is in addition placed in a section of limitations. It might be argued, therefore, that the power to suspend lies elsewhere and that this Clause limits that authority. This argument is opposed by the little authority there is on the subject. 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 213 (Max Farrand ed., 1937); *Ex parte Merryman*, 17 F. Cas. 144, 148 (No. 9487) (C.C.D. Md. 1861); but cf. 3 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 464 (Edmund Randolph, 2d ed. 1836). At the Convention, Gouverneur Morris proposed the language of the present Clause: the first section of the Clause, down to "unless" was adopted unanimously, but the second part, qualifying the prohibition on suspension was adopted over the opposition of three states. 2 FARRAND, *supra*, at 438. It would hardly have been meaningful for those states opposing any power to suspend to vote against this language if the power to suspend were conferred elsewhere.

⁵ Cf. U.S. CONST. art I § 9, cl. 7, 8.

⁶ 2 *RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 341 (Max Farrand ed., 1937).

⁷ *Id.* at 438.

⁸ *Id.*

⁹ 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 1336 (1833).

¹⁰ *Ex parte Bollman*, 8 U.S. (4 Cr.) 75, 101 (1807).

¹¹ Cf. J. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* 118–39 (rev. ed. 1951).

¹² Including a finding by Chief Justice Roger Taney on circuit that the President's action was invalid. *Ex parte Merryman*, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

¹³ Act of March 3, 1863, 1, 12 Stat. 755. See George Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 U. WIS. HISTORY BULL. 213 (1907).

¹⁴ The privilege of the Writ was suspended in nine counties in South Carolina in order to combat the Ku Klux Klan, pursuant to Act of April 20, 1871, 4, 17 Stat. 14. It was suspended in the Philippines in 1905, pursuant to the Act of July 1, 1902, 5, 32 Stat. 692. Cf. *Fisher v. Baker*, 203 U.S. 174 (1906). Finally, it was suspended in Hawaii during World War II, pursuant to a section of the Hawaiian Organic Act, 67, 31 Stat. 153 (1900). Cf. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). For the problem of de facto suspension through manipulation of the jurisdiction of the federal courts, see discussion under Article III, ArtIII.S1.5.1 Overview of Congressional Control Over Judicial Power.

¹⁵ 71 U.S. (4 Wall.) 2, 130–131 (1866).

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can proceed, thereby passing on the constitutionality of the suspension and whether the petitioner is within the terms of the suspension.

Restrictions on habeas corpus placed in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)¹⁶ and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) have provided occasion for further analysis of the scope of the Suspension Clause. AEDPA's restrictions on successive petitions from state prisoners are "well within the compass" of an evolving body of principles restraining "abuse of the writ," and hence do not amount to a suspension of the Writ within the meaning of the Clause.¹⁷ Interpreting IIRIRA so as to avoid what it viewed as a serious constitutional problem, the Court in another case held that Congress had not evidenced clear intent to eliminate federal court habeas corpus jurisdiction to determine whether the Attorney General retained discretionary authority to waive deportation for a limited category of resident aliens who had entered guilty pleas before IIRIRA repealed the waiver authority.¹⁸ "[At] the absolute minimum," the Court wrote, "the Suspension Clause protects the writ as it existed in 1789. At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."¹⁹

Building on its statement concerning the "minimum" reach of the Suspension Clause, the Court, in *Department of Homeland Security v. Thuraissigiam*, explored what the habeas writ protected, as it existed in 1789.²⁰ *Thuraissigiam* involved a Suspension Clause challenge to a provision in IIRIRA limiting when an asylum seeker could seek habeas review to challenge a removal decision and stay in the United States.²¹ Proceeding on the assumption that the Suspension Clause only prohibited limitations on the common-law habeas writ,²² the Court concluded that the Writ at the time of the Founding "simply provided a means of contesting the lawfulness of restraint and securing release."²³ The asylum seeker in *Thuraissigiam* did not ask to be released from United States custody, but instead sought vacatur of his removal order and a new opportunity to apply for asylum, which if granted would enable him to remain in the United States.²⁴ The Court concluded that such relief fell outside the scope of the

¹⁶ Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26, amending, *inter alia*, 28 U.S.C. §§ 2244, 2253, 2254, 2255, and Fed. R. App. P. 22.

¹⁷ *Felker v. Turpin*, 518 U.S. 651 (1996).

¹⁸ *INS v. St. Cyr*, 533 U.S. 289 (2001).

¹⁹ 533 U.S. at 301 (internal quotation marks and citation omitted).

²⁰ 140 S. Ct. 1959, 1968–69 (2020).

²¹ In relevant part, IIRIRA limited the review that an alien in expedited removal proceedings could obtain through a habeas petition by allowing habeas review of three matters: (1) whether the petitioner was an alien; (2) whether the petitioner was "ordered removed"; and (3) whether the petitioner had already been granted entry as a lawful permanent resident, refugee, or asylee. *See* 8 U.S.C. § 1252(e)(2)(A)–(C). The asylum seeker in *Thuraissigiam* challenged these jurisdictional limits, arguing they precluded review of a determination that he lacked a credible fear of persecution in his home country, of which an affirmative finding would enable him to enter the United States. *Thuraissigiam*, 140 S. Ct. at 1966–68.

²² The respondent in *Thuraissigiam* stated "there is no reason" for the Court to consider anything beyond whether the writ of habeas corpus, as it existed in 1789, encompassed the relief sought. *Thuraissigiam*, 140 S. Ct. at 1969 & n.12.

²³ *Id.* at 1969 (discussing the views of William Blackstone and Justice Joseph Story, among others).

²⁴ *Id.* at 1969–71.

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common-law habeas writ.²⁵ As a consequence, the Court held that, at least with respect to the relief sought by the respondent, Congress did not violate the Suspension Clause by limiting habeas relief for asylum seekers in IIRIRA.²⁶

Applying this reasoning in *Jones v. Hendrix*,²⁷ the Supreme Court held that dismissing a prisoner's habeas petition when such petition is based on a post-conviction change in statutory interpretation did not violate the Suspension Clause. The Court held that allowing a claim based on a change in statutory interpretation would extend the writ far beyond its scope at the time of the Constitution's ratification.²⁸ Specifically, the Court observed that at the time of the founding, courts entertaining habeas petitions "had no power to 'look beyond the judgment' . . . for substantive errors of law."²⁹

The question remains as to what aspects of habeas are protected against suspension. Noting that the statutory writ of habeas corpus has been expanded dramatically since the First Congress, the Court has written that it "assume[s] . . . that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than as it existed in 1789."³⁰ This statement, however, appears to be in tension with the theory of congressionally defined habeas found in *Bollman*, unless one assumes that a habeas right, once created, cannot be diminished. The Court, however, in reviewing provisions of the Antiterrorism and Effective Death Penalty Act that limited habeas, passed up an opportunity to delineate Congress's permissive authority over habeas, finding that none of the limitations to the writ in that statute raised questions of constitutional import.³¹ In *Jones*, the Court pushed back further, commenting that "[t]he Suspension Clause does not constitutionalize [an] innovation of nearly two centuries later."³²

In *Boumediene v. Bush*,³³ the Court held that Congress's attempt to eliminate all federal habeas jurisdiction over "enemy combatant" detainees held at Guantanamo Bay³⁴ vio-

²⁵ In so concluding, the Court rejected the argument that three bodies of case law—(1) "British and American cases decided prior to or around the time of the adoption of the Constitution"; (2) decisions from the Court during the so-called "finality era" from the late nineteenth to the mid-twentieth century; and (3) two more recent cases—suggested that the Suspension Clause "guarantees a broader habeas right" than the right to contest the lawfulness of restraint and seek release. *Id.* at 1971–82. With regard to the early British and American cases, the *Thuraissigiam* Court viewed those cases to suggest that the habeas writ could only be used to secure a "simple release" from government custody. *Id.* at 1971–76. With respect to the finality-era case law, the Court viewed those cases, including *Nishimura Ekiu v. United States*, 142 U.S. 651 (1892), as simply interpreting the scope of the then-existing habeas statute and not what limitations the Suspension Clause imposes on Congress. *Thuraissigiam*, 140 S. Ct. at 1976–81. Finally, the Court distinguished two more recent cases, *Boumediene v. Bush*, 553 U.S. 723 (2008) and *INS v. St. Cyr*, 533 U.S. 289 (2001), holding that the former case did not pertain to immigration and that the latter case involved using habeas as a vehicle to seek the release of aliens who were in custody pending deportation proceedings. *Thuraissigiam*, 140 S. Ct. at 1981–82.

²⁶ *Thuraissigiam*, 140 S. Ct. at 1963–64.

²⁷ 599 U.S. 465 (2023).

²⁸ *Id.* at 483.

²⁹ *Id.* (quoting *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202, 209 (1830)).

³⁰ *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996). See *INS v. St. Cyr*, 533 U.S. 289, 300–01 (2001) (leaving open the question of whether post-1789 legal developments are protected); *Swain v. Pressley*, 430 U.S. 372 (1977) (finding "no occasion" to define the contours of constitutional limits on congressional modification of the writ).

³¹ *Felker v. Turpin*, 518 U.S. 651 (1996).

³² *Jones*, 599 U.S. at 483.

³³ 553 U.S. 723 (2008).

³⁴ In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court found that 28 U.S.C. § 2241, the federal habeas statute, applied to these detainees. Congress then removed all court jurisdiction over these detainees under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1) (providing that "no court . . . shall have

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lated the Suspension Clause. Although the Court did not explicitly identify whether the underlying right to habeas that was at issue arose from statute, common law, or the Constitution itself, it did decline to infer “too much” from the lack of historical examples of habeas being extended to enemy aliens held overseas.³⁵ In *Boumediene*, the Court instead emphasized a functional approach that considered “the citizenship and status of the detainee,” “the adequacy of the process through which the status determination was made,” “the nature of the sites where apprehension and then detention took place,” and any “practical obstacles inherent in resolving the prisoner’s entitlement to the writ.”³⁶

In further determining that the procedures afforded to the detainees to challenge their detention in court were not adequate substitutes for habeas, the Court noted the heightened due process concerns when a detention is based principally on Executive Branch proceedings—here, Combatant Status Review Tribunals (CSRTs)—rather than proceedings before a court of law.³⁷ The Court also expressed concern that the detentions had, in some cases, lasted as long as six years without significant judicial oversight.³⁸ The Court further noted the limitations at the CSRT stage on a detainee’s ability to find and present evidence to challenge the government’s case, the unavailability of assistance of counsel, the inability of a detainee to access certain classified government records which could contain critical allegations against him, and the admissibility of hearsay evidence.³⁹ While reserving judgment as to whether the CSRT process itself comports with due process, the Court found that the appeals process for these decisions, assigned to the United States Court of Appeals for the District of Columbia, did not contain the means necessary to correct errors occurring in the CSRT process.⁴⁰

ArtI.S9.C7 Appropriations

ArtI.S9.C7.3 Appropriations Clause Generally

The Supreme Court has construed the Appropriations Clause in relatively few cases, concluding that the requirement for an “appropriation made by law” to prohibit conduct that would result in disbursements of public funds for which an appropriation was lacking. A statute qualifies as an appropriation in the constitutional sense, the Court

jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay.” After the Court decided in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), that the Detainee Treatment Act did not apply to detainees whose cases were pending at the time of enactment, it was amended by the Military Commissions Act of 2006, Pub. L. No. 109-366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

³⁵ *Boumediene*, 553 U.S. at 752.

³⁶ *Id.* at 766.

³⁷ Under the Detainee Treatment Act, Pub. L. No. 109-148, Title X, Congress granted only a limited appeal right to determination made by the Executive Branch as to “(I) whether the status determination of [a] Combatant Status Review Tribunal . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States.” § 1005(e)(2)(C).

³⁸ *Boumediene*, 553 U.S. at 772, 794.

³⁹ *Id.* at 783–84.

⁴⁰ The Court focused in particular on the inability of the reviewing court to admit and consider relevant exculpatory evidence that was not introduced in the prior proceeding. *Id.* at 788–89. The Court also listed other potential constitutional infirmities in the review process, including the absence of provisions empowering the D.C. Circuit to order release from detention, and not permitting petitioners to challenge the President’s authority to detain them indefinitely. *Id.* at 787–88.

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has explained, if the statute “authorizes expenditures from a specified source of public money for designated purposes.”¹ The Court has explained in cases involving the claims of private parties, for example, that a judgment requiring payment to a person asserting a claim against the United States could not be entered in that person’s favor without an appropriation to pay the judgment.² In *Knote v. United States*, the Court decided that an appropriation would likewise be needed for a court to order the return of the proceeds of seized property that had been paid into the Treasury.³ Prior to entry of judgment, the Appropriations Clause also shapes the legal doctrines that courts may apply to adjudicate money claims against the United States.⁴ Congress may even direct that no funds are available to pay what might otherwise be a valid debt.⁵ If there is no appropriation to pay an alleged debt, either because no such appropriation had been made or Congress has validly prohibited the use of otherwise available funds, the only way that the purported creditor may seek relief is by petitioning Congress.⁶

The Appropriations Clause’s limitation on drawing funds from the Treasury is not confined to the types of relief available in judicial proceedings against the United States.⁷ As the Court explained in 1850 in *Reeside v. Walker*, if there is no appropriation available, the President and Executive Branch officers and employees lack the authority to pay the “debts of the United States generally, when presented to them”⁸ or to incur obligations on behalf of the United States in anticipation of Congress later making an appropriation to support the obligation.⁹ Even the President’s constitutionally vested

¹ CFPB v. Cmty. Fin. Servs. Ass’n of Am., No. 22-448, slip op. at 5 (U.S. May 16, 2024).

² *Reeside v. Walker*, 52 U.S. (11 How.) 272, 291 (1851) (“[N]o mandamus or other remedy lies against any officer of the Treasury Department, in a case situated like this, where no appropriation to pay it has been made.”).

³ See 95 U.S. 149, 154 (1877) (explaining that “if the proceeds” of condemned and sold property “have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress”); see also *Republic Nat. Bank v. United States*, 506 U.S. 80, 94–96 (1992) (Rehnquist, C.J., opinion of the Court) (reading *Knote* as standing for “the principle that once funds are deposited into the Treasury, they become public money, and thus may only be paid out pursuant to a statutory appropriation,” even if the Government’s ownership of the funds is disputed, but concluding that there was an appropriation that authorized payment of the funds sought by the petitioner).

⁴ See *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414, 426 (1990) (“[J]udicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized.”).

⁵ See *Hart v. United States*, 118 U.S. 62, 65, 67 (1886) (“It was entirely within the competency of congress to declare” that no debt that accrued prior to the outbreak of the Civil War could be paid in favor of a claimant who had “promoted, encouraged, or in any manner sustained” rebellion “till the further order of congress.”).

⁶ See *Bradley v. United States*, 98 U.S. 104, 117 (1878) (stating that where the Federal Government contracted to lease real property owned by a third party, subject to Congress making appropriations in the future to pay the agreed annual rental amounts, the lessor had to “rely upon the justice of Congress” to recover the difference between the agreed rental value for the third year of the lease, \$4,200, and the lesser amount actually appropriated for that year’s rental payments, \$1,800); *Reeside*, 52 U.S. (11 How.) at 291 (“Hence, the petitioner should have presented her claim on the United States to Congress, and prayed for an appropriation to pay it.”); cf. *R.R. v. Alabama*, 101 U.S. 832, 835 (1879) (drawing an analogy between the Appropriations Clause and a similar provision in the Alabama Constitution to explain that in the absence of an appropriation “the party who gets a judgment must wait until Congress makes an appropriation before his money can be had”).

⁷ *Richmond*, 496 U.S. at 425.

⁸ *Reeside*, 52 U.S. at 291 (“No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned.”).

⁹ See *Bradley*, 98 U.S. at 114 (“Argument to show that money cannot be drawn from the treasury before it is appropriated is unnecessary, as the Constitution provides that ‘no money shall be drawn from the treasury but in consequence of an appropriation made by law. . . .’ (quoting U.S. CONST. art. I, § 9, cl. 7)).

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powers may not, on their own, authorize or require disbursements from the Treasury.¹⁰ For example, though a presidential pardon removes all disabilities resulting from a pardoned offense, a pardon cannot require return of property seized, sold, and paid into the Treasury as a consequence of the offense.¹¹

However, the Court has also identified circumstances in which the Appropriations Clause is not a relevant limitation on government action. The Clause governs the conduct of federal officers or employees, but it does not constrain Congress in its ability to incur obligations—binding commitments to pay federal funds—by statute¹² or to otherwise dispose of public funds.¹³ Similarly, the Clause is not implicated where there is an appropriation available to make a payment, because in that event payments made pursuant to the appropriation would comply with the Clause.¹⁴

While the Appropriations Clause does not itself constrain Congress’s ability to dictate the terms upon which it makes funds available, other provisions of the Constitution may. The Court held in *United States v. Lovett* that a limitation in an appropriations act that barred payment of compensation to three named federal employees was an unconstitutional bill of attainder because it inflicted punishment without judicial trial.¹⁵ The Court also disregarded a limitation placed on an appropriation for the payment of Court of Claims judgments in *United States v. Klein*, explaining that the limitation impermissibly sought to change the legal effect of a presidential pardon.¹⁶

¹⁰ See *Richmond*, 496 U.S. at 425 (“Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.”).

¹¹ *Knote v. United States*, 95 U.S. 149, 154 (1877) (holding that however large the President’s pardon power may be, that power, like “all” of the President’s powers, “cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress”).

¹² See *Me. Cmty. Health Options v. United States*, No. 18-1023, slip op. at 10, 13 (U.S. Apr. 27, 2020) (explaining that the Appropriations Clause constrains “how federal employees and officers may make or authorize payments without appropriations” but does not address “whether Congress itself can create or incur an obligation directly by statute”).

¹³ See *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 – 22 (1937) (concluding that the Appropriations Clause was “intended as a restriction upon the disbursing authority of the Executive department” and thus was “without significance” in a case challenging Congress’s decision to pay the proceeds of a tax on coconut oil to the treasury of the Philippine Islands and further rejecting the argument that the terms of the appropriation were so general that it constituted an impermissible delegation of legislative power to the Executive Branch); cf. *United States v. Realty Co.*, 163 U.S. 427, 444 (1896) (stating that Congress’s decision to recognize a claim “founded upon equitable and moral considerations, and grounded upon principles of right and justice” and “appropriating money for its payment, can rarely, if ever, be the subject of review by the Judicial Branch of the government”).

¹⁴ See *Salazar v. Ramah Navajo Chapter*, 567 U.S. 182, 198 n.9 (2012) (reading *Richmond* as having “indicated that the Appropriations Clause is no bar to recovery in a case like this one, in which ‘the express terms of a specific statute’ establish ‘a substantive right to compensation’ from” an appropriation (quoting *Richmond*, 496 U.S. at 432)). Congress may appropriate funds in terms that leave disbursing officials no discretion to deny a claimant the funds owed. See *United States v. Price*, 116 U.S. 43, 44 (1885) (“fully” concurring with the conclusion of the Court of Claims that “congress undertook, as it had the right to do, to determine, not only what particular citizens of Tennessee, by name, should have relief, but also the exact amount which should be paid to each of them” (internal quotation marks omitted)); *United States v. Jordan*, 113 U.S. 418, 422 (1885) (same).

¹⁵ See 328 U.S. 303, 313, 316–18 (1946) (holding that though Congress phrased the limitation as compensation prohibition it served as a permanent bar on federal employment, a consequence that case law held to be punishment within the meaning of the Bill of Attainder Clause).

¹⁶ See *United States v. Klein*, 80 U.S. 128, 147 – 48 (1871) (explaining that the “legislature cannot change the effect of” a “pardon any more than the executive can change a law”).

In short, the Court’s case law has considered the Appropriations Clause and its effects in roughly three contexts. The Court has articulated how, from Congress’s perspective, the Clause is not a relevant limitation on congressional action. The Clause requires an appropriation “made by law” before funds may leave the Treasury, and Congress is the branch empowered to authorize such disbursements. From the perspective of the other branches, the Clause conditions any exercise of a constitutional or statutory power, so that such powers cannot result in disbursements of Treasury funds absent an appropriation. Finally, the Court has considered appropriations made by Congress for their consistency with provisions or features of the Constitution other than the Appropriations Clause. If Congress imposes a limitation on funds that is itself unconstitutional, the limitation cannot be enforced.

ArtI.S10 Powers Denied States

ArtI.S10.C1 Proscribed Powers

ArtI.S10.C1.5 State Ex Post Facto Laws

An *ex post facto* law is a law that imposes criminal liability or increases criminal punishment retroactively.¹ Two separate clauses of the Constitution, Article I, Sections 9 and 10, ban enactment of *ex post facto* laws by the federal government and the States, respectively.² The Supreme Court has cited cases interpreting the federal *Ex Post Facto* Clause in challenges under the state clause, and vice versa, treating the two clauses as having the same scope.³ The Court’s decisions interpreting both clauses are therefore discussed collectively in greater detail in the Article I, Section 9 essays on the federal *Ex Post Facto* Clause.⁴ In particular, those essays on federal and state *ex post facto* laws discuss Supreme Court jurisprudence addressing imposing or increasing punishments, procedural changes, employment qualifications, retroactive taxes, inapplicability to judicial decisions, and deportation and related issues.

The Supreme Court has interpreted the *Ex Post Facto* Clauses to limit only legislation that is criminal or penal in nature,⁵ though the Court has also made clear that “the *ex post facto* effect of a law cannot be evaded by giving a civil form to that which is essentially criminal.”⁶ In addition, the Court has uniformly applied the prohibition on *ex post facto* legislation only to laws that operate retroactively.⁷ In the 1798 case *Calder v. Bull*, the Court enumerated four ways in which a legislature may violate the *Ex Post Facto* Clauses’ prohibition on imposing retroactive criminal liability: (1) making criminal an action taken before enactment of the law that was lawful when it was done; (2) increasing the severity of an offense after it was committed; (3) increasing the punishment for a crime after it was committed; and (4) altering the rules of evidence after an

¹ See, e.g., *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 391 (1798); *Locke v. New Orleans*, 71 U.S. (1 Wall.) 172, 173 (1867).

² For the prohibition on federal *ex post facto* laws, see U.S. CONST. art 1 § 10 cl. 1; see also ArtI.S9.C3.2 Ex Post Facto Laws.

³ See, e.g., *Peugh v. United States*, 569 U.S. 530, 532–33 (2013) (case construing federal clause citing case construing state clause); *Reetz v. Michigan*, 188 U.S. 505, 510 (1903) (case construing state clause citing case construing federal clause).

⁴ See ArtI.S9.C3.2 Historical Background on Ex Post Facto Laws.

⁵ E.g., *Calder*, 3 U.S. at 389; *Watson v. Mercer*, 33 U.S. (1 Pet.) 88, 110 (1834); see also ArtI.S9.C3.3.4 Ex Post Facto Laws Prohibition Limited to Penal Laws.

⁶ *Burgess v. Salmon*, 97 U.S. 381, 385 (1878).

⁷ E.g., *Calder*, 3 U.S. at 389; see also ArtI.S9.C3.3.3 Retroactivity of Ex Post Facto Laws.

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offense was committed so that it is easier to convict an offender.⁸ The *Ex Post Facto* Clauses are related to other constitutional provisions that limit retroactive government action, including the federal and state Bill of Attainder Clauses, the Contract Clause, and the Due Process Clauses.⁹

Multiple Supreme Court decisions have held that the *Ex Post Facto* Clauses apply only to federal and state legislation, not to judicial decisions.¹⁰ The state *Ex Post Facto* Clause also applies to state constitutional amendments. In *Cummings v. Missouri*, the Court considered a challenge to a post-Civil War amendment to the Missouri Constitution that required persons engaged in certain professions to swear an oath that they had never been disloyal to the United States.¹¹ In holding that the amendment violated the state *Ex Post Facto* Clause, the Court looked to the Clause’s language providing that “no State”—not *no legislature of a State*, but that “*no State*”—should pass any *ex post facto* law,” and concluded that “[i]t can make no difference, therefore, whether such legislation is found in a constitution or in a law of a State; if it be within the prohibition it is void.”¹²

⁸ *Calder*, 3 U.S. at 390.

⁹ See, e.g., *Fletcher v. Peck*, 10 U.S. (1 Cranch) 87, 138–39 (1810); cf. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 267 (1994) (the restrictions that the Constitution places on retroactive legislation “are of limited scope” and “[a]bsent a violation of one of those specific provisions,” when a new law makes clear that it is retroactive, the arguable “unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give [that law] its intended scope.”).

¹⁰ E.g., *Frank v. Magnum*, 237 U.S. 309, 344–45 (1914); cf. *Rogers v. Tennessee*, 532 U.S. 451, 456–60 (2000) (holding that “limitations on *ex post facto* judicial decision making are inherent in the notion of due process,” but the due process limitation on courts is not identical to the *ex post facto* prohibition that applies to legislation); see also ArtI.S9.C3.3.11 *Ex Post Facto* Prohibition and Judicial Decisions.

¹¹ *Cummings v. Missouri*, 71 U.S. (1 Wall.) 277, 280–81 (1866).

¹² *Id.* at 307–08. For additional discussion of *Cummings*, see ArtI.S9.C3.3.9 *Employment Qualifications and Ex Post Facto Laws*.

ARTICLE II

EXECUTIVE BRANCH

ArtII.S1 Function and Selection

ArtII.S1.C8 Presidential Oath of Office

ArtII.S1.C8.1 Oath of Office for the Presidency Generally

Article II, Section 1, Clause 8 provides that the President must swear or affirm to “faithfully execute the Office of President” and “preserve, protect and defend the Constitution” to the best of the President’s ability. Presidents since George Washington have reflected on the oath’s significance and the burden it places on the President. In his second inaugural address, Washington declared that a violation of the presidential oath would occasion not only “constitutional punishment,” but “the upbraidings of all who are now witnesses of the present solemn ceremony.”¹ Of the oath, Justice Joseph Story wrote: “[t]here is little need of commentary No man can well doubt the propriety of placing a president of the United States under the most solemn obligations to preserve, protect, and defend the constitution.”²

The Constitution requires many officials to swear oaths or affirmations,³ but the presidential oath in Article II is unique because it prescribes verbatim the language an official must use. Government officials generally must swear an oath to “support” the Constitution, but the Constitution does not demand any exact language.⁴ Because Article II provides a verbatim presidential oath, misadministration of the oath might elicit questions as to the President’s legitimacy. For example, while President Barack Obama re-took the oath after Chief Justice John Roberts mistakenly reordered words in the oath’s text,⁵ President Herbert Hoover declined to do so, believing such mistakes to be inconsequential.⁶ Many presidents have appended the phrase “so help me God” to the presidential oath;⁷ this phrase has been included in statutorily defined oaths since 1789, but is not required of the President.⁸

Although Article II sets forth the text of the presidential oath, it omits other details, including who shall administer the oath and when and where the oath shall be administered. By common practice, the Chief Justice of the United States Supreme Court administers the oath at a President’s inauguration. The practice of receiving the oath

¹ JOINT CONGRESSIONAL COMMITTEE ON INAUGURAL CEREMONIES, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. No. 101-10, at 6 (1st Sess. 1989) [hereinafter INAUGURAL ADDRESSES].

² 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1482 (1833).

³ U.S. CONST. art. VI, cl. 3.

⁴ *Id.* The Supreme Court has recognized the validity of oaths that do not use the exact language of article VI’s general oath in free speech challenges to such oaths. See *Cole v. Richardson*, 405 U.S. 676, 682 (1972) (“The Court has further made clear that an oath need not parrot the exact language of the constitutional oaths to be constitutionally proper.”). For more on free speech challenges to oaths, see Amdt1.7.9.1 Loyalty Oaths.

⁵ *E.g.*, *Statement from White House Counsel*, WHITE HOUSE OF PRES. BARACK OBAMA, <https://obamawhitehouse.archives.gov/the-press-office/statement-white-house-counsel> (Jan. 21, 2009) (observing that “there was one word out of sequence” in the oath taken by President Obama and “out of an abundance of caution . . . Chief Justice Roberts administered the oath a second time”).

⁶ See Jessie Kratz, *An Inaugural Blunder*, U.S. NAT’L ARCHIVES, <https://prologue.blogs.archives.gov/2014/07/29/an-inaugural-blunder/> (July 29, 2014) (describing Chief Justice William Howard Taft’s mistake in administering the oath to President Herbert Hoover). President Hoover was not sworn in a second time.

⁷ See, e.g., *Letters from Washington: Inauguration Day*, SACRAMENTO DAILY UNION (Apr. 10, 1865) (reporting the use of the phrase by President Abraham Lincoln); *The New Administration*, N.Y. TIMES (Sept. 23, 1881) (reporting the use of the phrase by President Chester A. Arthur); *William H. Taft Inaugurated President*, WASH. POST (Mar. 5, 1909) (reporting use of the phrase by President William Howard Taft).

⁸ *E.g.*, Judiciary Act of 1789, Ch. 20, §§ 7–8, 1 Stat. 73, 76.

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Sec. 1, Cl. 8—Function and Selection, Presidential Oath of Office

publicly began with George Washington’s inauguration. A joint committee of Congress appointed to organize the inauguration emphasized the importance of having the oath “administered to the President in the most public manner” such that “the greatest number of the people in the United States, and without distinction, may be witnesses to the solemnity.”⁹ President John Adams was the first President to receive the oath from the Chief Justice.¹⁰ Several Vice Presidents who became President through succession were administered oaths outside the nation’s capital and by people other than the Chief Justice.¹¹ For example, President Calvin Coolidge, who succeeded President Warren G. Harding after his death, received the oath from his father, a notary public, at his father’s residence in Vermont.¹²

The presidential oath’s language mirrors other provisions of the Constitution—such as the President’s obligation to “take Care that the Laws be faithfully executed”¹³—though much of the language in the presidential oath appears nowhere else in the Constitution. The significance of the oath’s unique text has been a matter of debate for centuries. James Madison’s notes suggest that even delegates to the Federal Convention of 1787, where the Constitution was drafted, lacked a shared understanding of this language: while debating whether the text of the oath should include a promise to “preserve protect and defend the Constitution,” Delegate James Wilson of Pennsylvania suggested that the general oath required by Article VI would render such text unnecessary.¹⁴

ArtII.S1.C8.2 Presidential Oath’s Effect on Executive Power

Several Presidents have relied on the oath, alone or in conjunction with the Take Care Clause,¹ for authority to take actions necessary to “preserve, protect and defend the Constitution.” President Thomas Jefferson contended that the oath obligated him to

⁹ *Order for Conducting the Ceremonial for the Inauguration of the President* (Apr. 27, 1789), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 50 (James D. Richardson ed., 1897); see also INAUGURAL ADDRESSES, *supra* note 1, at 175–76 (inaugural address of President Benjamin Harrison) (“There is no constitutional or legal requirement that the President shall take the oath of office in the presence of the people, but there is so manifest an appropriateness in the public induction to office of the chief executive officer of the nation that from the beginning of the Government the people . . . have been called to witness the solemn ceremonial.”).

¹⁰ 3rd *Inaugural Ceremonies*, JOINT CONGRESSIONAL COMMITTEE ON INAUGURAL CEREMONIES, <https://www.inaugural.senate.gov/3rd-inaugural-ceremonies/>. George Washington received the oath from the Chancellor of the State of New York in his first term and Associate Justice William Cushing in his second term.

¹¹ Prior to the passage of the Twenty-Fifth Amendment, whether a Vice President succeeding a President needed to take the presidential oath was unclear. President John Tyler, who succeeded President William Henry Harrison, becoming the first Vice President to assume the presidency following a President’s death in office, began the practice of swearing the presidential oath. See EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957*, at 54 (1957) (noting that Tyler took the presidential oath despite believing that he was qualified to act as President without taking an additional oath). See generally Amdt25.1 Overview of Twenty-Fifth Amendment, Presidential Vacancy and Disability.

¹² *The Swearing-In of Calvin Coolidge*, JOINT CONGRESSIONAL COMMITTEE ON INAUGURAL CEREMONIES, <https://www.inaugural.senate.gov/swearing-in-of-coolidge/>. Coolidge was purportedly administered a second oath by a Justice of the Supreme Court of the District of Columbia when his Attorney General and Solicitor General expressed doubts that Coolidge’s father could lawfully administer the oath. JIM BENDAT, *DEMOCRACY’S BIG DAY: THE INAUGURATION OF OUR PRESIDENT, 1789–2013*, at 156 (2012); *Tells of Coolidge and Second Oath*, N.Y. TIMES (Feb. 3, 1932) (Justice who purportedly administered Coolidge’s second oath confirming that he did so).

¹³ U.S. CONST. art. II, § 3.

¹⁴ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 427 (Max Farrand ed., 1911) (Madison’s notes, Aug. 27, 1787). The text was adopted. *Id.*

¹ U.S. CONST. art. II, § 3.

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suspend prosecutions under the Sedition Act, which Jefferson had repeatedly claimed was unconstitutional.² President Andrew Jackson relied in part on the presidential oath in vetoing a bill rechartering the Second Bank of the United States.³ He advanced the view that the presidential oath, as well as the general oath provision in Article VI,⁴ grants each branch of government an independent power to interpret the Constitution.⁵ Partially repudiating the Supreme Court's decision in *McCulloch v. Maryland*,⁶ which upheld the constitutionality of the national bank, President Jackson suggested that "[t]he authority of the Supreme Court must not . . . be permitted to control the Congress or the Executive when acting in their legislative capacities"⁷

President Abraham Lincoln relied on the oath to defend his decision to suspend unilaterally the privilege of the writ of habeas corpus,⁸ claiming that the presidential oath required the President to disregard "a single law" if doing so would preserve the Union.⁹ President Lincoln similarly justified his position on emancipation of enslaved persons during the Civil War by invoking the presidential oath:

I did understand . . . that my oath to preserve the Constitution to the best of my ability, imposed upon me the duty of preserving, by every indispensable means, that government—that nation—of which that Constitution was the organic law. . . . I felt that measures, otherwise unconstitutional, might become lawful, by becoming indispensable to the preservation of the Constitution, through the preservation of the nation. Right or wrong, I assumed this ground, and now avow it. I could not feel that, to the best of my ability, I had even tried to preserve the Constitution, if, to save slavery, or any minor matter, I should permit the wreck of government, country, and Constitution all together.¹⁰

During President Andrew Johnson's impeachment trial, his counsel alluded to the theory that the oath might grant the President power, but only in passing.¹¹ President

² Letter from Thomas Jefferson to Abigail Adams (July 22, 1804), in 1 THE ADAMS-JEFFERSON LETTERS 274, 275–76 (Lester J. Cappon ed., 1959) (suggesting that the "obligations of an oath to protect the constitution, violated by an unauthorized act of Congress," compelled Jefferson to "arrest [the] execution at every stage" of the Sedition Act).

³ *Veto Message* (July 10, 1832), in 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139 (James D. Richardson ed., 1897) [hereinafter MESSAGES AND PAPERS].

⁴ U.S. CONST. art. VI, cl. 3.

⁵ MESSAGES AND PAPERS, *supra* note 3, at 1145 ("Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others.").

⁶ 17 U.S. (4 Wheat.) 316 (1819).

⁷ MESSAGES AND PAPERS, *supra* note 3, at 1145.

⁸ The writ of habeas corpus, which allows detained individuals to challenge their detention in court, is protected from suspension by the Constitution. U.S. CONST. art. I, § 9, cl. 2; see Art.I.S9.C2.1 Suspension Clause and Writ of Habeas Corpus.

⁹ Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in ABRAHAM LINCOLN'S SPEECHES AND LETTERS, 1832–1865, at 173 (Paul M. Angle ed., 1957) ("[W]ould not the official oath be broken if the government should be overthrown, when it was believed that disregarding [a] single law would tend to preserve it?").

¹⁰ Letter from Abraham Lincoln to Albert G. Hodges, editor of the Frankfort, Kentucky 'Commonwealth' (Apr. 4, 1864), in ABRAHAM LINCOLN'S SPEECHES AND LETTERS, *supra* note 9, at 264.

¹¹ CONG. GLOBE SUPP., 40th Cong., 2d Sess. 314 (1868) (suggesting that a President is bound by oath to disregard a law that "upon its very face [is] in flat contradiction to plain express provisions of the Constitution").

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Johnson's lawyers argued that the oath might allow or obligate the President to disregard an unconstitutional law.¹² By contrast, the impeachment managers appeared to take the position that a President would violate their oath by doing so.¹³ Chief Justice Chase, who presided over the impeachment trial, had no official duty to resolve this question, but appeared to side more closely with the view of the President.¹⁴

Although several Presidents have cited the presidential oath as providing a basis for executive action, the Supreme Court has not expressly addressed whether the oath may be relied upon for that purpose.¹⁵ In the case *Lear Siegler, Inc., Energy Products Division v. Lehman*, the Ninth Circuit rejected this notion.¹⁶ The case involved President Ronald Reagan's decision to not enforce certain provisions of the Competition in Contracting Act (CICA)¹⁷ based on the provisions' alleged unconstitutionality.¹⁸ Lear Siegler, a bidder on a Navy contract, sued the Secretary of the Navy seeking to compel the Navy's compliance with CICA.¹⁹ In support of the Reagan Administration's decision to decline enforcement, the government argued that the President's oath and the Take Care Clause together "empower the President . . . to declare a law unconstitutional and suspend its operation."²⁰ The Ninth Circuit held that this position was "utterly at odds with the texture and plain language of the Constitution, and with nearly two centuries of judicial precedent," and therefore the President was without constitutional authority to suspend enforcement of CICA.²¹ The court concluded that permitting the President to suspend laws would expand the President's legislative role beyond what the Constitution specifically provides in the Presentment Clause.²² The Ninth Circuit also noted that the

¹² *Id.*

¹³ *Id.* at 270 (statement of Rep. George S. Boutwell, on behalf of the Managers) ("He must take the law and administer it as he finds it without any inquiry on his part as to the wisdom of the legislation If in any particular, by implication or construction, he assumes and exercises authority not granted to him by the Constitution or the laws he violates his oath of office").

¹⁴ Letter from Chief Justice Chase to Gerrit Smith (Apr. 19, 1868), in J.W. SHUCKERS, *THE LIFE AND PUBLIC SERVICES OF SALMON PORTLAND CHASE* 578 (1874) ("How can the President fulfill his oath to preserve, protect, and defend the Constitution, if he has no *right to defend* it against an act of Congress sincerely believed by him to have been passed in violation of it?"). For more on Andrew Johnson's impeachment, see ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses.

¹⁵ The Court has at times referred to the oath in passing as support for implied executive powers, such as the power to engage in electronic surveillance. *United States v. U.S. Dist. Court (Keith)*, 407 U.S. 297, 310 (1972) ("[T]he President of the United States has the fundamental duty . . . to 'preserve, protect and defend the Constitution of the United States.' Implicit in that duty is the power to protect our Government against those who would subvert or overthrow it by unlawful means.").

¹⁶ 842 F.2d 1102 (9th Cir. 1988), *withdrawn on other grounds*, 893 F.2d 205 (9th Cir. 1989).

¹⁷ Pub. L. No. 98-369, §§ 2701–53, 98 Stat. 1175 (1984).

¹⁸ The provisions at issue allow the Comptroller General to determine the length of a stay of a government contract when the contract is challenged. *Lear Siegler, Inc.*, 842 F.2d at 1104. The Office of Management and Budget directed executive branch agencies to disregard these provisions as unconstitutionally delegating an executive power to the legislative branch. *Id.* at 1105; *see also* *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress may not vest the Comptroller General with executive functions).

¹⁹ *Lear Siegler, Inc.*, 842 F.2d at 1105.

²⁰ *Id.* at 1121.

²¹ *Id.* at 1121–22.

²² *Id.* at 1123–24 (citing U.S. CONST. Art. I, § 7, cl. 2); *see also* *INS v. Chadha*, 462 U.S. 919, (1983) ("It emerges clearly that the prescription for legislative action Art. I, §§ 1, 7, represents the Framers' decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure"); *Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998) (holding that statute allowing President to exercise "line item veto" violated the requirements of the Presentment Clause). *See generally* ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills and subsequent essays.

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President “ha[d] assumed a role reserved for the judicial branch” by engaging in constitutional interpretation.²³

Since the Ninth Circuit’s decision in *Lear Siegler*, the executive branch continued to advance the notion that the oath allows or obligates the President to disregard a law the President deems unconstitutional. An opinion by the Department of Justice Office of Legal Counsel (OLC)²⁴ during George H.W. Bush’s presidency took the position that the President’s oath requires a President to uphold the Constitution when it is in conflict with the laws of Congress.²⁵ OLC observed that Delegate James Wilson, advocating for the Constitution’s ratification at the Pennsylvania convention, had suggested that the President could refuse to carry out laws that violate the Constitution.²⁶ OLC qualified its opinion by stating that the President has authority to disregard unconstitutional laws “at least in the context of legislation that infringes the separation of powers,” citing historic examples.²⁷ As OLC observed, this position “remains controversial,” and “there is little judicial authority” concerning the oath.²⁸ OLC continued to take this position under future Presidents.²⁹

Though the Supreme Court has not addressed the specific issue of the President’s oath as a source of executive power, the Court has issued decisions on the President’s exercise of legislative power beyond what the Presentment Clause permits,³⁰ as well as the President’s interpretive authority in connection with the Take Care Clause.³¹

ArtII.S1.C8.3 Faithful Execution of the Office

The oath’s requirement that the President swear or affirm to “faithfully execute the Office” of President bears close relation to the President’s constitutional duty to “take Care that the Laws be faithfully executed.”¹ Other provisions of the Constitution require action of various officials, but these two clauses comprise the only requirements that an

²³ *Lear Siegler, Inc.*, 842 F.2d at 1125 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

²⁴ OLC’s opinions are “controlling” within the executive branch, but do not have the force of law outside the executive branch. *See, e.g.,* *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281, 285–86 (1960) (declining to follow an Attorney General opinion and noting that such opinions are “entitled to some weight,” but “do not have the force of judicial decisions”).

²⁵ *Issues Raised by Foreign Relations Authorization Bill*, 14 Op. O.L.C. 37, 46 (1990).

²⁶ *Id.* at 48 (quoting 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 450 (Merrill Jensen ed., 1976) (statement of James Wilson, Dec. 1, 1787)).

²⁷ *Id.* at 49–50.

²⁸ *Id.* at 46.

²⁹ *E.g.,* Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199, 199–201 (1994) (contending that the presidential oath supports President’s power to not comply with unconstitutional enactments).

³⁰ *See generally* ArtI.S7.C2.2 Veto Power.

³¹ *See generally* ArtII.S3.3.5 Interpretations of Law as Part of the President’s Take Care Duties. Historians have debated whether historical practice provides a clear indication that the oath was intended to enlarge the President’s power. Compare EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787–1957, at 62–63 (1957) (concluding that antecedent oaths from state constitutions, records from the debates at the Convention, and understandings of the English coronation oath support the notion that the oath does not add to the President’s power), with MATTHEW A. PAULEY, I DO SOLEMNLY SWEAR: THE PRESIDENT’S CONSTITUTIONAL OATH 170 (1999) (challenging Corwin’s conclusion).

¹ U.S. CONST. art. II, § 3.

official act *faithfully*. Because of these textual similarities, the oath is often discussed in conjunction with the Take Care Clause.²

ArtII.S1.C8.4 Relationship with Article VI Oaths

The Article II oath’s requirement that the President swear or affirm to “preserve, protect and defend the Constitution” to the best of the President’s ability is textually distinct from the general oath required of federal and state officials in Article VI, which requires that an official swear or affirm “to support this Constitution.”¹ The text of these provisions does not indicate what relationship, if any, exists between the president’s duty to “preserve, protect and defend” the Constitution and the official’s duty to “support” it. At least one delegate to the Federal Convention of 1787 appears to have believed that Article VI’s requirement of “support” would include a duty to “preserve, protect and defend.” According to James Madison’s notes, Delegate James Wilson of Pennsylvania rejected the proposed addition of this language to the presidential oath on the grounds that “the general provision for oaths of office, in a subsequent place, rendered the amendment unnecessary.”² The amendment was nonetheless adopted.³

The version of the oath objected to by James Wilson at the Federal Convention would have required the President swear or affirm that they will “to the best of [their] judgment and power, preserve, protect and defend the Constitution of the United States.”⁴ The oath as ratified has the President swear or affirm that they will take such actions “to the best of [their] Ability.” Records of the Convention do not explain the change from “judgment and power” to “ability.”⁵

ArtII.S1.C8.5 Violation of the Presidential Oath

The Constitution provides no standards for determining whether a President has violated their oath. The fact that other branches interpret the Constitution, and may do inconsistently with the President, creates difficulties in determining whether the oath has been violated. Just as some Presidents have suggested that the oath may require them to disregard laws when doing so is necessary to “preserve, protect and defend” the Constitution,¹ some lawmakers have argued that the President’s oath requires them to execute *all* laws, regardless of whether the President believes them to be constitutional.²

² See generally ArtII.S3.3.1 Overview of the Take Care Clause and subsequent essays.

¹ See U.S. CONST. art. VI, cl. 3. See generally ArtVIC3.1 Oaths of Office Generally.

² 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 427 (Max Farrand ed., 1911) (Madison’s notes, Aug. 27, 1787).

³ *Id.*

⁴ *Id.*

⁵ See generally ArtIII.S2.C1.3.1 Overview of Rules of Justiciability and Cases or Controversies Requirement and subsequent essays.

¹ See CONG. GLOBE SUPP., 40th Cong., 2d Sess. 314 (1868) (suggesting that a President is bound by oath to disregard a law that “upon its very face [is] in flat contradiction to plain express provisions of the Constitution”).

² See *id.* at 270 (statement of Rep. George S. Boutwell, on behalf of the Managers) (“He must take the law and administer it as he finds it without any inquiry on his part as to the wisdom of the legislation If in any particular, by implication or construction, he assumes and exercises authority not granted to him by the Constitution or the laws he violates his oath of office”).

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The Supreme Court has not addressed these competing views, and the oath and its surrounding text do not suggest that questions about violations of the oath were intended for judicial resolution.³ The Court has held that the President is generally immune from civil or criminal liability for official actions taken while in office, which may impede judicial resolution of questions relating to a President's violation of their oath arising during the President's tenure.⁴ The Constitution's justiciability requirements are another potential obstacle to resolution in federal court.⁵

Impeachment provides a vehicle by which Congress may adjudicate a President's alleged violation of their oath.⁶ Articles of impeachment against Andrew Johnson charged the President with being "unmindful of the high duties of his office and of his oath of office."⁷ Draft articles of impeachment to be used against President Richard Nixon alleged that President Nixon violated his oath, though he resigned before these articles were adopted.⁸ Articles of impeachment adopted in the impeachment of President Bill Clinton charged the President with violating his constitutional oath,⁹ as did articles of impeachment adopted in both impeachments of President Donald Trump.¹⁰

The political process provides another check on the President's violation of their oath. James Madison and Alexander Hamilton suggested in various contexts that political accountability might help ensure the President's fidelity to their office.¹¹ In his second inaugural speech, George Washington observed that violating his oath would invite "the upbraidings of all who are now witnesses of the present solemn ceremony."¹²

³ *But see* Cassius VI, MASS. GAZETTE (Dec. 21, 1787), reprinted in 5 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 500 (John P. Kaminski et al. eds., 2009) (essay by James Sullivan stating that "if [the President] should presume to deviate from [his oath] he would be immediately arrested in his career and summoned to answer for his conduct before a federal court").

⁴ See ArtII.S3.5.1 Presidential Immunity to Suits and Official Conduct; ArtII.S3.5.4 Criminal Prosecution and Former Presidents.

⁵ See generally ArtIII.S2.C1.3.1 Overview of Rules of Justiciability and Cases or Controversies Requirement and subsequent essays.

⁶ U.S. CONST. art. II, § 4; cf. THE FEDERALIST NO. 65, at 396 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The subjects of [impeachment] are those offenses which proceed from . . . the abuse or violation of some public trust."); CONG. GLOBE SUPP., 40th Cong., 2d Sess. 29 (1868) (opening argument of Rep. Butler, on behalf of the Managers) (defining impeachable offenses as including "a violation of the Constitution, of law, of an official oath").

⁷ CONG. GLOBE SUPP., 40th Cong., 2d Sess. 3 (1868). For more on President Johnson's impeachment, see ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses.

⁸ H.R. REP. NO. 93-1305, at 1–4 (1974). For more on President Nixon's impeachment, see ArtII.S4.4.7 President Richard Nixon and Impeachable Offenses.

⁹ H.R. Res. 611, 105th Cong. (1998). Only articles I and III passed the House. For more on President Clinton's impeachment, see ArtII.S4.4.8 President Bill Clinton and Impeachable Offenses.

¹⁰ H.R. Res. 755, 116th Cong. (2019); H.R. Res. 24, 117th Cong. (2021). For more on President Trump's impeachments, see ArtII.S4.4.9 President Donald Trump and Impeachable Offenses.

¹¹ See, e.g., THE FEDERALIST NO. 70, at 424 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (observing that "a due dependence on the people, and a due responsibility" would provide a check on an executive's behavior); *id.* at 428–29 (describing "the restraints of public opinion" as one of the "greatest securities" the people have for faithful exercise of the executive power); Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in 10 THE PAPERS OF JAMES MADISON: CONGRESSIONAL SERIES 208 (J.C.A. Stagg ed., 2010) (suggesting that "the hope of being rewarded with a reappointment" is "the principal motive to the faithful discharge of [the executive's] duties").

¹² JOINT CONGRESSIONAL COMMITTEE ON INAUGURAL CEREMONIES, INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES, S. Doc. No. 101-10, at 6 (1st Sess. 1989).

ArtII.S2 Powers

ArtII.S2.C1 Military, Administrative, and Clemency

ArtII.S2.C1.3 Pardons

ArtII.S2.C1.3.8 Congress's Role in Pardons

The Supreme Court has recognized that Congress cannot substantively limit the effect of a pardon through legislation. In *Ex parte Garland*, the Court held that the power of the President to pardon “is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions.”¹

In *United States v. Klein*, the Court voided a law that sought to bar the use of a pardon or amnesty as a substitute for proof of loyalty necessary to recover property abandoned and sold by the government during the Civil War.² The *Klein* Court held that the provision was an impermissible attempt to change the effect of pardons by requiring courts to “treat them as null and void,” i.e., to “disregard pardons . . . and to deny them their legal effect.”³ Over a century after *Klein*, in rejecting the proposition that a condition attached to clemency must be authorized by statute, the Court in *Schick v. Reed* reaffirmed that “the power [of clemency] flows from the Constitution alone, not from any legislative enactments, and . . . it cannot be modified, abridged, or diminished by the Congress.”⁴ The Supreme Court reaffirmed the President’s control over pardons again in 2024, describing the pardon power as one of the president’s “exclusive and preclusive” powers from which Congress is disabled from acting upon.⁵

Despite the Supreme Court’s rigid view of the limits of legislative authority over pardons, Congress may have a role to play in exercise of the pardon power through other legal and constitutional processes. For instance, there is historical precedent for Congress facilitating exercise of the power by funding positions in the Department of Justice to assist in considering clemency petitions.⁶ The Court in *The Laura* also upheld a statute vesting in a subordinate officer, the Secretary of the Treasury, the authority to remit fines or penalties provided for in laws related to steam-vessels, with exceptions, rejecting the argument that the law encroached on the President’s power to pardon based on precedent for the practice going back to England.⁷

¹ 71 U.S. 333, 380 (1866); see also *Ex parte Grossman*, 267 U.S. 87, 120 (1925) (“The executive can reprieve or pardon all offenses after their commission, either before trial, during trial or after trial, by individuals, or by classes, conditionally or absolutely, and this without modification or regulation by Congress.”).

² 80 U.S. 128, 143 (1871).

³ *Id.* at 148.

⁴ 419 U.S. 256, 266 (1974).

⁵ *Trump v. United States*, No. 23-939, slip op. at 8 (U.S. July 1, 2024) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637-38 (1952) (Jackson, J., concurring)).

⁶ See, Act of March 3, 1865, ch. 98, 13 Stat. 516 (authorizing Attorney General to employ and provide salary for “pardon clerk,” among others). In a concurring opinion in an otherwise-unrelated 1990 Supreme Court decision, Justice Byron White noted that statutory appropriations *restrictions* may fall if “they encroach on the powers reserved to another branch of the Federal Government,” using as an example a hypothetical effort by Congress to “impair the President’s pardon power by denying him appropriations for pen and paper.” Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 435 (1990) (White, J., concurring).

⁷ 114 U.S. 411, 412–414 (1885). In the latter case of *Brown v. Walker*, the Court upheld what was essentially an immunity statute for testimony given to the Interstate Commerce Commission, but in doing so suggested that Congress has “the power to pass acts of general amnesty[.]” 161 U.S. 591, 601 (1896). The Court has not

Beyond legislation, Congress has invoked its Article I authority to conduct oversight as a more indirect constraint on use of the pardon power,⁸ and the Supreme Court has alluded to the possibility of impeachment as a check on misuse of the power.⁹ Congress can also seek to amend the Constitution to clarify or constrain the President's clemency authority.¹⁰ These constitutional processes are subject to constraints, which are discussed in more detail in their respective annotations.¹¹

ArtII.S2.Cl.1.3.9 Presidential Self-Pardons

Whether Presidents may pardon themselves is an unresolved legal question for which there is no judicial precedent.¹ Some federal officials discussed the prospect of a self-pardon during the Nixon,² Clinton,³ and first Trump Administrations;⁴ however, no President has issued a self-pardon, and no federal court has directly addressed the matter.⁵ Legal scholars and commentators have debated the question and reached differing conclusions. Proponents of the view that the President may pardon himself often emphasize the lack of limitation in the constitutional language,⁶ as well as certain

revisited its suggestion that Congress has some degree of clemency authority parallel to the President's, though the validity of the suggestion has been disputed in other quarters. *See id.* at 609 (Field, J., dissenting) ("Congress cannot grant a pardon. That is an act of grace which can only be performed by the president."); Legislative Proposal to Nullify Criminal Convictions Obtained Under the Ethics in Government Act, 10 Op. O.L.C. 93, 94 (1986) ("[T]he Constitution gives Congress no authority to legislate a pardon for any particular individual or class of individuals[.]").

⁸ *See, e.g., Pardon of Richard M. Nixon, and Related Matters: Hearings Before the Subcomm. on Criminal Just. of the H. Comm. on the Judiciary*, 93d Cong. 90–151 (1974) (testimony of President Gerald Ford). The Department of Justice has, in the past, taken the position that instances of Executive Branch compliance with congressional requests for information regarding pardon decisions have been purely voluntary and are not indicative of congressional authority to review clemency decisions. *See* Letter from Janet Reno, Att'y Gen., to President Bill Clinton (Sept. 16, 1999) (quoted in H.R. REP. NO. 106-488 119–20 (1999)).

⁹ *Ex parte Grossman*, 267 U.S. 87, 121 (1925) (indicating that if the President ever sought to "deprive a court of power to enforce its orders" by issuing "successive pardons of constantly recurring contempts in particular litigation," such an "improbable" situation "would suggest a resort to impeachment, rather than a narrow and strained construction of the general powers of the President").

¹⁰ U.S. CONST. art. V.

¹¹ *See* ArtI.S2.C5.3 Impeachment Doctrine; ArtV.3.2 Congressional Proposals of Amendments.

¹ As discussed *infra*, there is some debate about the extent to which a self-pardon would be susceptible to judicial resolution. *See infra* note 12 and accompanying text. For background on methods of constitutional interpretation courts might apply if the matter were to come before the judiciary, *see* BRANDON J. MURRILL, CRS REPORT R45129, *MODES OF CONSTITUTIONAL INTERPRETATION* (2018).

² *See* Presidential or Legislative Pardon of the President, 1 Op. O.L.C. Supp. 370, 370 (1974) (opining during the Nixon Administration that a President may not pardon himself based on "the fundamental rule that no one may be a judge in his own case").

³ *Impeachment Inquiry: William Jefferson Clinton, President of the United States: Hearing Before the H. Comm. on the Judiciary*, 105th Cong. 358 (1998) (statement of Rep. Robert Goodlatte) ("The prevailing opinion is that the President can pardon himself.")

⁴ Donald J. Trump (@realDonaldTrump), X (June 4, 2018, 8:35 AM), <https://x.com/realDonaldTrump/status/1003616210922147841> ("As has been stated by numerous legal scholars, I have the absolute right to PARDON myself . . .").

⁵ *See* RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 108 (1999) ("There is no case law on the question, of course[.]").

⁶ *E.g., id.* ("[I]t has generally been inferred from the breadth of the constitutional language that the President can indeed pardon himself[.]"); Jonathan Turley, *Self-Pardons: A Response to Tribe, Painter, and Eisen*, RES IPSA LOQUITUR – THE THING ITSELF SPEAKS (July 23, 2017), <https://jonathanturley.org/2017/07/23/self-pardons-a-response-to-tribe-painter-and-eisen/> (noting that "the Constitution does not clearly limit the power of pardons beyond its use with regard to impeachment"); Robert Nida & Rebecca L. Spiro, *The President as His Own Judge and Jury: A Legal Analysis of the Presidential Self-Pardon Power*, 52 OKLA. L. REV. 197, 216 (1999) ("A

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historical views and pronouncements of the Supreme Court as to the breadth of the President's pardon power in general.⁷

By contrast, those asserting that the President lacks the power to pardon himself raise competing textual arguments⁸ and suggest that self-pardons could be inconsistent with other constitutional provisions, such as the Article I provision stating that officials convicted in an impeachment trial “shall . . . be liable and subject to Indictment, Trial, Judgment, and Punishment, according to law.”⁹ A Department of Justice Office of Legal Counsel opinion issued shortly before President Nixon's resignation concluded that the President cannot pardon himself “[u]nder the fundamental rule that no one may be a judge in his own case,”¹⁰ and some scholars subsequently have supported this opinion.¹¹ Even if a President were to pardon himself, there is some debate as to whether a court would issue a definitive ruling on the pardon's lawfulness given practical considerations and separation-of-powers concerns.¹² Some Members of Congress have introduced con-

textual interpretation of the Pardon Clause provides the strongest argument that a self-pardon is not prohibited by the Constitution.”).

⁷ E.g., Paul F. Eckstein & Mikaela Colby, *Presidential Pardon Power: Are There Limits and, If Not, Should There Be?*, 51 ARIZ. ST. L.J. 71, 100 (2019) (stating that the textual argument is “consistent with the Federalist papers” and “strong” given “the Supreme Court's view that the constitutional text gives the President plenary pardon power”); see also Jack Goldsmith, *A Smorgasbord of Views on Self-Pardoning*, LAWFARE (June 5, 2018), <https://www.lawfaremedia.org/article/smorgasbord-views-self-pardoning> (collecting views on both sides).

⁸ Eckstein & Colby, *supra* note 7, at 98 (acknowledging argument that the constitutional text establishes power to “grant” pardons, and “a grant is something given to another person”).

⁹ Laurence H. Tribe, Richard Painter, & Norman Eisen, *No, Trump Can't Pardon Himself: The Constitution Tells Us So*, WASH. POST (July 21, 2017), https://www.washingtonpost.com/opinions/no-trump-cant-pardon-himself-the-constitution-tells-us-so/2017/07/21/f3445d74-6e49-11e7-b9e2-2056e768a7e5_story.html (referencing U.S. CONST. art. I, § 3, cl. 7). Others argue that a self-pardon would conflict with the Article II requirement that the President “take Care that the Laws be faithfully executed,” e.g., Philip Bobbitt, *Self-Pardons: The President Can't Pardon Himself, So Why Do People Think He Can?*, LAWFARE (June 20, 2018), <https://www.lawfaremedia.org/article/self-pardons-president-cant-pardon-himself-so-why-do-people-think-he-can> (citing U.S. CONST. art. II, § 3), or with the Due Process Clauses of the Fifth and Fourteenth Amendments, Peter Brandon Bayer, *The Due Process Bona Fides of Executive Self-Pardons and Blanket Pardons*, 9 FAULKNER L. REV. 95, 157 (2017). See also Grant Tudor & Justin Florence, *The Self-Pardon Question is Coming*, LAWFARE (June 12, 2024), <https://www.lawfaremedia.org/article/the-self-pardon-question-is-coming> (laying out arguments against President's authority to issue self-pardon).

¹⁰ Presidential or Legislative Pardon of the President, 1 Op. O.L.C. Supp. 370, 370 (1974). The OLC opinion did allude to a “different approach” to pardons that “could be taken” and that, according to the opinion, would potentially circumvent any constitutional limitation on self-pardons: the President could declare a temporary inability to perform the duties of his office pursuant to the Twenty-Fifth Amendment, after which the Vice President could, as Acting President, pardon the President and then allow him to resume his duties or resign. *Id.* at 371. Furthermore, President Nixon apparently received advice from other members of his legal team that a self-pardon would be available to him. Nida & Spiro, *supra* note 6, at 212–13.

¹¹ See Tribe, Painter, & Eisen, *supra* note 9 (describing a “foundational case in the Anglo-American legal tradition” from 1610 in which it was held that a party “could not act as a court and a litigant in the same case”).

¹² See *Trump v. United States*, No. 23-939, slip op. at 7 (July 1, 2024) (describing the President's power to pardon in dicta as “conclusive and preclusive”); Goldsmith, *supra* note 7 (noting that a prosecutor would have to try to prosecute a former President, the President would then have to raise the pardon in defense, and the courts would then have to decide whether they could review the action); Eckstein & Colby, *supra* note 7, at 103–04 (asserting that the Supreme Court might view the constitutional validity of a presidential pardon as a nonjusticiable political question and might “also find separation of powers concerns” based on the notion that the pardon power “was originally enacted to serve as a check against the judicial branch of government”); but see Tudor & Florence, *supra* note 9 (arguing in the context of self-pardons that there are “ample procedural mechanisms that can put the legality of a pardon in front of” a court).

stitutional amendments that would preclude self-pardons, but no proposals have been adopted.¹³

ArtII.S2.C2 Advice and Consent

ArtII.S2.C2.1 Treaty-Making Power

ArtII.S2.C2.1.6 Interpreting Treaties

All three branches of government play a part in treaty interpretation. When analyzing a treaty for purposes of applying it as domestic law of the United States, U.S. courts have final authority to interpret the treaty’s meaning.¹ The Supreme Court has stated that its goal in interpreting a treaty is to discern the intent of the nations that are parties to the treaty.² The interpretation process begins by examining “the text of the treaty and the context in which the written words are used.”³ When a treaty provides that it is to be concluded in multiple languages, the Supreme Court has analyzed foreign language versions to help understand the treaty’s terms.⁴ The Court also considers the broader “object and purpose” of a treaty.⁵ In some cases, the Supreme Court examines extratextual materials, such as drafting history,⁶ the views of other state parties,⁷ and the post-ratification practices of other nations.⁸ But the Court has cautioned that consulting sources outside the text may not be appropriate when the treaty is unambiguous.⁹

In the context of treaties made with Indian Tribes, the Court has held that such treaties impose judicially enforceable duties on the federal government only when the treaties contain “specific rights-creating or duty-imposing” language.¹⁰ In *Arizona v. Navajo*

¹³ See, e.g., H.R.J. Res. 193, 118th Cong. § 2 (2024); H.R.J. Res. 77, 118th Cong. (2023); H.R.J. Res. 45, 117th Cong. (2021); H.R.J. Res. 13, 116th Cong. (2019); H.R.J. Res. 8, 116th Cong. (2019).

¹ See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–54 (2006) (“If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law ‘is emphatically the province and duty of the judicial department.’”) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)).

² See, e.g., *BG Grp., PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014); *Lozano v. Montoya Alvarez*, 572 U.S. 1, 11 (2014); *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 183 (1982); *Wright v. Henkel*, 190 U.S. 40, 57 (1903).

³ See, e.g., *Monasky v. Taglieri*, No. 18-935, slip. op. 1, 7 (U.S. Feb. 25, 2020) (quoting *Air France v. Saks*, 470 U.S. 392, 397 (1985)); *Water Splash, Inc. v. Menon*, No. 16-254, 581 U.S. 271, 272 (2017) (quoting *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699 (1988)); *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa*, 482 U.S. 522, 534 (1987).

⁴ See, e.g., *Water Splash*, No. 18-935, slip. op. at 7–8; *Schlunk*, 486 U.S. at 699. In one case, the Supreme Court changed its conclusion about the self-executing effect of a provision in an 1819 treaty with Spain after analyzing an authenticated Spanish-language version of the text. See *supra* ArtII.S2.C2.1.9 Effect of Treaties on the Constitution, at n.19.

⁵ See, e.g., *Abbott v. Abbott*, 560 U.S. 1, 20 (2010); *Sanchez-Llamas*, 548 U.S. at 347; *Société Nationale Industrielle Aérospatiale*, 482 U.S. at 530; *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 552 (1991).

⁶ See, e.g., *Monasky*, No. 18-935, slip. op. at 8–9; *Water Splash*, No. 18-935, slip. op. at 7–8; *Medellín v. Texas*, 552 U.S. 491, 507 (2008); *Air France*, 470 U.S. at 400; *Schlunk*, 486 U.S. at 700.

⁷ See, e.g., *Water Splash*, No. 18-935, slip. op. at 7–9; *Abbott*, 560 U.S. at 16; *Lozano*, 572 U.S. at 12; *Air France*, 470 U.S. at 404.

⁸ See, e.g., *Medellín*, 552 U.S. at 507; *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984).

⁹ See *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 (1989) (“We must thus be governed by the text—solemnly adopted by the governments of many separate nations—whatever conclusions might be drawn from the intricate drafting history that petitioners and the United States have brought to our attention. The latter may of course be consulted to elucidate a text that is ambiguous But where the text is clear, as it is here, we have no power to insert an amendment.”).

¹⁰ *Arizona v. Navajo Nation*, No. 21-1484, slip op. at 7 (U.S. June 22, 2023) (citing *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003)).

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Nation, the Court held that an 1868 treaty establishing a reservation and reserving water rights for the Navajo Nation did not impose judicially enforceable affirmative duties on the federal government to assess or secure those water rights.¹¹

The Executive Branch also plays a role in interpreting treaties, especially outside the context of domestic litigation and when operating in the realm of international affairs. The Executive Branch generally is responsible for carrying out treaties' requirements and determining whether other countries fulfill their obligations to the United States.¹² In performing this role, the Executive Branch often must interpret treaties' provisions and mandates.¹³ In addition, some questions of treaty interpretation may involve presidential discretion or otherwise may present "political questions" that are more appropriately resolved in the political branches than in the courts.¹⁴

Within the Executive Branch, the Department of Justice participates in treaty interpretation as part of its statutory responsibilities to provide legal opinions within the Executive Branch¹⁵ and represent the United States in litigation.¹⁶ The Department of State, which oversees treaty negotiations,¹⁷ often is able to provide authoritative interpretations based on its access to information about negotiating history and the views of treaty partners.¹⁸ Because the Executive Branch may have special insight into a treaty's meaning, the Supreme Court has stated that the Executive Branch's views are entitled to "great weight."¹⁹ But the Court has not adopted the Executive Branch's

¹¹ *Id.* at 2, 13.

¹² See CONG. RSCH. SERV., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, S. REP. NO. 106-71, at 12–13 (2001) [hereinafter TREATIES AND OTHER INTERNATIONAL AGREEMENTS] ("The executive branch has the primary responsibility for carrying out treaties and ascertaining that other parties fulfill their obligations after treaties and other international agreements enter into force The executive branch interprets the requirements of an agreement as it carries out its provisions."); Constitutionality of Legislative Provision Regarding ABM Treaty, 20 Op. O.L.C. 246, 248–49 (1996) (discussing the Executive Branch's view on the President's power over treaty interpretation and execution); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW §306 cmt. g (2018) ("Execution of a treaty requires interpretation, and the President often determines what a treaty means in the first instance.").

¹³ See *supra* note 12.

¹⁴ In *Charlton v. Kelly*, for example, the Supreme Court declined to decide whether Italy violated its extradition treaty with the United States, reasoning that, even if a violation occurred, the President "elected to waive any right" to respond to the breach by voiding the treaty. See 229 U.S. 447, 475 (1913). For discussion of *Charlton* and the political question doctrine, see ArtIII.S2.C1.9.1 Overview of Political Question Doctrine.

¹⁵ See 28 U.S.C. § 512 ("The head of an executive department may require the opinion of the Attorney General on questions of law arising in the administration of his department."). For background on the Department of Justice's advice-giving function, see ArtII.S2.C2.1.4 Self-Executing and Non-Self-Executing Treaties, at n.43.

¹⁶ See 28 U.S.C. § 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

¹⁷ See U.S. DEPT OF STATE, 11 FOREIGN AFFAIRS MANUAL § 724.1 (2006), <https://fam.state.gov/fam/11fam/11fam0720.html> ("Negotiations of treaties . . . are not to be undertaken, nor any exploratory discussions undertaken with representatives of another government or international organization, until authorized in writing by the Secretary [of State] or an officer specifically authorized by the Secretary for that purpose.").

¹⁸ See, e.g., *Lozano*, 572 U.S. at 21–22 (accepting the State Department's interpretation of the Hague International Child Abduction Convention); *Sumitomo Shoji Am.*, 457 U.S. at 184–85 (adopting the State Department's interpretation of a Treaty of Friendship, Commerce and Navigation between Japan and the United States); *Kolovrat v. Oregon*, 366 U.S. 187, 194–95 (1961) (examining the State Department's diplomatic notes and correspondence in examining an 1881 Treaty between the United States and Serbia for Developing Commercial Relations).

¹⁹ See *Water Splash*, No. 18-935, slip. op. at 7–8 (quoting *Abbott*, 560 U.S. at 15); *Medellín*, 552 U.S. at 513; *Sumitomo Shoji Am.*, 457 U.S. at 184–85; *Kolovrat*, 366 U.S. at 194.

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interpretation in every case.²⁰ And interbranch disputes may arise if the Executive Branch changes its interpretation and departs from the shared understanding of the executive and the Senate at the time of ratification.²¹

The Legislative Branch also influences treaty interpretation. The Senate may directly shape interpretation during the advice-and-consent process by making its consent to ratification conditioned upon a particular understanding of a treaty's terms.²² The President may not ratify a treaty unless he accepts the Senate's interpretation or the Senate agrees to withdraw it.²³ After the advice-and-consent process, however, the Senate's ability to influence treaty interpretation is more restrained. According to a 1901 Supreme Court decision, Senate resolutions that purport to interpret a treaty after ratification are "without legal significance" because the "meaning of the treaty cannot be controlled by subsequent explanations of some of those who may have voted to ratify it."²⁴ That said, the Legislative Branch may still play a role in treaty interpretation when it passes implementing legislation or other treaty-related laws.²⁵ For example, when treaties require countries to ensure certain actions are criminalized in domestic law, Congress might interpret the treaty during the legislative process when it defines

²⁰ See *BG Grp.*, 572 U.S. at 37 (construing a dispute resolution provision in an investment treaty between the United Kingdom and Argentina and concluding "[w]e do not accept the Solicitor General's view as applied to the treaty before us"); *Hamdan v. Rumsfeld*, 548 U.S. 557, 629–30 (2006) (declining to adopt the Executive Branch's interpretation of Common Article 3 of the 1949 Geneva Conventions).

²¹ For example, the Reagan Administration proposed to advance a new interpretation of the 1972 Treaty on the Limitation of Anti-Ballistic Missile Systems (ABM Treaty) with the Soviet Union that would have allowed the U.S. to test a space-based missile defense system. See generally *ABM Treaty Interpretation Dispute: Hearing Before the Subcomm. on Arms Control, Int'l Sec. & Sci. of the H. Comm. on Foreign Affs.*, 99th Cong. (1985); *Strategic Defense Initiative: Hearing Before the Subcomm. on Strategic & Theater Nuclear Forces of the S. Comm. on Armed Servs.*, 99th Cong. (1985); *ABM Treaty and the Constitution: Joint Hearings Before the S. Comm. on Foreign Rel. & the S. Comm. on the Judiciary*, 100th Cong. 81–105 (1987); Abraham D. Sofaer, *The ABM Treaty and the Strategic Defense Initiative*, 99 HARV. L. REV. 1972 (1986). Some in Congress argued that the new interpretation contradicted the shared understanding of the Executive Branch and the Senate when the ABM Treaty was ratified, and the Reagan Administration ultimately decided not to rely on its new interpretation. See TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra* note 12, at 128–29; John Yoo, *Politics As Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CAL. L. REV. 851, 860 (2001). Since this controversy, the Senate at times has conditioned its advice and consent to treaties on what has become known as the "Biden Condition," which provides that "the United States shall interpret the Treaty in accordance with the common understanding of the Treaty shared by the President and the Senate at the time the Senate gave its advice and consent to ratification." See, e.g., 134 CONG. REC. 12849 (1988).

²² See, e.g., 164 CONG. REC. S8052 (daily ed. Jan. 2, 2019) (providing the Senate's advice and consent to ratification of the U.N. Convention on Assignment of Receivables in International Trade conditioned on, among other things, the understanding that the treaty would not regulate securities); 143 CONG. REC. 22795 (1997) (resolution of advice and consent to the Constitution and Convention of the International Telecommunications Union conditioned on, among other things, the understanding that the treaty's reference to "geographical situation of particular countries" would not "imply a recognition of claim to any preferential rights to the geostationary-satellite orbit"). For discussion of the Senate's conditional consent authority and its ability to issue reservations, understandings, and declarations, see ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power.

²³ See ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power.

²⁴ See *The Diamond Rings*, 183 U.S. 176, 180 (1901).

²⁵ Accord LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 206 (2d ed. 1996) ("Congress . . . has occasion to interpret a treaty when it considers enacting implementing legislation, or other legislation to which the treaty might be relevant.").

the prohibited actions in U.S. law; determines appropriate punishments; and decides whether domestic law already prohibits the conduct.²⁶

ArtII.S3 Duties

ArtII.S3.5 Presidential Immunity

ArtII.S3.5.4 Criminal Prosecution, Presidential Immunity and Former Presidents

In *Trump v. United States*, the Supreme Court addressed how principles of presidential immunity apply to a criminal prosecution of a former president for actions taken while in office. The case concerned an indictment against former President Trump for allegedly attempting to overturn the results of the 2020 election. In evaluating President Trump’s claim that he was immune from prosecution, the Supreme Court announced a three-part framework for evaluating a former president’s immunity from criminal prosecution.

First, the Court held that former presidents are entitled to absolute immunity from criminal prosecution for actions within the “exclusive sphere” of their constitutional authority while in office.¹ Certain core presidential powers, such as granting pardons,² removing executive officers whom the president has appointed,³ and discussing potential investigations and prosecutions with the Justice Department, including those concerning “allegations of election crime,”⁴ are “exclusive and preclusive”—meaning that the other branches of government have no constitutional power to restrict them, the Court explained.⁵ For example, President Trump acted in this exclusive sphere of authority, the Court held, when he “allegedly attempted to leverage the Justice Department’s power and authority to convince certain States to replace their legitimate electors with Trump’s fraudulent slates of electors.”⁶ Because “the President cannot be prosecuted for conduct within his exclusive constitutional authority,”⁷ the Court explained, the former President is “absolutely immune from prosecution for the alleged conduct involving his discussions with Justice Department officials.”⁸

²⁶ For example, the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) requires countries to make torture and other defined offenses punishable by “appropriate” penalties in domestic law. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 4, Dec. 10, 1984, 23 I.L.M. 1027, 1465 U.N.T.S. 85 [hereinafter *Torture Convention*] (“Each State Party shall make these offences punishable by appropriate penalties which take into account their grave nature.”). The legislation implementing the Torture Convention appears to interpret this provision by making torture resulting in death a capital offense and torture that does not result in death punishable by imprisonment up to 20 years. 18 U.S.C. § 2340A(a).

¹ *Trump v. United States*, No. 23-939, slip op. at 9.

² *Id.* at 7-8.

³ *Id.* at 8.

⁴ *Id.* at 20.

⁵ *Id.* at 8 (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 638 (1952) (Jackson, J., concurring)). See also *id.* at 19 (“The Government does not dispute that the indictment’s allegations regarding the Justice Department involve Trump’s ‘use of official power.’ The allegations in fact plainly implicate Trump’s ‘conclusive and preclusive’ authority. ‘[I]nvestigation and prosecution of crimes is a quintessentially executive function.’”) (citations omitted).

⁶ *Id.* at 19.

⁷ *Id.* at 21.

⁸ See *id.* The Court explained: “The indictment’s allegations that the requested investigations were ‘sham[s]’ or proposed for an improper purpose do not divest the President of exclusive authority over the investigative

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The second facet of the framework addresses conduct that falls outside of the exclusive sphere of presidential power but still constitutes an official act by the President.⁹ Although not protected in the same manner as core executive powers, such official acts may still be protected by immunity, the Court reasoned, in order to safeguard the independence and effectiveness of the presidency and to enable presidents to perform their constitutional responsibilities without being overly cautious or concerned with future prosecutions.¹⁰ Official acts are “at least presumptively immune” from criminal prosecution,¹¹ the Supreme Court held, unless the government can show that prosecuting a former President in that instance “would pose no ‘dangers of intrusion on the authority and functions of the Executive Branch.’”¹² The Court held that President Trump’s official acts included his alleged attempt to pressure the former Vice President to take certain acts in connection with certifying the electoral vote count, and the Court remanded for lower courts to determine whether the United States could rebut the presumption that immunity applied to those acts.¹³

Finally, the Supreme Court held that former presidents do not have immunity for their unofficial acts.¹⁴ The Court observed that the process of “[d]istinguishing the President’s official acts from his unofficial can be difficult[,]”¹⁵ especially in the context of the former President’s public communications on social media and in a public speech.¹⁶ Because the official acts analysis requires a fact-specific evaluation that lower courts did not conduct, the Supreme Court remanded the case for further consideration on whether certain activity qualifies as official or unofficial.¹⁷

Although the Supreme Court left questions of immunity unresolved in *Trump v. United States*, it did definitively address President Trump’s argument that a former President can only be prosecuted after being impeached in the House and convicted in the Senate.¹⁸ The Supreme Court rejected the view that impeachment is a prerequisite to a criminal conviction, reasoning that transforming the political process of impeachment into an essential first step in a criminal prosecution did not have support in the Constitution’s text or the structure of the United States government.¹⁹

ArtII.S4 Impeachment

ArtII.S4.2 Offices Eligible for Impeachment

The Constitution provides that “[t]he President, Vice President, and all civil Officers of the United States” are subject to removal from office upon impeachment and convic-

and prosecutorial functions of the Justice Department and its officials. And the President cannot be prosecuted for conduct within his exclusive constitutional authority.” *Id.* (citations omitted).

⁹ See *id.* at 9.

¹⁰ *Id.* at 12-15.

¹¹ *Id.* at 23, 36.

¹² *Id.* at 14 (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982)).

¹³ *Id.* at 23-24.

¹⁴ *Id.* at 15.

¹⁵ *Id.* at 17.

¹⁶ *Id.* at 28-30.

¹⁷ *Id.* at 28.

¹⁸ *Id.* at 32-34.

¹⁹ *Id.* at 34.

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tion.¹ However, neither the text nor early historical sources precisely delineate *who qualifies* as a “civil officer.” For example, debates at the Constitutional Convention do not appear to reveal the scope of who may be impeached beyond the provision’s applicability to the President.² And while the *Federalist Papers* emphasized that the power of impeachment serves as a check on the Executive³ and Judicial Branches,⁴ they did not outline exactly what types of officials were considered to be civil officers.⁵

Historical practice thus informs the understanding of who qualifies as a civil officer. Aside from the President and Vice President, who are plainly identified in the Constitution’s text as impeachable officials, historical practice indicates that federal judges clearly qualify as officers subject to impeachment and removal, as the majority of proceedings have applied to those positions.⁶ Congress has also impeached the head of a cabinet-level Executive department.⁷ While this indicates a congressional understanding that high-level Executive officers may be subject to impeachment, it is unclear how far down the ranks of the federal bureaucracy this principle travels.⁸

The second impeachment trial of President Donald Trump centered on the question of whether former officials remain subject to trial by the Senate after leaving office. There is historical evidence to support an original understanding that former officials remain subject to conviction and punishment by the Senate for actions taken while in office.⁹ The constitutional text, however, does not directly address the question. Former President Trump’s attorneys viewed the Constitution’s command that “[t]he President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment . . . and Conviction,” as supporting a requirement that the impeachment

¹ U.S. CONST. art. II, § 4.

² Statements from at least one delegate indicate that participants at the Constitutional Convention assumed that judges were subject to impeachment. *See* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66 (Max Farrand ed., 1911) (describing Rufus King’s observation that judges would be impeachable because they hold their office during good behavior).

³ THE FEDERALIST NO. 66 (Alexander Hamilton).

⁴ *Id.* at No. 79; *Id.* at No. 81; *see generally* ArtIII.S1.10.2.1 Overview of Good Behavior Clause.

⁵ *See, e.g.*, VA. CONST. OF 1776, ¶ 14 (providing that the chief executive of the state could only be impeached after leaving office); DEL. CONST. OF 1776 art. 23 (same).

⁶ *See List of Individuals Impeached by the House of Representatives*, U.S. HOUSE OF REPRESENTATIVES, <http://history.house.gov/Institution/Impeachment/Impeachment-List/> (last visited June 7, 2023).

⁷ *See* 3 ASHER C. HINDS, HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES §§ 2444–68 (1907) [hereinafter HINDS]; *see infra* ArtII.S4.4.5 Jurisprudence on Impeachable Offenses (1865–1900).

⁸ Judicial interpretations of which positions qualify as officers under the Appointments Clause may shed light on which Executive Branch positions are filled by civil officers that are subject to impeachment. *See* Akhil Reed Amar, *On Impeaching Presidents*, 28 HOFSTRA L. REV. 291, 303 (1999); Michael J. Broyde & Robert A. Schapiro, *Impeachment and Accountability: The Case of the First Lady*, 15 CONST. COMMENT. 479 (1998). The Supreme Court, in interpreting those provisions, has distinguished between officers, who exercise “significant authority” of the United States, *Buckley v. Valeo*, 424 U.S. 1, 126 (1976), and employees, or non-officers who are “lesser functionaries subordinate to the officers of the United States.” *Id.* at 126 n.162. The Court has further recognized the Constitution’s distinction between principal officers, who must be appointed by the President and confirmed by the Senate, and inferior officers, whose appointment may be placed in the President, department heads, or the courts of law. *Edmond v. United States*, 520 U.S. 651, 663 (1997). Assuming this line of cases serves as a guide in deciding who is a civil officer subject to impeachment, it appears that “employees”, as non-officers, are not subject to impeachment, while principal officers, such as the head of a cabinet-level Executive department, are. In between these two categories, historical practice does not indicate whether an inferior officer is subject to impeachment, as the House has never impeached such an individual.

⁹ For a historical and textual interpretation of whether a former official is subject to trial for impeachment, *see* JARED P. COLE & TODD GARVEY, CONG. RSCH. SERV., LSB10565, THE IMPEACHMENT AND TRIAL OF A FORMER PRESIDENT (2021).

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process applies only to officials who are holding office during the impeachment proceedings.¹⁰ Justice Joseph Story, in his influential *Commentaries on the Constitution of the United States*, similarly argued that “the language of the constitution may create some doubt, whether [disqualification] can be pronounced without being coupled with a removal from office.”¹¹ Moreover, to extend the impeachment process to former officials could be viewed as in tension with the Constitution’s otherwise clear break from the British model, which permitted impeachment of private citizens.¹²

But it has also been argued, including by the House managers in the second Trump trial, that the constitutionally enumerated punishments of removal from office and disqualification from future office are distinct components of the remedy for impeachable misconduct.¹³ The fact that an official has left office, and is therefore no longer subject to removal, does not “exempt” them from the remaining penalty of disqualification.¹⁴ Moreover, if impeachment does not extend to officials who are no longer in office, then an important aspect of the impeachment punishment would be lost as Congress could never bar an official from holding office in the future as long as that individual resigns at some point prior to a Senate conviction.¹⁵

While these interpretive arguments have, and likely will continue to be raised, the Senate has determined by majority vote on multiple occasions that they retain the power to proceed against an Executive Branch official who has resigned from office. These decisions span from the trial of former Secretary of War William Belknap in 1876 to former President Trump in 2020.¹⁶ Nevertheless, it appears that while Congress may have legal authority to impeach and try a former official, current disagreement on the matter may be widespread enough to create a practical obstacle to obtaining the supermajority necessary to convict a former official.

The Constitution’s structure and historical practice also indicate that impeachment likely does not apply to Members of Congress.¹⁷ First, Article II, Section 3 provides that officers of the United States are commissioned by the President;¹⁸ Members of Congress receive no such commission. Second, Members may be removed from office by other means explicitly provided in the Constitution.¹⁹ Third, the Ineligibility Clause bars any

¹⁰ U.S. CONST. art. II § 4; PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART II, S. DOC. NO. 117-2, 117th Cong. 122–32 (2021).

¹¹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 801 (1833).

¹² *Id.* at § 788.

¹³ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART I, S. DOC. NO. 117-2, 117th Cong. 70–97 (2021).

¹⁴ PROCEEDINGS OF THE UNITED STATES SENATE IN THE IMPEACHMENT TRIAL OF DONALD JOHN TRUMP, PART III, S. DOC. NO. 117-2, 117th Cong. 101 (2021).

¹⁵ *Id.* at 191.

¹⁶ See COLE & GARVEY, *supra* note 9 (discussing the Senate’s decision to exercise jurisdiction in the Belknap impeachment); 167 CONG. REC. S609 (daily ed. Feb. 9, 2021).

¹⁷ See ART.II.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860); THE FEDERALIST NO. 66 (Alexander Hamilton).

¹⁸ U.S. CONST. art. II, § 3.

¹⁹ *Id.* art. I, § 5.

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person “holding any office under the United States” from serving in any house of Congress, indicating the Members of Congress are not considered officers of the United States.²⁰

Finally, congressional practice indicates that Members of Congress are not officers of the United States.²¹ In 1797, the House of Representatives voted to impeach Senator William Blount, the first impeachment in the history of the young Republic.²² Two years later, the Senate concluded that Senator Blount was not a civil officer subject to impeachment and voted to dismiss the articles because that body lacked jurisdiction over the matter.²³ This determination has been accepted ever since by the House and the Senate, and since then, the House has never again voted to impeach a Member of Congress.²⁴

²⁰ *Id.* § 6.

²¹ See DEP’T OF JUST., OFF. OF LEGAL COUNS., LEGAL ASPECTS OF IMPEACHMENT: AN OVERVIEW 55 n.31 (1974) (“The Senator William Blount precedent of 1798 does seem to have determined that the Senate will not try its members on an impeachment.”); DAVID CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD 1789–1801 275–281 (1997).

²² 3 HINDS, *supra* note 7, at §§ 2300–02.

²³ *Id.* at § 2318.

²⁴ See CHARLES W. JOHNSON, JOHN V. SULLIVAN, AND THOMAS J. WICKHAM, JR., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE 604–06 (2017); STAFF OF H. COMM. ON THE JUDICIARY, 93D CONG., IMPEACHMENT, SELECTED MATERIALS 692 (Comm. Print 1973); *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1373 (Fed. Cir. 2006) (“This principle has been accepted since 1799, when the Senate, presented with articles of impeachment against Senator William Blount, concluded after four days of debate that a Senator was not a civil officer for purposes of the Impeachment Clause.”); MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 48 (2000). In addition, in contrast to English practice, impeachment does not extend to private citizens or state officers, but is limited to officers of the federal government. 3 HINDS, *supra* note 7, at §§ 2007, 2315. No military officer has ever been impeached, which is consistent with the views of some early constitutional commentary that military officers are not subject to impeachment. Justice Joseph Story has suggested that “civil officers” was not intended to cover military officers. See 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 789 (1833) (concluding that “[t]he sense, in which [civil] is used in the Constitution, seems to be in contradistinction to military, to indicate the rights and duties relating to citizens generally, in contradistinction to those of persons engaged in the land or naval service of the government”).

ARTICLE III

JUDICIAL BRANCH

ArtIII.S2 Justiciability

ArtIII.S2.C1 Cases or Controversies

ArtIII.S2.C1.6 Standing

ArtIII.S2.C1.6.1 Overview of Standing

The concept of “standing” broadly refers to a litigant’s right to have a court rule upon the merits of particular claims for which he seeks judicial relief.¹ The Supreme Court has held that, as a threshold procedural matter,² a litigant must have standing in order to invoke the jurisdiction of a federal court so that the court may exercise its “remedial powers on his behalf.”³ In general, for a party to establish Article III standing, he must allege (and ultimately prove) that he has a genuine stake in the outcome of the case because he has personally suffered (or will imminently suffer): (1) a concrete and particularized injury; (2) that is traceable to the allegedly unlawful actions of the opposing party; and (3) that is redressable by a favorable judicial decision.⁴ These requirements seek to ensure that federal courts do not exceed their Article III power to decide actual “cases” or “controversies.”⁵

The Court has held that the burden of establishing standing falls upon each party who seeks a distinct form of judicial relief,⁶ including a party initiating a lawsuit,⁷ inter-

¹ *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (“In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues.”); BLACK’S LAW DICTIONARY 1536 (9th ed. 2009) (defining “standing” as “a party’s right to make a legal claim or seek judicial enforcement of a duty or right”).

² Federal courts must necessarily resolve standing inquiries before proceeding to the merits of a lawsuit. *See, e.g.*, *Davis v. FEC*, 554 U.S. 724, 732 (2008). In fact, a court may raise the issue of standing *sua sponte* (i.e., of its own accord) in order to ensure that it has jurisdiction, even if no party to the lawsuit contests standing. *See, e.g.*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001) (*per curiam*). Although the Supreme Court must examine a litigant’s standing when the lower court has erroneously assumed that standing exists, it will not investigate standing *sua sponte* in order to rule upon an issue that a lower court denied the litigant standing to bring before the court. *Id.*

³ *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976) (quoting *Warth*, 422 U.S. at 498–99). *See also Davis*, 554 U.S. at 732; *Simon*, 426 U.S. at 37 (“No principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. The concept of standing is part of this limitation.”) (citation omitted); *Warth*, 422 U.S. at 498–99 (“In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a ‘case or controversy’ between himself and the defendant within the meaning of Art. III.”). The Court has occasionally invoked the English common law tradition as supporting its inquiry into a litigant’s standing. *See, e.g.*, *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 132 (2011) (“In the English legal tradition, the need to redress an injury resulting from a specific dispute taught the efficacy of judicial resolution and gave legitimacy to judicial decrees. . . . The Framers paid heed to these lessons.”).

⁴ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (listing the elements of standing). For further discussion on the elements of Article III standing, see ArtIII.S2.C1.6.4.1 Overview of Lujan Test.

⁵ *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 102 (1998) (“Article III, § 2, of the Constitution extends the ‘judicial Power’ of the United States only to ‘Cases’ and ‘Controversies.’ We have always taken this to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process.”).

⁶ The Supreme Court has indicated that if one party to a lawsuit has standing, other entities can join as parties without having to satisfy independently the demands of Article III, provided those parties do not seek a distinct form of relief from the party with standing. *E.g.*, *Horne v. Flores*, 557 U.S. 433, 446 (2009) (determining that, because a school superintendent had standing to challenge lower court decisions in which he was named a defendant, the Court did not need to consider whether interveners, who were state legislators, had standing); *Davis*, 554 U.S. at 724 (requiring a litigant to have standing for each form of relief sought); *Rumsfeld v. Forum for Acad. & Instt. Rts., Inc.*, 547 U.S. 47, 52 n.2 (2006) (“[T]he presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.”); *Director v. Perini N. River Assocs.*, 459 U.S. 297, 305 (1983) (stating that a justiciable controversy existed because an injured employee who sought coverage under the Longshoremen’s and Harbor Workers’ Compensation Act was a party respond-

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vening in a lawsuit,⁸ or appealing a lower court decision.⁹ Each of these parties must make an appropriate showing during each stage of the litigation¹⁰ that the elements of injury, causation, and redressability existed at the outset of the lawsuit, and continue to exist,¹¹ for each claim¹² and for each form of relief sought.¹³ A litigant's failure to establish standing to sue may result in dismissal of his distinct claims for relief without a decision on the merits of those claims.¹⁴

ent before the court and had standing, and thus there was no need to determine whether the Director of the Office of Workers' Compensation Programs, as the official responsible for administration and enforcement of the Act, had standing).

⁷ *FW/PBS Inc. v. Dallas*, 493 U.S. 215, 231 (1990) (“[P]etitioners in this case must allege . . . facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing.”) (citations and internal quotation marks omitted).

⁸ A party seeking to intervene in a lawsuit (i.e., seeking to join a lawsuit already in progress) as a matter of right must have Article III standing to seek judicial relief that differs from that sought by the other litigants with standing. *Town of Chester v. Laroe Estates, Inc.*, No. 16-605, slip op. at 6 (U.S. June 5, 2017); *Wittman v. Personhuballah*, 578 U.S. 539, 543 (2016).

⁹ *Diamond v. Charles*, 476 U.S. 54, 56 (1986).

The Supreme Court also addressed standing on appeal in a 2011 case in which government employees that had obtained a favorable judgment on the basis of qualified immunity sought to appeal a lower court's ruling that their conduct had violated the Constitution. The Court held that these officials had Article III standing because they had a personal stake in seeing the ruling overturned, as its mere existence could lead to the risk of future liability for them. *Camreta v. Greene*, 563 U.S. 692, 703 (2011) (“If the official regularly engages in that conduct as part of his job . . . he suffers injury caused by the adverse constitutional ruling. So long as it continues in effect, he must either change the way he performs his duties or risk a meritorious damages action.”).

Standing on appeal may also be based on an alleged injury arising from the decision below—for example, where the lower court had ordered the appealing party to comply with a government demand that would injure that party, and overturning the lower court's decision would redress the injury by absolving the appealing party of an obligation to comply with the demand. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, No. 19-7 slip op. at 9 (U.S. June 29, 2020) (stating that a petitioner had “appellate standing” where the petitioner suffered a concrete injury that was “traceable to the decision below” and could be redressed by the Court). *See also West Virginia v. Env't Prot. Agency*, No. 20-1530, slip op. at 14 (U.S. June 30, 2022).

¹⁰ *Hollingsworth v. Perry*, 570 U.S. 693 (2013); *Davis*, 554 U.S. at 734 (“[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief sought. . . . While the proof to establish standing increases as the suit proceeds, the standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.”) (citations and internal quotation marks omitted). *See also Nat'l Org. for Women v. Scheidler*, 510 U.S. 249, 255–56 (1994) (observing that, at the pleading stage, the plaintiff may have standing sufficient to withstand a motion to dismiss if he sets “forth general factual allegations of injury resulting from the defendant's conduct”) (citation omitted); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (noting that the plaintiff's burden of proof on the standing issue differs depending on whether the case is at the pleading stage, the plaintiff is responding to a motion for summary judgment, or the case has gone to trial).

¹¹ *Davis*, 554 U.S. at 732–33 (“[I]t is not enough that the requisite interest exist at the outset. ‘To qualify as a case fit for federal-court adjudication, an actual controversy must be extant at all stages of review, not merely at the time complaint is filed.’” (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997))). If an injury no longer exists as the litigation progresses, the court may also lack jurisdiction under the related doctrine of mootness. *See* ArtIII.S2.C1.8.1 Overview of Mootness Doctrine to ArtIII.S2.C1.8.9 Class Action Litigation and Mootness.

¹² *Davis*, 554 U.S. at 734 (“[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief sought.”) (internal quotation marks omitted).

¹³ *See, e.g., Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983) (“Lyons fares no better if it be assumed that his pending damages suit affords him Art. III standing to seek an injunction as a remedy for the claim arising out of the October 1976 events. The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again . . .”).

¹⁴ *E.g., Warth v. Seldin*, 422 U.S. 490, 502 (1975) (stating that if “the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed”). *But see Gill v. Whitford*, No. 16-1161, slip op. at 21 (U.S. June 18, 2018) (declining to direct dismissal of a partisan gerrymandering case that involved “an unsettled kind of claim . . . the contours and justiciability of which are unresolved” and, therefore, remanding the case for further proceedings).

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Since the 1920s, the Supreme Court has offered various justifications for these somewhat amorphous¹⁵ constitutional limitations on the categories of litigants who can maintain a claim for judicial relief in an Article III federal court.¹⁶ Perhaps the most frequently cited rationale derives from the Constitution's separation of powers among the branches of government.¹⁷ Issues of standing often arise when a private plaintiff sues the government, seeking to have it act in accordance with the Constitution or other law.¹⁸ But, as the Court has frequently noted, the Constitution makes the political branches—and not the courts—responsible for “vindicating the public interest.”¹⁹ As a result, unelected judges lack the authority to render advisory opinions as to whether Congress or the Executive has followed the law; they may only decide a specific case brought before the court by a party that has suffered a particularized injury as a result of the government's actions.²⁰ Such deference to the political branches, particularly in cases raising questions about the separation of powers,²¹ reflects the Court's under-

¹⁵ As discussed below, the Court's standing jurisprudence has been inconsistent in approach over the years. See ArtIII.S2.C1.6.3 Standing Doctrine from 1940s to 1970s.

¹⁶ Although the Supreme Court has often stated that the standing inquiry focuses on whether the plaintiff is a proper party to maintain a claim for a particular form of judicial relief in federal court and not on the “issues he wishes to have adjudicated,” the Court has acknowledged the difficulty in separating the plaintiff's status from the nature of his claims when applying principles of standing. Compare *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 38 (1976) (“[S]tanding focuses on the party seeking to get his complaint before a federal court and not on the issues he wished to have adjudicated.” (quoting *Flast v. Cohen*, 392 U.S. 83, 99 (1968) (internal quotation marks omitted))), with *Allen v. Wright*, 468 U.S. 737, 752 (1984) (“Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.”).

¹⁷ *E.g.*, *Lujan*, 504 U.S. at 576. *FDA v. All. for Hippocratic Med.*, No. 23-235, slip op. at 5-6 (U.S. June 13, 2024).

¹⁸ See, e.g., *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222-23 (1974) (holding that an association of officers and enlisted members of the military reserves, as well as individual members, lacked standing to sue as taxpayers in a case arguing that the Incompatibility Clause of Article I forbid certain Members of Congress from holding commissions in the Armed Forces Reserve). Issues of standing may also arise in cases in which a litigant sues a private party under a law providing for a private right of action against a private defendant. *E.g.*, *Spokeo Inc., v. Robins* 578 U.S. 330, 342 (2016).

¹⁹ *Lujan*, 504 U.S. at 576 (“Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive.”); *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923) (“We have no power per se to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the power exercised is that of ascertaining and declaring the law applicable to the controversy.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803). When reviewing administrative action or inaction of federal agencies, courts must be wary of intruding upon the President's duty under Article II, Section 3 of the Constitution to “take Care that the Laws be faithfully executed” by ordering the Executive to follow the law. *Lujan*, 504 U.S. at 577 (citing U.S. Const. art. II, § 3).

The Court has adhered to the standing doctrine even in cases in which no party exists who would have standing to challenge government action or inaction in the courts, noting that the political process is available to those seeking to vindicate generalized grievances. *United States v. Richardson*, 418 U.S. 166, 179 (1974).

²⁰ See *supra* note 19. See also *Hollingsworth v. Perry*, 570 U.S. 693, 693–94 (2013) (characterizing the standing requirement as “an essential limit on [the Court's] power: It ensures that we act as *judges*, and do not engage in policymaking properly left to elected representatives.”). For more on Article III's bar on advisory opinions and its relationship to standing doctrine, see ArtIII.S2.C1.4.1 Overview of Advisory Opinions.

²¹ *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408–09 (2013) (“The law of Article III standing, which is built on separation of powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches.”); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) (“The judicial power of the United States defined by Art. III is not an unconditional authority to determine the constitutionality of legislative or executive acts.”); *id.* at 474 (“Proper regard for the complex nature of our constitutional structure requires neither that the Judicial Branch shrink from a confrontation with the other two coequal branches of the Federal Government, nor that it hospitably accept for adjudication claims of constitutional violation by other branches of government where the claimant has not suffered cognizable injury.”). Thus, the Court applies the standing requirements most stringently when

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standing of the “limited . . . role of the courts in a democratic society,”²² as well as its determination that federal courts should hear only those types of cases that the English judicial system would historically have considered suitable for judicial resolution.²³ And separation of powers concerns have also motivated the Court’s conclusion that Article III limits Congress’s ability to confer standing on plaintiffs to sue the government by enacting statutes containing “citizen-suit” provisions.²⁴ Such case law has reasoned that permitting plaintiffs who do not have a personal and direct stake in the outcome of a case to sue under one of these provisions would effectively allow the Legislative Branch to intrude upon the Executive Branch’s duty to enforce the law.²⁵

Although standing doctrine is grounded primarily in constitutional separation of powers concerns, the Supreme Court has also cited other rationales for its existence that may not be constitutional in nature. Requiring the litigant to have a personal stake in the outcome of his lawsuit ensures that a court will decide complex legal and factual issues in the context of a specific factual situation involving adverse parties who can more clearly illuminate for judges the issues in dispute.²⁶ Even in cases in which adversity between the parties exists, standing doctrine seeks to ensure that federal courts will not

litigants challenge the constitutionality of an action or omission by one or both of the political branches of government. *Raines v. Byrd*, 521 U.S. 811, 819–20 (1997) (“[O]ur standing inquiry has been especially rigorous when reaching the merits of the dispute would force us to decide whether an action taken by one of the other two branches of the Federal Government was unconstitutional.”); *Flast v. Cohen*, 392 U.S. 83, 100, 101 (1968) (“The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated.”). The Court later stated that “*Flast* failed to recognize that [standing] doctrine has a separation of powers component, which keeps courts within certain traditional bounds vis-a-vis the other branches . . .” *Lewis v. Casey*, 518 U.S. 343, 353 n.3 (1996). In the Court’s early years, Chief Justice John Marshall noted that if federal courts could hear “every question under the Constitution,” rather than traditional “cases” or “controversies,” then federal courts would have jurisdiction over many issues that should be the subject of legislative discussion and decision. 4 PAPERS OF JOHN MARSHALL 95 (Charles Cullen ed., 1984) (“If the judicial power extended to every *question* under the Constitution it would involve almost every subject proper for legislative discussion and decision; if to every *question* under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and the other departments would be swallowed up by the judiciary.”). The French sociologist and political theorist Alexis de Tocqueville once noted the benefits of the U.S. federal judiciary’s requirement that a litigant have a direct stake in the outcome of legal proceedings to maintain a lawsuit, stating that: “It will be seen, also, that by leaving it to private interest to censure the law, and by intimately uniting the trial of the law with the trial of an individual, legislation is protected from wanton assaults and from the daily aggressions of party spirit. The errors of the legislator are exposed only to meet a real want; and it is always a positive and appreciable fact that must serve as the basis of a prosecution.” 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 102 (Philips Bradley, ed., 1945).

²² *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 133 (2011) (“Continued adherence to the case-or-controversy requirement of Article III maintains the public’s confidence in an unelected but restrained Federal Judiciary.”).

²³ *Spokeo*, 578 U.S. at 337 (“Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy.”); *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (“In limiting the judicial power to ‘Cases’ and ‘Controversies,’ Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law.”).

²⁴ *Lujan*, 504 U.S. at 577.

²⁵ *Id.* (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an ‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed.’”) (quoting U.S. CONST. art. II, § 3).

²⁶ *Baker v. Carr*, 369 U.S. 186, 204 (1962) (stating that the parties invoking the court’s jurisdiction must have “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which

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exercise the judicial power, which can significantly affect the lives, liberty, and property of others, to resolve generalized grievances brought primarily for the benefit of “concerned bystanders” who seek to vindicate abstract ideological interests (for example, a general interest in the protection of the environment is insufficient to confer standing).²⁷ More practical reasons for the standing requirements include a need to reserve the limited resources of the federal courts for concrete disputes;²⁸ the sweeping precedential effects of the Court’s holdings on the merits in constitutional litigation, which can be difficult, if not impossible, for Congress to alter without amending the Constitution;²⁹ and a need for the court to fashion relief no more broadly than the litigant’s situation requires.³⁰

The Supreme Court has also previously recognized certain *prudential* limitations on the exercise of federal courts’ jurisdiction, which, although lacking constitutional status, may nonetheless result in a court’s refusal to hear a case: (1) when the litigant seeks to assert the rights of third parties not before the court; (2) when the litigant seeks redress for a generalized grievance widely shared by a large number of citizens; and (3) when the litigant challenges government action or inaction and its asserted interests do not fall within the zone of interests arguably protected or regulated by the statute or constitutional provision underlying its claims.³¹

In recent years, however, the Court has questioned the basis of the doctrine of prudential standing.³² The Court has suggested that the bar on generalized grievances is a constitutional (and not prudential) requirement.³³ Moreover, the Court likewise has determined that a court applying the “zone of interests” test should examine whether the plaintiff’s claim falls within the scope of a statutory provision creating a cause of

sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.”).

²⁷ *United States v. SCRAP*, 412 U.S. 669, 687 (1973) (stating that the injury-in-fact requirement of standing “prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of concerned bystanders”). *See also* *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009) (“While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice.”); *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *Valley Forge Christian Coll.*, 454 U.S. at 472–73 (“[The standing requirement] tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action. . . . The [Article III] aspect of standing also reflects a due regard for the autonomy of those persons likely to be most directly affected by a judicial order.”). *FDA v. All. for Hippocratic Med.*, No. 23-235, slip op. at 5-6 (U.S. June 13, 2024) (“For a plaintiff to get in the federal courthouse door and obtain a judicial determination of what the governing law is, the plaintiff cannot be a mere bystander . . .”).

²⁸ *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 191 (2000) (“Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake.”).

²⁹ *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 146 (2011) (“Making the Article III standing inquiry all the more necessary are the significant implications of constitutional litigation, which can result in rules of wide applicability that are beyond Congress’s power to change.”).

³⁰ *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

³¹ *United States v. Windsor*, 570 U.S. 744, 760 (2013) (“Even when Article III permits the exercise of federal jurisdiction, prudential considerations demand that the Court insist upon ‘that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.’”) (quoting *Baker*, 369 U.S. at 204); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (listing the three types of prudential restraints); *Gladstone v. Village of Bellwood*, 441 U.S. 91, 99–100 (1979).

³² *Lexmark Int’l Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 127 n.3 (2014).

³³ *Id.*

action.³⁴ Furthermore, Congress, through express legislation, may abrogate these prudential standing requirements, to the extent that they remain viable and are not mandated by the Constitution.³⁵

The following essays trace the development of Article III standing doctrine in Supreme Court jurisprudence from its origins in the 1920s to the development of the modern doctrine and its key elements of injury, causation, and redressability. They then examine select topics that implicate the doctrine, including cases in which a plaintiff seeks to maintain standing to challenge government action or inaction by relying solely upon his status as a taxpayer, as well as the various forms of representational standing that a litigant who has not himself sustained injury may rely upon when asserting the rights of people not before the court. Finally, they conclude with an overview of standing for Members of Congress, congressional control of standing, and what remains of the concept of prudential standing.³⁶

ArtIII.S2.Cl.1.6.4 *Lujan v. Defenders of Wildlife* Test

ArtIII.S2.Cl.1.6.4.2 Concrete Injury

First, to have an injury-in-fact, a litigant must establish that he has suffered or is imminently threatened with a concrete injury—that is, an injury that is “real” and not “abstract.”¹ Although the Supreme Court has not clearly articulated what makes a particular harm sufficiently “concrete” for standing purposes, it has provided some broad guidance. Over the years, the Court has decided several cases that explain the general types of injuries that qualify as concrete.² Many of these cases required the Justices to

³⁴ *Id.*

³⁵ *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (“Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules.”).

³⁶ Federal rules for standing do not apply in state courts, which may have their own rules not addressed in this essay. *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution or . . . a federal statute.”). However, when a state court enters a judgment in a case in which the plaintiffs would not have had standing had they brought the case in federal court, a party may have standing to appeal that judgment in federal court if the judgment rests upon an allegedly incorrect interpretation of federal law and causes the appellant direct injury. *Id.* at 623–24 (“When a state court has issued a judgment in a case where plaintiffs in the original action had no standing to sue under the principles governing the federal courts, we may exercise our jurisdiction on certiorari if the judgment of the state court causes direct, specific, and concrete injury to the parties who petition for our review, where the requisites of a case or controversy are also met.”) (citations omitted).

¹ *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016).

² *See, e.g., Food Mktg. Inst. v. Argus Leader Media*, No. 18-481, slip op. at 4–5 (U.S. June 24, 2019) (holding that the U.S. Department of Agriculture’s disclosure of annual store-level data regarding redemption of Supplemental Nutrition Assistance Program benefits under the Freedom of Information Act would constitute a cognizable competitive and financial injury to grocery retailers); *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324–26 (2008) (holding that a tribal court’s exercise of jurisdiction over a discrimination claim against a non-Indian bank is a sufficiently concrete injury); *Dep’t of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331 (1999) (determining that a voter’s loss of a Representative to the United States Congress is a sufficiently concrete harm); *GMC v. Tracy*, 519 U.S. 278, 286 (1997) (stating that liability for payment of a tax that allegedly discriminated against out-of-state interests in violation of the Commerce Clause amounts to a concrete harm); *Int’l Primate Prot. League v. Adm’rs of Tulane Educ. Fund*, 500 U.S. 72, 77 (1991) (holding that a litigants’ loss of a right to sue in the forum of their choosing is a concrete harm); *Franchise Tax Bd. v. Alcan Aluminum*, 493 U.S. 331, 336 (1990) (determining that shareholders’ reduced returns on their investments from an accounting method employed by California in calculating

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determine whether an intangible injury sufficed for standing. The Court has identified several arguably noneconomic harms to be concrete injuries, including aesthetic injuries (e.g., harm to a plaintiff's ability to observe an animal species);³ recreational injuries (e.g., injury to a plaintiff's enjoyment of natural resources such as a park);⁴ certain procedural injuries (e.g., injury to a litigant's right to have an agency prepare an environmental impact statement for a federal agency action that affects his or her interests);⁵ injuries to constitutional rights;⁶ dilution of the effectiveness of a citizen's vote in a federal election;⁷ and stigmatic injuries from racial discrimination.⁸ By contrast, the Court has held that concrete injuries would not include, for example, psychological harm from observing the federal government's use of taxpayer money to provide financial assistance to a religious institution⁹ or harms to the plaintiff's general interest in advancing abstract interests (e.g., an interest in having low-income people access health services).¹⁰ Notably, the fact that an injury is "particularized"—or, in other words, that it affects the plaintiff individually¹¹—does not necessarily make that injury a concrete harm.

taxable income of companies in which they had invested is a concrete harm); *Meese v. Keene*, 481 U.S. 465, 476 (1987) (finding the government's designation of film exhibitor's film as "political propaganda" is a sufficiently concrete harm for standing purposes).

³ *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562–63 (1992).

⁴ *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 686–87 (1973).

⁵ *See, e.g.*, *Lujan*, 504 U.S. at 572 n.7. *See also* *FEC v. Akins*, 524 U.S. 11, 21 (1998) (holding that a litigant's failure to obtain information that federal law requires to be disclosed can constitute a sufficiently concrete injury of his procedural statutory right for Article III standing purposes).

⁶ *See, e.g.*, *Spokeo*, 578 U.S. at 341 (noting that injuries to First Amendment rights to free speech and free exercise of religion may amount to concrete injuries). *But see* *Laird v. Tatum*, 408 U.S. 1, 13–16 (1972) (finding that civilians lacked standing to challenge the Department of the Army's alleged surveillance of peaceful political activity because they failed to allege a specific harm, beyond speculation, that it had a chilling effect on the exercise of their First Amendment rights).

⁷ *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331–32 (1999) (stating that "voters have standing to challenge an apportionment statute because they are asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes.") (citations and internal quotation marks omitted).

⁸ *Allen v. Wright*, 468 U.S. 737, 755 (1984) ("There can be no doubt that [the stigmatizing injury caused by racial discrimination] is one of the most serious consequences of discriminatory government action and is sufficient in some circumstances to support standing."). The Court has also held that a litigant may have standing when it alleges injury from the federal government's disregard of the basic structure of government established in the Constitution.

⁹ *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) (indicating that psychological injuries stemming from the plaintiffs witnessing "conduct with which [they] disagree[d]" was an insufficient injury for standing).

¹⁰ *Summers v. Earth Island Inst.*, 555 U.S. 488, 497–98 (2009) (rejecting environmental organizations' argument that they had suffered a concrete injury because there was a "statistical probability" that at least some of their hundreds of thousands of members nationwide were threatened with concrete harm from Forest Service regulations); *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 39–40 (1976) ("We note at the outset that the five respondent organizations, which described themselves as dedicated to promoting access of the poor to health services, could not establish their standing on the basis of that goal. Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by [Article III]."). *But see* *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) ("If, as broadly alleged, petitioners' steering practices have perceptibly impaired HOME's ability to provide counseling and referral services for low- and moderate-income home-seekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources—constitutes far more than simply a setback to the organization's abstract social interests.").

¹¹ For more on the Article III requirement that the plaintiff have suffered a particularized injury, see Art.III.S2.C1.6.4.3 Particularized Injury.

On June 23, 2023, the Supreme Court issued a decision in *United States v. Texas*¹² a case involving a legal challenge to the Department of Homeland Security (DHS)’s 2021 Guidelines for the Enforcement of Civil Immigration Law. The DHS Guidelines prioritized “the arrest and removal from the United States” of certain categories of noncitizens, including dangerous criminals and suspected terrorists.¹³ The States of Texas and Louisiana contended that the DHS Guidelines violated federal immigration statutes that require the arrest and detention of noncitizens who have committed specified crimes or are subject to final orders of removal.¹⁴ However, the Court held that the states lacked Article III standing to challenge the Guidelines because they had failed to show that they had suffered a judicially cognizable injury resulting from the Executive Branch’s alleged failure to enforce federal immigration law.¹⁵ Although the states had incurred additional costs as a result of the DHS Guidelines, they failed to identify any “precedent, history, or tradition” of federal courts hearing lawsuits challenging the Executive Branch’s decision not to arrest or prosecute particular categories of third parties.¹⁶ Moreover, the states’ asserted injury was not redressable because the Federal Judiciary could not order the Executive Branch to enforce immigration laws against particular violators.¹⁷

Congress, by statute, can influence a court’s standing analysis, but Congress cannot itself create standing in the absence of the constitutional prerequisites. When determining whether the defendant’s alleged violation of a right created by Congress is sufficient by itself to constitute a concrete harm to a litigant for standing purposes, the Court has stated that federal courts should examine whether the injury is similar to a harm that “has traditionally been regarded as providing a basis for a lawsuit in English or American courts.”¹⁸ But in doing so, courts must also give at least some weight to Congress’s judgments about which intangible harms amount to concrete Article III injuries.¹⁹ Thus, although Congress may, through enactment of legislation, elevate certain harms to the status of concrete injuries for standing purposes,²⁰ Congress cannot create standing for litigants who do not face at least a material risk of injury from a defendant’s violation of the litigant’s statutory rights.²¹

ArtIII.S2.C1.6.4.5 Causation

The second prong of the *Lujan* test for Article III standing requires the litigant to demonstrate that the injury-in-fact that he or she has suffered is “fairly traceable” to the

¹² No. 22-58 (U.S. June 23, 2023)

¹³ *Id.* at 1.

¹⁴ *Id.* at 2 (citing 8 U.S.C. §§ 1226(c), 1231(a)(2)).

¹⁵ *Id.* at 4–5.

¹⁶ *Id.* at 5–6 (citing *Linda R.S. v. Richard D.*, 410 U.S. 615, 619 (1973)).

¹⁷ *Id.* at 13–14.

¹⁸ *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016).

¹⁹ *Id.* at 343.

²⁰ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) (“As we said in *Sierra Club*, statutory ‘broadening of the categories of injury that may be alleged in support of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.’”).

²¹ *Spokeo*, 578 U.S. at 343; *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009). *See also* *Thole v. U.S. Bank N.A.*, No. 17-1712, slip op. at 4 (U.S. June 1, 2020) (rejecting the argument that the existence of a general cause of action for participants in a defined-benefit plan in the Employee Retirement Income Security Act of 1974 sufficed to provide Article III standing).

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challenged actions of the defendant.¹ Under Supreme Court jurisprudence, this requirement may not be met when the litigant's injury results at least in part from the actions of a third party not before the court or, more broadly, when "the line of causation between the illegal conduct and injury [is] too attenuated."²

For example, in *Simon v. Eastern Kentucky Welfare Rights Org.*, the Supreme Court found that the plaintiffs lacked standing because they failed to show that the *defendants' actions* had caused them harm, rather than the actions of absent third parties.³ In that case, a group of indigent plaintiffs challenged an Internal Revenue Service (IRS) ruling that allowed nonprofit hospitals to reduce the availability of free services and still retain their charitable organization status.⁴ The plaintiffs alleged that the Revenue Ruling made such hospitals less likely to grant free services to indigents.⁵ However, the Court held that the plaintiffs lacked standing to sue because their injury was the result of independent action of parties not before the Court—i.e., the hospitals.⁶ In other words, the hospitals' denial of services to the indigents, even if likely to injure them, was not fairly traceable to the federal government's issuance of the Revenue Ruling.⁷ Instead, the Court determined that it was too speculative to conclude that the denial of service was caused by the Revenue Ruling or that the plaintiffs would receive free hospital services if the IRS revoked its rule, as hospitals could establish their own policies with respect to providing services to indigents without regard to the tax implications.⁸ Thus, the plaintiffs lacked standing because they alleged future injuries

¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks omitted). The Court has stated that plaintiffs challenging a law's constitutionality may have Article III even if they cannot trace their injuries to the challenged law, so long as their injuries are traceable to the conduct of the defendant. *Collins v. Yellen*, No. 19-422, slip op. at 17–19 (U.S. June 23, 2021) (determining that shareholders had Article III standing when their economic injuries were traceable to the Federal Housing Finance Agency's adoption of a new policy, even though the shareholders specifically challenged the constitutionality of the law that created the agency and defined its structure). In *FEC v. Ted Cruz for Senate*, the Court determined that a U.S. Senator and his campaign committee had standing to challenge the constitutionality of a provision in a federal campaign finance statute. The government argued that the Federal Election Commission's threatened enforcement of the statutory provision did not cause the litigants' Article III injuries; rather, the litigants' injuries stemmed from the agency's threatened enforcement of an implementing regulation that imposed loan-repayment limitations. Nonetheless, the Court held that the litigants had standing to challenge the statutory provision because "an agency's regulation cannot operate independently of the statute that authorized it." No. 21–12, slip op. at 22 (U.S. May 16, 2022) (citation and internal quotation marks omitted). Moreover, the litigants' injuries were traceable to the agency's threatened enforcement of the statute and implementing regulations despite the fact that the litigants had "knowingly triggered" the provisions' application. *See id.* at 4–5.

² *Allen v. Wright*, 468 U.S. 737, 752 (1984).

³ 426 U.S. 26, 42–44 (1976).

⁴ *Id.* at 28.

⁵ *Id.*

⁶ *Id.* at 42.

⁷ *Id.* at 41–42.

⁸ *Id.* at 42–43 ("It is purely speculative whether the denials of service . . . fairly can be traced to [federal officials'] 'encouragement' or instead result from decisions made by the hospitals without regard to the tax implications."). Although the Court's decision in *Simon* signaled that the Court would take a less permissive approach to the standing doctrine than it had in prior years, the Court had reached a similar result a year earlier. *See Warth v. Seldin*, 422 U.S. 490, 502, 506–07 (1975) (finding that low- and moderate-income residents of Rochester, New York, who sued the adjacent town of Penfield for allegedly excluding them from living in Penfield, lacked standing because the plaintiffs failed to demonstrate that their alleged inability to obtain affordable housing was fairly traceable to the town's zoning practices instead of other factors, such as the independent decisions of companies not to build housing for lower-income individuals in the town). For an example of a case from this era in which the Court found that a litigant had satisfied the causation requirement because the plaintiff's injury did not depend on the actions of absent third parties, see *Vill. of*

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that depended at least in part on the actions of third parties not before the court, and they could not show more than mere speculation that those third parties would establish policies that would injure them.⁹

A further example of how the interplay between the decisions of absent third parties and the litigant's injury has affected the causation prong of the standing analysis is *Allen v. Wright*.¹⁰ In that case, parents of African-American children who attended public schools alleged that the IRS had caused them injury by allowing racially discriminatory private schools to qualify for federal tax exemptions, preventing the desegregation of their children's schools.¹¹ The Court found these allegations did not establish sufficient causation for standing purposes.¹² Relying on its earlier decision in *Simon*, the Court determined that it was not clear that racial segregation in the public schools was linked to the IRS policies because private school officials might not change racially discriminatory school policies in response to a withdrawal of tax benefits, and, even if they did, parents of children attending private schools might not transfer their children to public school as a result of such changes.¹³ Thus, the plaintiffs' allegations that the IRS policy had caused them injury rested on speculation about the actions of multiple third parties, and such speculation was insufficient to establish a causal connection between the defendant's actions and the plaintiffs' alleged injuries for standing purposes.¹⁴

Similarly, in *Murthy v. Missouri*, the Supreme Court addressed allegations that federal agencies and officials infringed a group of plaintiffs' First Amendment rights by coercing social media companies to make content moderation decisions that affected the plaintiffs' online speech.¹⁵ The Supreme Court concluded that the plaintiffs had not established causation because their theories of standing depended on the social media platforms' actions rather than the actions of government agencies and officials against whom the case had been brought.¹⁶ The "one-step removed, anticipatory nature of the alleged injuries" did not satisfy Article III standing requirements, the Court concluded.¹⁷

As in the case of standing for procedural injuries, discussed above, certain kinds of equal protection injuries may be accepted as sufficient for standing even if the possibility of

Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264 (1977) (determining that a low-income person had shown a "substantial probability" that judicial relief addressing an allegedly racially discriminatory zoning practices would redress his inability to locate housing near his employer by permitting a specific housing project to move forward because the project's success did not depend on the actions of third parties not before the court).

⁹ *Simon*, 426 U.S. at 42–43. *But see* *Dep't of Commerce v. New York*, No. 18-966, slip op. at 10–11 (U.S. June 27, 2019) (holding that states' alleged injuries stemming from the prospective loss of federal funds were fairly traceable to the Department of Commerce's inclusion of a citizenship question on the federal census questionnaire because a depressed census response rate, even if the result of unlawful third-party conduct, would be the "predictable outcome" of government action on third parties).

¹⁰ 468 U.S. 737 (1984).

¹¹ *Id.* at 739–40, 757–59.

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Murthy v. Missouri*, No. 23-411, slip op. at 1 (June 26, 2024). For additional background on the constitutional requirement for standing, see ArtIII.S2.C1.6.1 Overview of Standing. For additional background on the *Murthy* decision, see Intro.9.2.3: The First Amendment and Government Influence on Social Media Companies' Content Moderation.

¹⁶ *Murthy*, No. 23-411, slip op. at 12.

¹⁷ *Id.* at 11.

ultimate relief from that injury remains somewhat speculative. When a litigant challenges a governmental entity's alleged discriminatory practices on equal protection grounds, arguing that those practices have deprived it of a benefit granted to another favored class of individuals, the litigant may have standing even if it cannot demonstrate that it would have received the benefit in the absence of the government's conduct—or that a judicial order would result in its receipt of the benefit if it prevailed. Rather, the litigant must simply show that it would secure equal treatment under the law if it obtained judicial relief. Thus, for example, in *Adarand Constructors v. Peña*, the Court allowed a company's challenge to subcontractor compensation clauses in federal procurement contracts that allegedly favored small businesses controlled by racial minorities.¹⁸ The Court held that, even if the company could not demonstrate that it would be the low bidder on any particular subcontract, it had alleged a sufficient injury from its inability to compete on an equal footing with other companies.¹⁹ Similarly, the Court determined that a male plaintiff had standing to challenge Alabama laws that authorized courts to impose alimony obligations on husbands but not wives.²⁰ The Court permitted the challenge even though it was possible that prevailing in the suit would “not ultimately bring [the plaintiff] relief from the judgment [for alimony] outstanding against him, as the State could respond to a reversal by neutrally extending alimony rights to needy husbands as well as wives.”²¹

ArtIII.S2.C1.6.6 Representational Standing

ArtIII.S2.C1.6.6.1 Overview of Representational Standing

Federal courts must sometimes decide whether a litigant who has not suffered an injury-in-fact may request judicial relief on behalf of an injured third party who has not appeared before the court. The presumption is that an uninjured litigant lacks standing to sue and cannot raise claims on behalf of a third party.¹ The Supreme Court, however, has at times permitted this form of “representational standing”, allowing certain rela-

¹⁸ 515 U.S. 200, 211 (1995).

¹⁹ *Id.* See also *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.”); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 280 n.14 (1978) (“The trial court found [an injury] in the University’s decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Hence the constitutional requirements of Art. III were met. The question of Bakke’s admission [or nonadmission] is merely one of relief.”) (internal citation omitted).

²⁰ *Orr v. Orr*, 440 U.S. 268, 271–73 (1979).

²¹ *Id.* See also *Heckler v. Mathews*, 465 U.S. 728, 737–39 (1984) (“[W]e have frequently entertained attacks on discriminatory statutes or practices even when the government could deprive a successful plaintiff of any monetary relief by withdrawing the statute’s benefits from both the favored and the excluded class.”). The Court employed similar reasoning when holding that a general interest newspaper had standing to bring a First Amendment challenge to an allegedly discriminatory Arkansas sales tax exemption for special interest journals. *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987) (stating that to hold otherwise would “effectively insulate underinclusive statutes from constitutional challenge”).

¹ *United Food & Commercial Workers Union Local 571 v. Brown Grp., Inc.*, 517 U.S. 544, 557 (1996). The foundational case for the general bar on third-party standing is *Yazoo & Miss. Valley R.R. v. Jackson Vinegar Co.*, 226 U.S. 217, 219–20 (1912) (holding that a railway company could not assert the rights of hypothetical third parties in a challenge to a Mississippi statute providing a penalty for lost or damaged freight). See also *Sec’y of State of Md. v. Munson Co.*, 467 U.S. 947, 947 n.5 (1984) (noting that third-party standing is disfavored in part due to “Art. III’s requirement that a plaintiff have a ‘sufficiently concrete interest in the outcome of the suit to make it a case or controversy,’” and in part due to the prudential concern that “if the claim is brought

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tionships between an uninjured litigant and an injured third party to overcome that presumption.² Thus, for example, courts sometimes permit representational standing when a formal association seeks to bring suit on behalf of its members;³ a state sues on behalf of its citizens;⁴ a plaintiff asserts a claim assigned to it by another party (e.g., a claim assigned to it by the government under a *qui tam*⁵ provision);⁶ or an agent brings suit on behalf of its principal.⁷ Such issues may also arise when a party brings a facial challenge to a law on First Amendment grounds, arguing that although the party itself is not subject to the law, it would be unconstitutional for the government to apply it to third parties with which the litigant has some form of close relationship (e.g., a business relationship).⁸

by someone other than one at whom the constitutional protection is aimed,” it may be “an abstract, generalized grievance that the courts are neither well equipped nor well advised to adjudicate” (citations omitted)).

² *United Food & Commercial Workers Union Local 571*, 517 U.S. at 557 (“[T]he entire doctrine of ‘representational standing’ . . . rests on the premise that in certain circumstances, particular relationships (recognized either by common-law tradition or by statute) are sufficient to rebut the background presumption (in the statutory context, about Congress’s intent) that litigants may not assert the rights of absent third parties.”) (internal citations omitted). Notably, the concept of representational standing, which involves a litigant who has not suffered an injury-in-fact bringing suit on behalf of an injured third party, differs from the issue of “third-party” or *jus tertii* standing. The latter concept, which is discussed in more detail below, is a prudential doctrine that refers to a situation in which an *injured* party asserts the rights of someone who is not before the court as part of the legal theory underlying its claim or defense. An example of a case concerning third-party standing is *Eisenstadt v. Baird*, in which the Court held that a person convicted for distributing a contraceptive device to an unmarried woman had standing to assert the constitutional rights of unmarried persons denied access to contraception when challenging the Massachusetts law under which he was convicted on equal protection grounds. *E.g.*, 405 U.S. 438, 445–46 (1972) (holding that an advocate of contraception convicted for giving a contraceptive device to an unmarried woman had standing to assert the rights of unmarried persons denied access to contraception, as such persons were not themselves subject to prosecution and would unlikely be able to assert their constitutional right to use it). For more on third-party standing, see ArtIII.S2.C1.6.9.3 Third Party Standing.

³ *E.g.*, *Int’l Union v. Brock*, 477 U.S. 274, 290 (1986).

⁴ Compare *e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007) (allowing trade associations to establish representational standing in a case concerning the Environmental Protection Agency’s regulation of greenhouse gases) with *FDA v. All. for Hippocratic Med.*, Nos. 23-235, slip op. at 21-24 (U.S. June 13, 2024) (denying representational standing to a group of medical associations challenging the Food and Drug Administration’s regulatory regime concerning the drug mifepristone).

⁵ “*Qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro ipso in hac parte sequitur*, which means ‘who pursues this action on our Lord the King’s behalf as well as his own.’” *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 768 n.1 (2000). *Qui tam* lawsuits allow a private party to enforce a law by acting as a private attorney general. John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 *MD. L. REV.* 215, 215–16 (1983) (providing an overview of the concept of private attorneys general).

⁶ *E.g.*, *Vt. Agency of Nat. Res.*, 529 U.S. at 778.

⁷ *E.g.*, *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 271 (2008).

⁸ *E.g.*, *Sec’y of State of Md. v. Munson Co.*, 467 U.S. 947, 958 (1984). Issues of representational standing may also arise in the context of class action lawsuits (i.e., lawsuits by representative parties on behalf of all members of a class of similar plaintiffs that have aggregated their claims in one case). *See, e.g.*, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 803–06 (1985) (determining that class action defendant had standing to challenge a Kansas Supreme Court judgment rendered against it on the grounds that the judgment would bind the oil and gas company that would not bind all potential plaintiffs because the company “had a distinct and personal interest in seeing the entire plaintiff class bound by *res judicata* just as [it] is bound”); *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 403–04 (1980) (holding that a proposed class representative retained a personal stake sufficient for the representative to appeal a court’s ruling denying his class certification motion even though the named plaintiff’s substantive claim had expired); *Sosna v. Iowa*, 419 U.S. 393, 402 (1975) (determining that a “live controversy” existed for purposes of Article III standing “between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff ha[d] become moot”).

ArtIII.S2.Cl.1.6.6.2 Associational Standing

Perhaps the most obvious context in which the Supreme Court confronts issues of representational standing is when a formal association sues to redress injury to its members. In the past, associations seeking relief in federal court have included environmental groups,¹ unions (i.e., associations of workers),² and trade associations (i.e., associations of businesses).³ While an organization may have standing to sue on its own behalf when it sustains an injury as an organization (e.g., a loss of membership),⁴ the Supreme Court held in *Hunt v. Washington State Apple Advertising Commission*, that an association has standing to sue to redress its members' injuries, even when the association has not itself suffered injury, when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."⁵

In subsequent decisions, the Supreme Court has elaborated on the three prongs of the *Hunt* test. The first two prongs of this three-part test reflect *Lujan's* constitutional minimum requirements, assuring that the association possesses a genuine stake in the controversy and that the lawsuit involves a contest between adversarial parties.⁶ Therefore, Congress may not waive these requirements through the enactment of legislation. However, the third requirement for associational standing is a prudential limitation, focusing on "administrative convenience and efficiency", that Congress may modify or eliminate in certain contexts.⁷ Applying the third prong, the Court has found that associations lack standing when, for example, it would be too difficult to establish individualized proof of injury for each member of an association that seeks monetary damages on behalf of its members⁸ or when resolving an association's claims would

¹ *E.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563 (1992); *Sierra Club v. Morton*, 405 U.S. 727, 731 (1972).

² *E.g.*, *Int'l Union v. Brock*, 477 U.S. 274, 276 (1986).

³ *E.g.*, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 344–45 (1977) (determining that a state agency that represents an industry of the state and acts like a trade association but with compelled membership may have standing to sue for its members' injuries). In a 2024 decision concerning challenges to the Food and Drug Administration's regulatory regime covering the drug mifepristone used in medication abortions, the Court explained that associations may not establish standing based solely on the "intensity" of their interests or opposition to government actions. *FDA v. All. for Hippocratic Med.*, No. 23-235, slip op. at 21-22 (U.S. June 13, 2024) (quoting *Valley Forge Coll. v. Americans United*, 454 U.S. 464, 486 (1982)). Nor can associations "manufacture" an injury and create standing "simply by expending money to gather information and advocate" for their positions. *Id.* at 22.

⁴ *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

⁵ *United Food & Commercial Workers Union Local 571 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996) (quoting *Hunt*, 432 U.S. at 343). *See also Brock*, 477 U.S. at 282–90 (applying the three-part test and determining that an automobile workers union had associational standing to challenge a Department of Labor policy directive interpreting the trade readjustment allowance (TRA) benefit eligibility provisions of the Trade Act of 1974). Some argue that an association is able to more effectively advance the shared interests of its members by pooling financial resources and expertise. *Id.* at 290 ("[T]he primary reason people join an organization is often to create an effective vehicle for vindicating interests that they share with others.").

⁶ *United Food & Commercial Workers*, 517 U.S. at 554–57.

⁷ *Id.*

⁸ *See Brock*, 477 U.S. at 287 ("Neither these claims nor the relief sought required the District Court to consider the individual circumstances of any aggrieved UAW member. The suit raises a pure question of law: whether the Secretary properly interpreted the Trade Act's TRA eligibility provisions. And the relief requested, and granted by the District Court, leaves any questions regarding the eligibility of individual TRA claimants to the state authorities given jurisdiction over such questions by [the Trade Act of 1974].") (citations omitted). *But see Warth*, 422 U.S. at 515–16 (finding that an association of construction firms lacked standing to seek

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require the Court to ascertain each member's individual views on a particular matter.⁹ Nonetheless, Congress may override judicial concerns about the difficulty in establishing individualized proof for each member of an association if the association satisfies the first two elements of the *Hunt* test.¹⁰

ArtIII.S2.C1.6.6.3 States and Parens Patriae

A state has standing to sue in its sovereign capacity for injuries to its own interests.¹ For example, the Supreme Court upheld standing for: (1) Wyoming to sue Oklahoma for an injury to its ability to collect a specific tax that allegedly resulted from Oklahoma requiring its coal-fired electric utilities to burn at least 10% Oklahoma-mined coal;² (2) California to sue the Secretary of the Interior for injury to its financial interests from the Secretary of Interior choosing one form of bidding system over another in awarding leases for oil and gas exploration development of Outer Continental Shelf lands;³ and (3) several states from increased natural gas costs resulting from a Louisiana tax on natural gas imported into the state.⁴

On June 30, 2023, the Supreme Court issued a decision on Article III standing in *Biden v. Nebraska*, a case in which six state attorneys general challenged a Department of Education student debt-relief program allegedly authorized under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act).⁵ The challenged student debt-relief program would have canceled between \$10,000 and \$20,000 per eligible student borrower, amounting to a total of about \$430 billion in forgiven debt principal.⁶

The Court ruled that, of the six states that had challenged the program, at least Missouri had Article III standing to sue because the debt-relief plan would cost “MOHELA, a nonprofit government corporation created by Missouri to participate in the

damages for lost profits and business because “whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof”).

⁹ *Harris v. McRae*, 448 U.S. 297, 321 (1980) (finding that the women's division of a religious organization lacked standing to assert the rights of its members under the Free Exercise Clause because the Court needed to ascertain each member's individual views as to the “permissibility, advisability, and/or necessity of abortion” in order to rule upon the organization's constitutional claims). Because individuals in the organization could have diverse views on the issue of abortion, inquiring into each member's individual views was “necessary in a free exercise case [in order] to show the coercive effect of the enactment as it operates against [an individual] in the practice of his religion.” *Id.*

¹⁰ *United Food & Commercial Workers*, 517 U.S. at 554–57.

¹ *Massachusetts v. EPA*, 549 U.S. 497, 516–20 (2007). *See also* *West Virginia v. EPA*, No. 20-1530, slip op. at 14 (U.S. June 30, 2022) (noting that states had been injured for Article III standing purposes when a federal appeals court decision had purported to revive an Environmental Protection Agency rule that required the states to “more stringently regulate power plant emissions within their borders”).

² *Wyoming v. Oklahoma*, 502 U.S. 437, 440, 451 (1992).

³ *Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 153 160–61 (1981).

⁴ *Maryland v. Louisiana*, 451 U.S. 725, 736 (1981).

⁵ No. 22-506, slip op. at 1 (U.S. June 30, 2023). In a separate case decided the same day, *Dep't of Education v. Brown* the Court unanimously held that two private student loan borrowers lacked Article III standing to challenge the debt-relief program because they had not demonstrated that their asserted injury of failing to obtain debt relief under the Higher Education Act of 1965 was fairly traceable to the Department's decision to establish a loan forgiveness program under a separate federal statute, the HEROES Act. No. 22-535, slip op. at 10–14.

⁶ *Biden*, slip op. at 6.

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student loan market, an estimated \$44 million a year in fees.”⁷ Because MOHELA was an instrumentality of the State of Missouri “by law and function,” an injury to MOHELA in the performance of its public function was “necessarily a direct injury to Missouri itself.”⁸ Although MOHELA was not a party to the lawsuit, the Court held that “[w]here a State has been harmed in carrying out its responsibilities, the fact that it chose to exercise its authority through a public corporation it created and controls does not bar the State from suing to remedy that harm itself.”⁹ On the merits, the Court held that the Department lacked the statutory authority to establish the program, determining that it could not rely on generally worded provisions of the HEROES Act to authorize a program of major “economic and political significance.”¹⁰

However, a distinct issue of representational standing arises when a state seeks to sue on behalf of its citizens in federal court. The Supreme Court has long recognized that a state may sue as *parens patriae*—literally, “parent of his or her country”¹¹—but only when it has a separate “sovereign interest” at stake in the outcome of the controversy.¹² And while a state may sue to assert its rights *under* federal law, it may not sue to protect its citizens *from* federal law on the grounds that Congress has intruded upon an area of traditional state authority.¹³

For instance, in *Massachusetts v. Mellon* the State of Massachusetts sought to maintain a lawsuit against the federal government challenging the Maternity Act, a federal statute that created a grant program to distribute taxpayer funds to states that agreed to cooperate with the federal government to protect the health of mothers and infants.¹⁴ Massachusetts argued that Congress had usurped state powers over traditionally local matters in violation of the Tenth Amendment.¹⁵ The Supreme Court first found that the state lacked standing to sue on its own behalf because it had no separate sovereign interest that would be affected by the statute (e.g., a property interest).¹⁶ The Court then determined that Massachusetts lacked standing to sue as a representative of its citizens

⁷ *Id.* at 8.

⁸ *Id.* at 8–9.

⁹ *Id.* at 7–12.

¹⁰ *Id.* at 13–18, 20–24. See also Art.I.S1.5.6 Major Questions Doctrine and Canons of Statutory Construction.

¹¹ BLACK’S LAW DICTIONARY 1221 (9th ed. 2009) (defining “*parens patriae*” as “a doctrine by which a government has standing to prosecute a lawsuit on behalf of a citizen” but stating that the “state ordinarily has no standing to sue on behalf of its citizens, unless a separate, sovereign interest will be served by the suit”). For a historical discussion of *parens patriae* suits, see *New York v. New Jersey*, 256 U.S. 296, 301–02 (1921) (“The health, comfort and prosperity of the people of the State and the value of their property being gravely menaced, as it is averred that they are by the proposed action of the defendants [in executing a sewer project that would allegedly discharge polluted water into New York Harbor], the State is the proper party to represent and defend such rights by resort to the remedy of an original suit in this court under the provisions of the Constitution of the United States.”); *Missouri v. Illinois*, 180 U.S. 208, 241 (1901) (“[I]f the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them.”). Since deciding these cases, the Court has taken a narrower view of the *parens patriae* doctrine. In particular, the Court now requires that the state have a “separate sovereign interest” at stake apart from litigating the “personal claims of its citizens.” *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976).

¹² *Id.* (“It has . . . become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens.”).

¹³ *Massachusetts v. Mellon*, 262 U.S. 447, 520 n.17 (1923).

¹⁴ *Id.* at 479. The Court consolidated the case with the above-discussed case of *Frothingham v. Mellon*.

¹⁵ *Massachusetts*, 262 U.S. at 479.

¹⁶ *Id.* at 482–85 (“It follows that in so far as the case depends upon the assertion of a right on the part of the State to sue in its own behalf we are without jurisdiction. . . . [W]e are called upon to adjudicate, not rights of

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because it was the role of the federal government to act as representative, or *parens patriae*, of Massachusetts citizens with respect to federal laws.¹⁷ As a result, the Court reasoned that Massachusetts lacked standing to pursue its Tenth Amendment claim, which sought to protect its citizens from a federal statute.¹⁸

Several decades later, the Supreme Court discussed a state's standing to sue protect its sovereign interests in a major environmental case. In the 2007 case *Massachusetts v. EPA*, the Court held that the State of Massachusetts had standing to challenge the Environmental Protection Agency (EPA)'s denial of a petition asking the agency to regulate greenhouse gas emissions from new motor vehicles under the Clean Air Act (CAA).¹⁹ The Court determined that Massachusetts had standing for two major reasons. First, the Court held that the because the dispute involved the proper construction of the CAA, and because Congress had granted a specific procedural right in the Act to protect the state's concrete interests in EPA's regulatory actions, the state had a personal stake in the outcome and could assert that procedural right without meeting the normal standards for immediacy and redressability.²⁰ Second, the Court deemed Massachusetts' alleged injury—its loss of shore land from global-warming induced sea level rise—an independent *quasi*-sovereign interest in preserving its territory separate from its citizens' interests and thus sufficient for standing.²¹

The Supreme Court's reasoning in *Massachusetts v. EPA* did not endorse the concept of *parens patriae* standing generally, but it did recognize that the states "are not normal litigants for the purposes of invoking federal jurisdiction."²² The court thus allowed Massachusetts's suit as one that involved its rights under federal law (i.e., the CAA's citizen-suit provision), and not solely an action (as in *Mellon*) involving a state seeking to protect its citizens *from* the operation of a federal statute.²³ Although the Court also determined that Massachusetts had standing to sue for injury to its "quasi-sovereign" interest in protecting its territory, it is unclear whether the Court established a new precedent on a state's standing to sue as *parens patriae*. The Court's decision in *Massachusetts v. EPA* could be characterized as resting on principles of federalism and a state's sovereign prerogative to regulate in-state motor vehicle emissions.

persons or property, not rights of dominion over physical domain, not quasi-sovereign rights actually invaded or threatened, but abstract questions of political power, of sovereignty, of government.").

¹⁷ *Id.* at 486; see also *Murthy v. Missouri*, No. 23-411, slip op. at 11-12 (June 26, 2024) (holding that states do not have *parens patriae* standing to sue the federal government on behalf of the citizens they would listen to). For additional background on the *Murthy* decision, see Intro.9.2.3 The First Amendment and Government Influence on Social Media Companies' Content Moderation.

¹⁸ *Massachusetts*, 262 U.S. at 486.

¹⁹ 549 U.S. 497, 505–06 (2007).

²⁰ *Id.* at 516–18 ("When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.").

²¹ *Id.* at 518–20 (citing *Georgia v. Tenn. Copper Co.*, 206 U.S. 230, 237 (1907)).

²² *Massachusetts*, 262 U.S. at 518.

²³ *Id.* at 520 n.17 ("[T]here is a critical difference between allowing a State 'to protect her citizens from the operation of federal statutes' (which is what *Mellon* prohibits) and allowing a State to assert its rights under federal law (which it has standing to do).") (citations omitted).

ArtIII.S2.C1.8 Mootness

ArtIII.S2.C1.8.3 Modern Mootness Doctrine

The Supreme Court has decided mootness issues in a wide array of contexts since the Supreme Court decided *Liner* in 1964.¹ As a result, the Court has developed a robust body of precedent governing when a case should (or should not) be dismissed as moot, as well as what procedures a federal court should follow after a case becomes moot.

ArtIII.S2.C1.8.4 Criteria

ArtIII.S2.C1.8.4.1 General Criteria of Mootness

Under current law, “a case is moot when the issues presented are no longer ‘live’ or the parties lack a cognizable interest in the outcome.”¹ “[A]n actual controversy must exist not only at the time the complaint is filed, but through all stages of the litigation.”² Thus, “[i]f an intervening circumstance deprives the plaintiff of a ‘personal stake in the outcome of the lawsuit[]’ at any point during litigation, the action can no longer proceed

¹ *Acheson Hotels, LLC v. Laufer*, No. 22-429, slip op. at 3-4 (U.S. Dec. 5, 2023) (Americans with Disabilities Act); *See, e.g.*, *North Carolina v. Covington*, 138 S. Ct. 2548, 2552–53 (2018) (per curiam) (electoral redistricting case); *Kernan v. Cuero*, 138 S. Ct. 4, 7 (2017) (habeas corpus case); *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224 n.3 (2013) (antitrust case); *Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115, 120 (2013) (admiralty case); *Pac. Bell Tel. Co. v. Linkline Commc’ns, Inc.*, 555 U.S. 438, 446 (2009) (antitrust case); *Lopez v. Gonzales*, 549 U.S. 47, 52 n.2 (2006) (immigration case); *Tory v. Cochran*, 544 U.S. 734, 736–37 (2005) (defamation case); *Washington v. Harper*, 494 U.S. 210, 218–19 (1990) (civil rights case); *FDIC v. Mallen*, 486 U.S. 230, 236 n.7 (1988) (banking law case); *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (environmental law case); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 426 n.3 (1987) (immigration case); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 n.* (1986) (free speech case); *Lockhart v. McCree*, 476 U.S. 162, 168 n.2 (1986) (habeas corpus case); *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 613 n.3 (1986) (labor law case); *Ohio v. Kovacs*, 469 U.S. 274, 277–78 (1985) (bankruptcy case); *U.S. Dep’t of Just. v. Provenzano*, 469 U.S. 14, 14–16 (1984) (privacy law case); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 568–72 (1984) (employment law case); *Local No. 82, Furniture & Piano Moving, Furniture Store Drivers, Helpers, Warehousemen & Packers v. Crowley*, 467 U.S. 526, 535 n.11 (1984) (labor law case); *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 630–31 (1984) (discrimination case); *INS v. Phinpathya*, 464 U.S. 183, 188 n.6 (1984) (immigration case); *City of Los Angeles v. Lyons*, 461 U.S. 96, 101 (1983) (civil rights case); *Johnson v. Bd. of Educ. of City of Chi.*, 457 U.S. 52, 52–54 (1982) (per curiam) (discrimination case); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 370–71 (1982) (housing law case); *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 391–98 (1981) (discrimination case); *Vitek v. Jones*, 445 U.S. 480, 486–87 (1980) (prison law case); *Quern v. Mandley*, 436 U.S. 725, 733 n.7 (1978) (public assistance law case); *Stanton v. Stanton*, 421 U.S. 7, 11 (1975) (family law case); *Vill. of Belle Terre v. Boraas*, 416 U.S. 1, 9–10 (1974) (zoning law case); *Mancusi v. Stubbs*, 408 U.S. 204, 205–07 (1972) (habeas corpus case); *Socialist Labor Party v. Gilligan*, 406 U.S. 583, 584, 589 (1972) (election law case); *Roudebush v. Hartke*, 405 U.S. 15, 18–19 (1972) (election law case); *Whitcomb v. Chavis*, 403 U.S. 124, 140–41 (1971) (legislative apportionment case).

¹ *City of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (quoting *Powell v. McCormack*, 395 U.S. 486, 498 (1969)). *See also, e.g.*, *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (same); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287 (2000) (same).

² *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1975 (2016) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 90–91 (2013)). *See also, e.g.*, *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013) (“It is a basic principle of Article III that a justiciable case or controversy must remain extant at all stages of review, not merely at the time the complaint is filed.”) (quoting *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011) (per curiam)); *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477–78 (1990) (“To sustain our jurisdiction . . . it is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals.”); *Honig v. Doe*, 484 U.S. 305, 317 (1988) (“That the dispute between parties was very much alive when suit was filed . . . cannot substitute for the actual case or controversy that an exercise of this Court’s jurisdiction requires.”); *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (“Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case; it is not enough that there may have been a live case or controversy when the case was decided by the court whose judgment we are reviewing.”).

and must be dismissed as moot.”³ “A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.”⁴ When (1) “it can be said with assurance that there is no reasonable expectation that the alleged violation will recur,” and (2) “interim relief or events have completely and irrevocably eradicated the effects of the alleged violation,” then “the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law.”⁵

ArtIII.S2.Cl.1.8.4.2 Mootness and Intervening Events

Significantly, however, a case does not necessarily become moot simply because intervening events make it impossible for a federal court to issue the *exact* form of relief that the plaintiff requests.¹ As long as the court retains the ability to “fashion *some* form of meaningful relief, ‘then that’ is sufficient to prevent th[e] case from being moot.”² To illustrate, “[i]f there is any chance of money changing hands” as a result of the lawsuit, then the “suit remains live.”³ Similarly, even if it is uncertain that the relief granted by the court will ultimately have any meaningful practical impact on the plaintiff, that does not itself render the case moot.⁴

Intervening circumstances that may render a case moot can result either from actions attributable to the litigants or from outside forces. For example, in the *City News & Novelty, Inc. v. City of Waukesha* case discussed in greater detail below, the Court ruled that an adult business’s challenge to a municipality’s decision to deny the business’s license became moot after the business chose to cease operations while the case was pending on appeal.⁵ A lawsuit predicated upon a federal statute may also become moot if Congress amends the statute while the suit remains pending.⁶ A case may also become moot merely through the passage of time; for instance, the Court ruled in *Camreta v.*

³ *Campbell-Ewald Co. v. Gomez*, 577 U.S. 153, 161 (2016) (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013)). See also *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (“[M]ootness can arise at any stage of litigation.”).

⁴ *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quoting *City of Erie*, 529 U.S. at 287) (internal quotation marks omitted). See also, e.g., *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (same); *Campbell-Ewald*, 577 U.S. at 161 (same); *Decker*, 568 U.S. at 609 (same); *Chafin*, 568 U.S. at 172 (same).

⁵ *City of Los Angeles*, 440 U.S. at 631. See also, e.g., *City of Erie*, 529 U.S. at 287 (holding that a case becomes moot “when the challenged conduct ceases such that ‘there is no reasonable expectation that the wrong will be repeated’”) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

¹ See *Chafin*, 568 U.S. at 177 (“Such relief would of course not be fully satisfactory, but with respect to the case as a whole, even the availability of a partial remedy is sufficient to prevent a case from being moot.”) (quoting *Calderon*, 518 U.S. at 150) (brackets and internal quotation marks omitted); *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12–13 (1992) (“While a court may not be able to return the parties to the status quo ante . . . a court can fashion some form of meaningful relief in circumstances such as these . . . The availability of this possible remedy is sufficient to prevent this case from being moot.”).

² *Id.* at 12–13. See also, e.g., *Chafin*, 568 U.S. at 177 (“[E]ven the availability of a partial remedy is sufficient to prevent a case from being moot.”) (quoting *Calderon*, 518 U.S. at 150) (brackets and internal quotation marks omitted).

³ *Mission Prod. Holdings*, 139 S. Ct. at 1660.

⁴ See *Chafin*, 568 U.S. at 175 (“Enforcement of the order may be uncertain if Ms. Chafin chooses to defy it, but such uncertainty does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured.”).

⁵ See 531 U.S. 278, 281–84 (2001).

⁶ *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 474 (1990) (“We conclude that the case has been rendered moot by 1987 amendments to the Bank Holding Company Act.”).

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Greene that a child’s constitutional challenge to an elementary school’s methods of interviewing its students became moot after “the child [grew] up and moved across the country” and thus would “never again be subject to the . . . in-school interviewing practices whose constitutionality [wa]s at issue.”⁷

The Court’s 1974 opinion in *DeFunis v. Odegaard* illustrates how the aforementioned legal principles apply in practice.⁸ The petitioner in *DeFunis* applied for admission at a public law school.⁹ After the school rejected his application, the petitioner filed suit, “contending that the procedures and criteria employed by the Law School Admissions Committee invidiously discriminated against him on account of his race.”¹⁰ The trial court agreed and ordered the law school to admit the petitioner.¹¹ The petitioner accordingly started taking classes at the law school while the case was on appeal.¹² By the time the case reached the Supreme Court, the petitioner had almost completed his law degree,¹³ such that the petitioner stood to “receive his diploma regardless of any decision th[e] Court might reach on the merits of [h]is case.”¹⁴ Because the petitioner would “complete his law school studies at the end of the term . . . regardless of any decision th[e] Court might reach on the merits,” the Court concluded that the case was moot.¹⁵

Because federal courts lack jurisdiction to adjudicate moot cases, a federal court can—and indeed must—dismiss a moot case even if none of the parties ask the court to do so.¹⁶ Moreover, because mootness deprives the courts of jurisdiction to hear a case, the Supreme Court has stated that litigants have “a ‘continuing duty to inform the Court’” of intervening events that could potentially render a case moot.¹⁷ “The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated.”¹⁸ As a result, a party may raise a mootness challenge at any time during the litigation, including for the first time

⁷ 563 U.S. 692, 698 (2011).

⁸ 416 U.S. 312 (1974) (per curiam).

⁹ *Id.* at 314.

¹⁰ *Id.* See also Amdt14.S1.8.4.1 Early Doctrine on Appropriate Scrutiny and Amdt14.S1.8.4.2 Modern Doctrine on Appropriate Scrutiny (discussing constitutional challenges to educational admissions practices that allegedly discriminate on the basis of race).

¹¹ *DeFunis*, 417 U.S. at 314–15.

¹² *Id.* at 315.

¹³ See *id.*

¹⁴ *Id.* at 317.

¹⁵ *Id.* at 319–20.

¹⁶ See, e.g., *United States v. Juvenile Male*, 564 U.S. 932, 933–34 (2011) (per curiam) (deeming case moot even though “[n]o party had raised any issue of mootness in the [court below], and the Court of Appeals did not address the issue *sua sponte*”); *St. Paul Fire & Marine Ins. Co. v. Barry*, 438 U.S. 531, 537 (1978) (“At the threshold, we confront a question of mootness. Although not raised by the parties, this issue implicates our jurisdiction.”); *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 7–8 (1978) (“There is, at the outset, a question of mootness. Although the parties have not addressed this question in their briefs, ‘they may not by stipulation invoke the judicial power of the United States in litigation which does not present an actual case or controversy.’”) (quoting *Sosna v. Iowa*, 419 U.S. 393, 398 (1975)); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (per curiam) (“Although neither party has urged that this case is moot, resolution of the question is essential if federal courts are to function within their constitutional sphere of authority.”).

¹⁷ *Bd. of License Comm’rs of Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985) (per curiam) (quoting *Fusari v. Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)). See also *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 288 (2000) (chastising litigant for its “failure, despite its obligation to the Court, to mention a word about the potential mootness issue in its brief in opposition to the petition for writ of certiorari”).

¹⁸ E.g., *Roe v. Wade*, 410 U.S. 113, 125 (1973).

on appeal.¹⁹ “[A]n appeal should therefore be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant ‘any effectual relief whatever’ in favor of the appellant.”²⁰ “If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with subsequent events that have produced that alleged result.”²¹

ArtIII.S2.C1.8.4.3 Dismissal of Moot Cases

The Supreme Court has developed several doctrines that govern how courts should dispose of cases that become moot during the pendency of an appeal.¹ When reviewing a lower court’s judgment, an appellate court has several potential options for resolving the case: it may affirm—that is, approve—the judgment;² it may reverse—that is, overturn—the judgment;³ it may vacate the judgment—that is, nullify the judgment⁴ and thereby “strip[] the decision below of its binding effect;”⁵ or it may remand the case to the lower court for further proceedings.⁶ As the Court explained in its 1950 opinion in *United States v. Munsingwear, Inc.*, “[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot” on appeal or before the Court has issued its “decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss.”⁷ Disposing of a moot case in this manner thereby “clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happen-

¹⁹ *E.g.*, *DBSI/TRI IV Ltd. P’ship v. United States*, 465 F.3d 1031, 1038 (9th Cir. 2006) (explaining that mootness is a “jurisdictional issue[] that may be raised at any time, even for the first time on appeal”); *Cont’l Cas. Co. v. Anderson Excavating & Wrecking Co.*, 189 F.3d 512, 518 (7th Cir. 1999) (“A case can become moot at any time, and destroy the court’s jurisdiction.”); *Smith v. United States*, 921 F.2d 136, 138 (8th Cir. 1990) (“Mootness goes to the very heart of Article III jurisdiction, and any party can raise it at any time.”).

²⁰ *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). See also, *e.g.*, *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (“[I]f an event occurs while a case is pending on appeal that makes it impossible for the court to grant ‘any effectual relief whatever’ to a prevailing party, the appeal must be dismissed.”) (quoting *Mills*, 159 U.S. at 653).

²¹ *Cardinal Chem. Co. v. Morton Int’l, Inc.*, 508 U.S. 83, 98 (1993).

¹ See, *e.g.*, *Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 314 (1999) (“Generally, an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction, because the former merges into the latter. We have dismissed appeals in such circumstances.”).

² BLACK’S LAW DICTIONARY (10th ed. 2014).

³ *Id.*

⁴ *Id.*

⁵ *Deakins v. Monaghan*, 484 U.S. 193, 200 (1988).

⁶ BLACK’S LAW DICTIONARY (10th ed. 2014).

⁷ *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). See also, *e.g.*, *Acheson Hotels, LLC v. Laufer*, No. 22-429, slip op. at 3-4 (U.S. Dec. 5, 2023) (vacating and remanding a moot case for dismissal as contemplated by *Munsingwear*); *Azar v. Garza*, 138 S. Ct. 1790, 1793 (2018) (per curiam)(same); *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1542 (2018) (same); *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (per curiam) (same); *Camreta v. Greene*, 563 U.S. 692, 712–14 (2011) (same); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 80 (1997) (same); *Frank v. Minn. Newspaper Ass’n, Inc.*, 490 U.S. 225, 227 (1989) (per curiam) (same); *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (same); *Iron Arrow Honor Soc’y v. Heckler*, 464 U.S. 67, 73 (1983) (per curiam) (same); *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 92–94 & n.* (1979) (per curiam) (same); *City of Los Angeles v. Davis*, 440 U.S. 625, 634 (1979) (same); *Weinstein v. Bradford*, 423 U.S. 147, 148–49 (1975) (per curiam) (same); *Preiser v. Newkirk*, 422 U.S. 395, 403–04 (1975) (same); *Bd. of Sch. Comm’rs of City of Indianapolis v. Jacobs*, 420 U.S. 128, 130 (1975) (per curiam) (same). See also, *e.g.*, *Alvarez v. Smith*, 558 U.S. 87, 94–97 (2009) (analyzing the *Munsingwear* rule); *U.S. Bancorp Mortg. Co. v. Bonner Mall P’ship*, 513 U.S. 18, 22 (1994) (describing *Munsingwear* as “[t]he leading case on vacatur”); *Great W. Sugar Co. v. Nelson*, 442 U.S. 92, 93 n.* (1979) (per curiam) (“*United States v. Munsingwear, Inc.*, is perhaps the leading case on the proper disposition of cases that become moot on appeal.”).

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stance.”⁸ Put another way, the *Munsingwear* procedure for disposing of cases that become moot on appeal “prevent[s] a judgment, unreviewable because of mootness, from spawning any legal consequences,” and thereby ensures that the federal appellate courts, rather than individual litigants, have the last word on the answers to legal questions.⁹

The Supreme Court has noted, however, “the decision whether to vacate” a moot case pursuant to *Munsingwear* “turns on ‘the conditions and circumstances of the particular case.’”¹⁰ To that end, the Supreme Court has crafted several exceptions to the *Munsingwear* rule.¹¹ For one, the Supreme Court has specified that “vacatur is in order” under *Munsingwear* only when mootness occurs through “happenstance”—that is, “circumstances not attributable to the parties”—or “the ‘unilateral action of the party who prevailed in the lower court.’”¹² Thus, if a case becomes moot as a result of the parties’ mutual agreement to settle the case, the Court has held that federal courts should generally not vacate the judgment.¹³ The Court has justified this exception by explaining that “where mootness results from settlement . . . the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal or certiorari, thereby surrendering his claim to the . . . remedy of vacatur.”¹⁴ Such cases are therefore “not unreviewable, but simply unreviewed” as a result of the losing party’s “own choice.”¹⁵ Likewise, the Court has ruled that it is inappropriate to “clear[] the path for future relitigation of the issues between the parties”¹⁶ when the plaintiff renders the case moot by voluntarily agreeing to permanently withdraw its claims against the defendant.¹⁷ In such instances, rather than wiping the slate clean in the manner contemplated by *Munsingwear*, the Court has ordered that the case be dismissed with prejudice to refile so that “it cannot be resumed in this or any subsequent action.”¹⁸ Dismissing the case with prejudice thereby “prevent[s] the regeneration of the controversy” if the plaintiff later changes its mind and attempts to relitigate the dismissed claims in federal court.¹⁹

⁸ *Munsingwear*, 340 U.S. at 40.

⁹ See *id.* at 41.

¹⁰ *Azar*, 138 S. Ct. at 1792 (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U.S. 466, 478 (1916)).

¹¹ See, e.g., *Camreta*, 563 U.S. at 712 (explaining that, although the *Munsingwear* rule provides the “established” practice for resolving a civil case that “becomes moot pending appeal,” the *Munsingwear* doctrine is “not exceptionless”).

¹² *Arizonans for Official English*, 520 U.S. at 71–72 (quoting *U.S. Bancorp*, 513 U.S. at 23). See also *Azar*, 138 S. Ct. at 1792 (“One clear example where vacatur is in order is when mootness occurs through the unilateral action of the party who prevailed in the lower court.”) (brackets and internal citations quotation marks omitted); *Karcher v. May*, 484 U.S. 72, 83 (1987) (“Th[e] controversy did not become moot due to circumstances unattributable to any of the parties. The controversy ended when the losing party . . . declined to pursue its appeal. Accordingly, the *Munsingwear* procedure is inapplicable to this case.”).

¹³ *U.S. Bancorp*, 513 U.S. at 29. See also, e.g., *Alvarez v. Smith*, 558 U.S. 87, 94–97 (2009) (analyzing the interplay between *Munsingwear* and *U.S. Bancorp*).

¹⁴ *U.S. Bancorp*, 513 U.S. at 25.

¹⁵ *Id.*

¹⁶ See *Munsingwear*, 340 U.S. at 40.

¹⁷ See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 513 (1989); *Deakins v. Monaghan*, 484 U.S. 193, 199–200 (1988).

¹⁸ *Id.* at 200 n.4. See also *Webster*, 492 U.S. at 513 (“Because this dispute was rendered moot in part by appellees’ willingness permanently to withdraw their equitable claims from their federal action, a dismissal with prejudice is indicated.”) (quoting *Deakins*, 484 U.S. at 200) (brackets omitted).

¹⁹ *Deakins*, 484 U.S. at 200.

Nor does the Court follow its usual practice of vacating the judgment with directions to dismiss when a case has become moot due to an intervening change in the governing law.²⁰ Instead, the Court ordinarily “remand[s] for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully” to respond to the intervening change in law.²¹ For instance, in *Diffenderfer v. Central Baptist Church of Miami, Florida, Inc.*, the plaintiff challenged a Florida statute as unconstitutional.²² While the litigation was pending, however, the Florida legislature repealed the challenged statute and enacted a new statute in its place.²³ “[R]ather than remanding the case to the District Court for dismissal” in the manner contemplated by *Munsingwear*, the Supreme Court “remand[ed] the case to the District Court with leave to the appellants to amend their pleadings.”²⁴ Resolving the case in this way thereby afforded the appellants an opportunity “to demonstrate that the repealed statute retain[ed] some continuing force or to attack the newly enacted legislation.”²⁵

Finally, “[t]he Court’s treatment of cases that become moot on review from the lower federal courts” differs from its treatment of moot cases arising from state courts.²⁶ The Court’s “regular practice in the latter situation has been to dismiss the case and leave the judgment of the state court undisturbed,” rather than to vacate the judgment in the manner contemplated by *Munsingwear*.²⁷ According to the Court, allowing state court judgments in moot cases to stand “evinces a proper recognition that in the absence of any live case or controversy, [the Court] lack[s] jurisdiction and thus also the power to disturb the state court’s judgment.”²⁸

ArtIII.S2.C1.8.6 Voluntary Cessation Doctrine

First, the Supreme Court has held that a party’s voluntary cessation of an unlawful practice will usually not moot its opponent’s challenge to that practice.¹ Thus, “a

²⁰ *E.g.*, *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 482 (1990) (“Our ordinary practice in disposing of a case that has become moot on appeal is to vacate the judgment with directions to dismiss. However, in instances where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously, our practice is to vacate the judgment and remand for further proceedings in which the parties may, if necessary, amend their pleadings or develop the record more fully.”) (internal citations omitted).

²¹ *Id.* See also *U.S. Dep’t of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galito*, 477 U.S. 556, 559–60 (1986) (remanding case for further proceedings following amendment of statutory provision at issue); *Crowell v. Mader*, 444 U.S. 505, 505–06 (1980) (“Appellees may still wish to attack the newly enacted legislation . . . [W]e direct that the judgment of the District Court be vacated without prejudice to such further proceedings in the District Court as may be appropriate.”).

²² 404 U.S. 412, 412–14 (1972) (per curiam).

²³ *Id.* at 414.

²⁴ *Id.* at 415.

²⁵ *Id.*

²⁶ *ASARCO Inc. v. Kadish*, 490 U.S. 605, 621 n.1 (1989).

²⁷ *Id.* (citing *Kan. Gas & Elec. Co. v. State Corp. Comm’n of Kan.*, 481 U.S. 1044 (1987); *Times-Picayune Publ’g Corp. v. Schulingkamp*, 420 U.S. 985 (1975)).

²⁸ *Id.*

¹ See, e.g., *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1537 n.* (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017); *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307 (2012); *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 609 (2001); *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 287–89 (2000); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993); *Chi. Teachers Union, Local No. 1, AFT, AFL-CIO v. Hudson*, 475

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defendant cannot automatically moot a case by simply ending its unlawful conduct once sued.”² This exception to the mootness doctrine exists because if a litigant could defeat a lawsuit simply by temporarily ceasing its unlawful activities, there would be nothing to stop that litigant from engaging in that unlawful behavior again after the court dismissed the case³; the litigant would effectively “be free to return to [its] old ways.”⁴

The 1982 case of *City of Mesquite v. Aladdin’s Castle, Inc.* illustrates how this “voluntary cessation” doctrine applies in practice.⁵ The plaintiff in *City of Mesquite* challenged the constitutionality of a municipal ordinance.⁶ While the case was pending, however, the city repealed the offending provisions of the ordinance.⁷ The Court, explaining that “a defendant’s voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice,” concluded that the city’s revision of the ordinance did not render the plaintiff’s challenge moot.⁸ Because “the city’s repeal of the objectionable language” in the ordinance “would not preclude it from reenacting precisely the same provision” if the case were dismissed on mootness grounds, the Court concluded that it needed to “confront the merits of the” plaintiff’s constitutional challenge.⁹

The *DeFunis v. Odegaard* case discussed above, by contrast, exemplifies when the voluntary cessation doctrine will not save a case from dismissal.¹⁰ To reiterate, the petitioner in *DeFunis* claimed that certain law school admissions practices and criteria

U.S. 292, 305 n.14 (1986); *United States v. Generix Drug Corp.*, 460 U.S. 453, 456 n.6 (1983); *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 289 (1982); *City of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *Allee v. Medrano*, 416 U.S. 802, 810 (1974).

² *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013).

³ *See id.* (explaining that, in the absence of the voluntary cessation doctrine, “a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends”); *Knox*, 567 U.S. at 307 (“[A] dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.”); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001) (“[A] party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior.”); *City of Mesquite*, 455 U.S. at 289 (“In this case the city’s repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court’s judgment were vacated.”); *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 309 (1897) (“If the mere dissolution of the association worked an abatement of the suit as to all the defendants . . . it is plain that they have thus discovered an effectual means to prevent the judgment of this court being given upon the question really involved in the case. The defendants having succeeded in the court below, it would only be necessary thereafter to dissolve their association and instantly form another of a similar kind, and the fact of the dissolution would prevent an appeal to this court or procure its dismissal if taken. This result does not and ought not to follow.”).

⁴ *Allee*, 416 U.S. at 811 (quoting *Gray v. Sanders*, 372 U.S. 368, 376 (1963)). *See also, e.g., Friends of the Earth*, 528 U.S. at 189 (same).

⁵ 455 U.S. 283.

⁶ *Id.* at 284–86.

⁷ *Id.* at 288.

⁸ *Id.* at 288–89.

⁹ *Id.* at 289. The Court subsequently elaborated that “*City of Mesquite* does not stand for the proposition that it is only the possibility that the *selfsame* statute will be enacted that prevents a case from being moot; if that were the rule, a defendant could moot a case by repealing the challenged statute and replacing it with one that differs only in some insignificant respect.” *Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 508 U.S. 656, 662 (1993). *But see Princeton Univ. v. Schmid*, 455 U.S. 100, 103 (1982) (per curiam) (deeming case moot, without explicitly mentioning the voluntary cessation doctrine, where intervening party “substantially amended its regulations” “while the case was pending on appeal”).

¹⁰ *See* 416 U.S. 312, 318 (1974) (per curiam).

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discriminated against him on the basis of race.¹¹ While the case was pending, however, the petitioner began taking classes at the law school, and had almost completed his law degree by the time the case reached the Supreme Court.¹² The Court rejected the petitioner’s argument that the voluntary cessation doctrine rendered the case justiciable because the case’s mootness had “partially stem[med] from a policy decision on the part of the respondent Law School authorities” to allow the petitioner to complete his law school studies and receive his diploma.¹³ The Court emphasized that the respondents had not voluntarily ceased the allegedly discriminatory admissions practices that the petitioner challenged as unconstitutional; instead, the case became moot because the petitioner was just a few credits shy of completing his degree.¹⁴ In other words, the case was moot not because the school stopped engaging in allegedly unlawful activity, but rather because the petitioner would “receive his diploma regardless of any decision th[e] Court might reach on the merits of th[e] case.”¹⁵

The Court has clarified several other aspects of the voluntary cessation doctrine. For one, if it is “absolutely clear” that the allegedly wrongful behavior will not recur after the court dismisses the case, then a case can become moot notwithstanding a party’s voluntary cessation of that unlawful behavior.¹⁶ “The ‘heavy burden of persua[ding]’ the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.”¹⁷ To illustrate, in *Preiser v. Newkirk*, a prisoner claimed that prison officials had unlawfully transferred him from a medium security institution to a more restrictive maximum security institution, and asked the court to order his return to the medium security prison.¹⁸ While the case was pending, however, officials transferred the prisoner back to the medium security institution, and then subsequently transferred him to an even less restrictive minimum security institution.¹⁹ According to the Court, these subsequent developments made it “clear that correction authorities harbor[ed] no animosity toward” the plaintiff, such that there was “no reasonable expectation that the wrong” challenged by the prisoner would “be repeated.”²⁰ The Court therefore deemed the case nonjusticiable even though the prison

¹¹ *Id.* at 314–15.

¹² *Id.* at 315–17.

¹³ *Id.* at 317.

¹⁴ *See id.* at 318.

¹⁵ *Id.* at 317.

¹⁶ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 n.1 (2017) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)). *See also, e.g.*, *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000) (per curiam) (“Voluntary cessation of challenged conduct moots a case, however, only if it is ‘absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.’”) (quoting *United States v. Concentrated Phosphate Export Ass’n*, 393 U.S. 199, 203 (1968)).

¹⁷ *Friends of the Earth*, 528 U.S. at 189 (quoting *Concentrated Phosphate Export Ass’n*, 393 U.S. at 203); *see also* *FBI v. Fikre*, No. 22-1178, slip op. at 9 (U.S. Mar. 19, 2024) (“What matters is not whether a defendant repudiates its past actions, but what repudiation can prove about its future conduct. It is on that consideration alone—the potential for a defendant’s future conduct—that we rest our judgment.”); *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (explaining that a party’s burden to avoid the voluntary cessation doctrine is “formidable”); *see also, e.g.*, *Trinity Lutheran Church*, 137 S. Ct. at 2019 n.1; *Adarand Constructors*, 528 U.S. at 222.

¹⁸ 422 U.S. 395, 396–98 (1975).

¹⁹ *Id.* at 401.

²⁰ *Id.* at 402 (quoting *Concentrated Phosphate Export Ass’n*, 393 U.S. at 203); *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)).

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officials themselves had rendered the case moot by transferring the prisoner to a less restrictive institution.²¹

Additionally, the voluntary cessation doctrine typically applies only when a *party to the case* voluntarily discontinues an allegedly unlawful action. If, instead, a case becomes moot because “of the voluntary acts of a *third party non-defendant*,” the voluntary cessation doctrine will usually not save that case from dismissal.²² For instance, in *Iron Arrow Honor Society v. Heckler*, the Secretary of the Department of Health, Education, and Welfare (Secretary) promulgated a regulation barring recipients of federal funding from “providing significant assistance to any . . . organization . . . which discriminates on the basis of sex.”²³ The petitioner, an all-male honorary organization at a public university, commenced a lawsuit seeking to prevent the Secretary from interpreting that regulation in a manner that would require the university to ban the organization from conducting activities on campus so long as it continued to exclude women.²⁴ While the lawsuit was pending, however, the university determined that no matter whether the Secretary’s regulation required the university to ban the organization, the university’s own non-discrimination code independently barred the organization from operating on campus until it discontinued its male-only membership policy.²⁵ Because no judicial ruling with respect to the Secretary’s interpretation of the regulation would have any effect on the university’s independent decision to ban the organization pursuant to its own *non-discrimination policy*, the Court concluded that “the dispute as to how the [r]egulation should be interpreted” was “classically ‘moot.’”²⁶ The Court concluded that the voluntary cessation doctrine did not save the case from dismissal, as it was “the voluntary acts of a third party non-defendant”—namely, the university—that rendered the case moot, rather than the voluntary acts of the Secretary herself.²⁷

Similarly, the voluntary cessation doctrine will not save a case from dismissal when it is the *losing* party, rather than the prevailing party, whose voluntary actions render the case moot during the pendency of an appeal.²⁸ Thus, in *City News & Novelty, Inc. v. City of Waukesha*, a retailer of sexually explicit materials challenged a municipality’s decision to deny its adult business license.²⁹ After the lower courts ruled *against* the retailer, the retailer asked the Supreme Court to review the judgment in the municipality’s favor.³⁰ While the appeal was pending, however, the retailer opted to close its business.³¹ The Court determined that the retailer’s decision to cease operations had rendered the

²¹ *Id.* (“We have before us more than a mere voluntary cessation of allegedly illegal conduct, where we would leave the defendant free to return to his old ways.”) (ellipses, brackets, and internal quotation marks omitted).

²² *Iron Arrow Honor Soc’y v. Heckler*, 464 U.S. 67, 72 (1983) (per curiam) (emphasis added). *See also* *Deakins v. Monaghan*, 484 U.S. 193, 200 n.4 (1988) (“The Court’s ability to prevent respondents from renewing their claims after they are dismissed as moot distinguishes this case from one in which a *defendant* attempts to avoid appellate review by voluntarily ceasing the challenged conduct without losing the ability to reinstitute the conduct once the mooted case is dismissed.”).

²³ *Iron Arrow*, 464 U.S. at 68 (quoting 45 C.F.R. § 86.31(b)(7) (1975)) (emphasis omitted).

²⁴ *Id.* at 69.

²⁵ *Id.* at 69–70.

²⁶ *Id.* at 70–71.

²⁷ *Id.* at 72.

²⁸ *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 (2001).

²⁹ *Id.* at 281–82.

³⁰ *Id.* at 282.

³¹ *Id.* at 282–83.

case moot because the retailer no longer had any cognizable interest in the outcome of the case.³² Even though the circumstance rendering the case moot was the retailer's voluntary decision to close its business, the Court nonetheless concluded that the voluntary cessation doctrine did not render the case justiciable.³³ The Court emphasized that because the lower courts had ruled against the retailer, the retailer "left the fray as a loser, not a winner."³⁴ The Court reasoned that the retailer's voluntary cessation of its business therefore did "not keep [its opponent] under the weight of an adverse judgment" or "reward an arguable manipulation of [the Court's] jurisdiction."³⁵

ArtIII.S2.C1.10 Constitutional Avoidance Doctrine

ArtIII.S2.C1.10.6 Last Resort Rule

Under the Last Resort Rule, a court should "not pass upon a constitutional question . . . if there is also present some other ground upon which the case may be disposed."¹ Accordingly, if a court can resolve a case on both constitutional and non-constitutional grounds, the court should do so on non-constitutional grounds.² By doing so, the court avoids creating constitutional precedent unnecessarily, while giving the political process time to resolve contentious constitutional issues. Because the Last Resort Rule informs the order in which the Court should address constitutional and non-constitutional questions in a case, it is sometimes described as a "rule of judicial procedure."³

An example of the Court's use of the Last Resort Rule is its decision in *Bond v. United States*.⁴ In *Bond*, federal prosecutors charged Carol Bond with violating Section 229 of the Chemical Weapons Convention Implementation Act (CWCIA) when she caused "a minor thumb burn readily treated by rinsing with water" to her husband's lover by

³² *Id.* at 283–85.

³³ *Id.* at 283–84.

³⁴ *Id.* at 284.

³⁵ *Id.*

¹ *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). *See also* *Eustis v. Bolles*, 150 U.S. 361, 366 (1893) ("[W]here the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not federal has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the judgment.").

² *Berea Coll. v. Kentucky*, 211 U.S. 45, 53 (1908) ("[W]hen a state court decides a case upon two grounds, one Federal and the other non-Federal, this court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision."); *Allen v. Arguimbau*, 198 U.S. 149, 154–55 (1905) ("[I]f the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction."); *Murdock v. Memphis*, 87 U.S. 590, 636 (1874) ("If [the judgment] was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the Federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue."); *see also* *DeVillier v. Texas*, No. 22-913, slip op. at 6 (U.S. Apr. 16, 2024) ("Our precedents do not cleanly answer the question whether a plaintiff has a cause of action arising directly under the Takings Clause. But this case does not require us to resolve that question. The question presented asks what would happen if a property owner had no cause of action to vindicate his rights under the Takings Clause. It would be imprudent to decide that question without satisfying ourselves of the premise that there is no cause of action.").

³ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 251 (2012).

⁴ *Bond v. United States*, 572 U.S. 844 (2014).

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applying toxic chemicals to the paramour's car, mailbox, and door knob.⁵ Bond argued that Section 229 (1) "exceeded Congress's enumerated powers and invaded powers reserved to the States by the Tenth Amendment"⁶ and (2) did not apply to her because "her conduct, though reprehensible, was not at all 'warlike.'"⁷ Faced with resolving *Bond* on either statutory or constitutional grounds, the Court, relying on the Last Resort Rule, considered first whether it could resolve the case based on Bond's argument that Section 229 did not apply to her actions.⁸ After analyzing the CWCIA, the Court concluded that Congress did not intend for Section 229 to apply to Bond's circumstance.⁹

Based on the Last Resort Rule, the Supreme Court has remanded cases involving constitutional questions to lower courts to see if the case can be resolved on statutory grounds. For example, in *Escambia County v. McMillan*, the Supreme Court remanded a case affirmed by the appellate court on constitutional grounds because the district court also found a statutory violation.¹⁰ The Supreme Court instructed the appellate court to determine if it could affirm the district court's decision based on the statutory rather than the constitutional ruling.¹¹ In other cases, the Court has avoided ruling on a constitutional question by deciding a case based on statutory reasons not considered by the lower court.¹² For instance, the Court resolved *Siler v. Louisville & Nashville Railroad* by ruling that the Railroad Commission violated a Kentucky statute—an issue the Kentucky state court had not considered.¹³ By reaching this conclusion, the Court avoided addressing *Siler's* constitutional questions.¹⁴

Siler concerned questions of federal and state law. While the Supreme Court interpreted the Kentucky statute in *Siler*, the Court often remands cases involving constitutional and state law issues to state courts so they can first resolve state law questions. Consistent with this approach, the Supreme Court has dismissed state court appeals based on constitutional questions if state law can sustain the judgment.¹⁵ Besides

⁵ *Id.* at 852.

⁶ *Id.* at 853. Discussing Bond's constitutional claim, the Court noted that, under the Constitution, the states retained "broad authority to enact legislation for the public good-what we have often called a 'police power.'" *Id.* at 854 (citing *United States v. Lopez*, 514 U.S. 549, 567 (1995)). As a consequence, the Court explained, "[a] criminal act committed wholly within a State 'cannot be made an offence against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States.'" *Id.* (quoting *United States v. Fox*, 95 U.S. 670, 672 (1878)).

⁷ *Id.* at 853.

⁸ *Id.* at 855.

⁹ *Id.* at 866 ("[I]f section 229 reached Bond's conduct, it would mark a dramatic departure from that constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States. Absent a clear statement of that purpose, we will not presume Congress to have authorized such a stark intrusion into traditional state authority.").

¹⁰ *Escambia Cnty. v. McMillan*, 466 U.S. 48, 51 (1984).

¹¹ *Id.*

¹² *Siler v. Louisville & Nashville R.R.*, 213 U.S. 175, 191 (1909) ("This court . . . can, if it deem it proper, decide the local questions only, and omit to decide the federal questions."). See also *Jean v. Nelson*, 472 U.S. 846 (1985); *United States v. Locke*, 471 U.S. 84 (1985); *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981). But see *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984) (holding Eleventh Amendment bars federal courts from hearing state law cases when the state is the defendant).

¹³ *Siler*, 213 U.S. at 194.

¹⁴ *Id.* at 193.

¹⁵ *Berea Coll. v. Kentucky*, 211 U.S. 45, 53 (1908) ("[W]hen a state court decides a case upon two grounds, one Federal and the other non-Federal, this court will not disturb the judgment if the non-Federal ground, fairly construed, sustains the decision." (citations omitted)). See also *Allen v. Arguimbau*, 198 U. S. 149, 154–55 (1905).

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avoiding constitutional questions, remanding state law questions to state courts has other advantages: First, the Court avoids using its resources to decide questions where its decisions would be advisory.¹⁶ Second, the Court acknowledges state expertise and autonomy to interpret state laws.¹⁷ Declining to rule on a constitutional question when a ruling on either of two state laws could resolve the case,¹⁸ the Court observed:

The doctrine that the Court will not “anticipate a question of constitutional law in advance of the necessity of deciding it” . . . is a well-settled doctrine of this Court which, because it carries a special weight in maintaining proper harmony in federal-state relations, must not yield to the claim of the relatively minor inconvenience of postponement of decision.¹⁹

Third, the Court avoids having to rule on unfamiliar state law. In *Spector Motor Service v. McLaughlin*, the Court ruled that federal litigation should be held pending state court resolution of “intertwined” local law.²⁰ Justice Felix Frankfurter stated:

[W]e have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law. Avoidance of such guesswork, by holding the litigation in the federal courts until definite determinations on local law are made by the state courts, merely heeds this time-honored canon of constitutional adjudication.²¹

The Court has used the Last Resort Rule to avoid politically contentious issues. For example, in *Railroad Commission of Texas v. Pullman Co.*, the Court directed the parties to litigate their state law questions in state court and ordered the lower federal court to hold the federal case in abeyance pending the state litigation. By doing this, the Court avoided ruling on the politically charged issue of whether the Railroad Commission of Texas violated the Constitution by requiring white Pullman conductors, and not black Pullman porters, to operate sleeping cars. Reasoning that “[s]uch constitutional adjudication

¹⁶ *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983) (“Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court’s refusal to decide cases where there is an adequate and independent state ground. It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions.”). See also *Erie R.R. v. Tompkins*, 304 U.S. 64, 79 (1938) (“[Federal] [s]upervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the state, and, to that extent, a denial of its independence.”).

¹⁷ *Giles v. Teasley*, 193 U.S. 146, 160 (1904) (“[I]f the decision of a state court rests on an independent ground—one which does not necessarily include a determination of the Federal right claimed—or upon a ground broad enough to sustain it without deciding the Federal question raised, this court has no jurisdiction to review the judgment of the state court.” (citations omitted)). See also *Wade v. Lawder*, 165 U.S. 624, 628 (1897) (“The decree rested on grounds broad enough to sustain it without reference to any federal question.”); *Dower v. Richards*, 151 U.S. 658, 666 (1894) (“[A] writ of error can be sustained only when the decision of the state court is against a right claimed under the constitution and laws of the United States. And if the decision of the state court rests on an independent ground of law, not involving any federal question, this court has no jurisdiction.” (citations omitted)).

¹⁸ *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960).

¹⁹ *Id.* at 211–12 (citations omitted).

²⁰ *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944).

²¹ *Id.* See also *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 (1943); *City of Chicago v. Fieldcrest Dairies*, 316 U.S. 168, 173 (1942).

cation plainly can be avoided if a definitive ruling on the state issue would terminate the controversy,” Justice Frankfurter stated: “[The equal protection issue] touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open.”²²

ArtIII.S2.C1.12 Admiralty and Maritime Jurisdiction

ArtIII.S2.C1.12.1 Overview of Admiralty and Maritime Jurisdiction

The federal courts’ jurisdiction over admiralty and maritime cases derives from the Constitution and federal statutes. Article III of the Constitution extends the federal judicial power to “all Cases of admiralty and maritime Jurisdiction.”¹ By giving the Federal Judiciary jurisdiction over admiralty cases—and authorizing Congress to regulate that jurisdiction²—the Framers sought to ensure that federal courts would resolve cases that might implicate the Nation’s foreign policy.³ The Framers also recognized that uniform federal admiralty jurisdiction could protect maritime commerce from the diverse and unpredictable rules that state admiralty courts had applied under the Articles of Confederation.⁴ The Supreme Court has explained that Article III’s grant of admiralty jurisdiction to the federal courts “contemplates a system of maritime law coextensive with, and operating uniformly in, the whole country” in order to promote “the great interests of navigation and commerce” and maintain the United States’ “diplomatic relations.”⁵

Beginning with the Judiciary Act of 1789, Congress established the federal district courts and granted them “exclusive” and “original”⁶ subject matter jurisdiction over any “civil case of admiralty or maritime jurisdiction.”⁷ Congress also allowed state courts to supplement the administration of federal maritime law by exercising concurrent juris-

²² R.R. Comm’n of Tex. v. Pullman Co., 312 U.S. 496, 498 (1941). *See also* Harris Cnty. Comm’r v. Moore, 420 U.S. 77, 88–89 (1975) (holding federal court to abstain until Texas court resolves state constitutional questions); Reetz v. Bozanich, 397 U.S. 82, 87 (1970) (“[T]he federal court should have stayed its hand while the parties repaired to the state courts for a resolution of their state constitutional questions.”).

¹ U.S. CONST. art. III, § 2, cl. 1. Federal courts have treated the “admiralty” and “maritime” aspects of such jurisdiction as functionally synonymous. This essay sometimes refers to “admiralty and maritime jurisdiction” as “admiralty jurisdiction.” Jurisdiction generally refers to a court’s power to decide a case. *Jurisdiction*, BLACK’S LAW DICTIONARY 980 (10th ed. 2014).

² *See* U.S. CONST. art. III, § 1; *id.* § 2, cl. 1; *United States v. Hudson & Goodwin*, 11 U.S. (7 Cr.) 32, 33 (1812).

³ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1666 (1833).

⁴ *Id.*; *Waring v. Clarke*, 46 U.S. (5 How.) 441, 456–57 (1847).

⁵ *Great Lakes Ins. SE v. Raiders Retreat Realty Co.*, Docket No. 22-500, slip op. at 1 (U.S. Feb. 21, 2024).

⁶ If a court has “original jurisdiction” over a particular subject matter, then it may hear and decide a case concerning that matter before any other tribunal does. *Original Jurisdiction*, BLACK’S LAW DICTIONARY 982 (10th ed. 2014).

⁷ The current version of this statutory grant of admiralty jurisdiction is located at 28 U.S.C. § 1333(1). Congress also granted the federal district courts exclusive jurisdiction over prize cases, which have historically involved property (e.g., a ship) used by an enemy, captured during wartime, and brought into the United States. *Id.* § 1333(2). Under federal law, the district courts have jurisdiction over cases involving the seizure and forfeiture of a vessel for violating federal law. *Id.* §§ 1333(1), 1356. Congress also granted district courts in U.S. territories jurisdiction over admiralty and maritime cases. *See The City of Panama*, 101 U.S. 453, 458 (1880).

In general, district courts have discretion as to whether to retain admiralty jurisdiction over suits between foreign parties. *Charter Shipping Co. v. Bowring, Jones & Tidy, Ltd.*, 281 U.S. 515, 517 (1930); *The Maggie Hammond*, 76 U.S. (9 Wall.) 435, 450, 457 (1869).

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diction over admiralty cases in which plaintiffs seek traditional common law remedies.⁸ Under the “saving to suitors clause” in Section 9 of the Judiciary Act, courts retain concurrent jurisdiction over most contract and tort claims that fall within federal admiralty jurisdiction because a plaintiff may bring a personal action against an individual defendant seeking common law remedies (e.g., payment of money damages).⁹ However, in general, plaintiffs must pursue actions in federal court when they seek remedies that lie against property in rem, such as the seizure of a vessel to enforce a maritime lien.¹⁰

Much of the Supreme Court’s jurisprudence on admiralty jurisdiction has examined the territorial extent of such jurisdiction and which types of cases fall within this limited grant of jurisdiction. Generally, courts consider the location in which a tort or crime occurs to be a major factor when determining whether the tort or crime falls within admiralty jurisdiction.¹¹ The Court has held that, under the Constitution, admiralty jurisdiction extends to all navigable public waters, regardless of whether they are saltwater or freshwater, or subject to the ebb and flow of the tide.¹² Admiralty jurisdiction also extends to contracts, regardless of where they are entered into or to be performed, provided that their subject matter is “essentially maritime.”¹³

When a federal court exercises admiralty jurisdiction over a case,¹⁴ it follows a special set of procedural rules. Notably, jury trials are unavailable in civil admiralty proceedings¹⁵ unless Congress provides otherwise.¹⁶ Thus, in federal admiralty proceedings, the judge typically decides issues of both law and fact. When a federal or state court exercises admiralty jurisdiction over a case, the judge must apply the substantive rules

⁸ 28 U.S.C. § 1333(1) (“The district courts shall have original jurisdiction, exclusive of the courts of the States, of . . . [a]ny civil case of admiralty or maritime jurisdiction, *saving to suitors in all cases all other remedies to which they are otherwise entitled.*”) (emphasis added). See also, e.g., *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 454 (2001); *Schoonmaker v. Gilmore*, 102 U.S. 118, 119 (1880); *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 337 (1816). Lawsuits brought under the savings clause in state court may not be removed to federal court unless independent grounds exist, other than admiralty, for the federal court’s exercise of jurisdiction. *Romero v. Int’l Terminal Operating Co.*, 358 U.S. 354, 371–72 (1959).

⁹ For more on the relationship between federal and state court jurisdiction in admiralty cases, see Art.III.S2.C1.12.8 Exclusivity of Federal Admiralty and Maritime Jurisdiction.

¹⁰ See *id.* In in rem admiralty proceedings, the court takes custody of the *res* or property. The property itself is made the defendant in the case, and parties who have an interest in it “may appear” and each “propound independently his interest.” *Taylor v. Carryl*, 61 U.S. (20 How.) 583, 599 (1858).

¹¹ *Exec. Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268 (1972).

¹² See, e.g., *S. S.S. Co. v. NLRB*, 316 U.S. 31, 41 (1942); *The Montello*, 87 U.S. (20 Wall.) 430, 441–45 (1874); *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563–64 (1870). Congress has some power to extend the territorial scope of admiralty jurisdiction. For example, in the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 30101, Congress augmented admiralty jurisdiction so that it encompasses claims that involve injury or damage to persons or property “caused by a vessel on navigable waters,” even if such injury or damage is “done or consummated on land” (e.g., collision of a ship with a bridge).

¹³ *Ex parte Easton*, 95 U.S. 68, 72 (1877).

¹⁴ A federal court exercising admiralty jurisdiction is sometimes said to be “sitting in admiralty.”

¹⁵ E.g., *The Whelan*, 11 U.S. (7 Cr.) 112, 112 (1812); *The Schooner Betsey*, 8 U.S. (4 Cr.) 443, 452 (1807); *The Schooner Sally*, 6 U.S. (2 Cr.) 406, 406 (1805); *La Vengeance*, 3 U.S. (3 Dall.) 297, 301 (1796).

¹⁶ Congress may, consistent with the Constitution, provide for jury trials in admiralty cases. See *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 20 (1963) (noting that the Seventh Amendment does not require jury trials in admiralty cases but “neither that Amendment nor any other provision of the Constitution forbids them”); *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443, 460 (1852). The Great Lakes Statute, 28 U.S.C. § 1873, provides that parties to a lawsuit involving maritime contracts or torts may demand a jury trial in admiralty cases that arise upon the Great Lakes, provided that the vessels involved meet certain conditions.

of federal maritime law,¹⁷ which is a type of federal common law¹⁸ that Congress may revise.¹⁹ In the absence of controlling federal maritime law, federal courts have sometimes applied substantive state law in admiralty cases when it would not interfere with the uniformity of federal maritime law.²⁰ In some cases, such as those involving maritime torts in a state's territorial waters, the Court has held that state law may supplement federal maritime law with additional remedies.²¹

This group of essays examines the Constitution's grant of federal judicial power over cases of admiralty and maritime jurisdiction. The first essay provides an overview of the historical development of admiralty and maritime jurisdiction in the United States. Subsequent essays examine Supreme Court decisions that interpret the territorial and conceptual scope of this jurisdiction. The essays conclude by discussing when concurrent federal and state jurisdiction exists over maritime claims and, alternatively, when such claims fall within the exclusive admiralty jurisdiction of the federal courts.

ArtIII.S2.C1.12.2 Historical Background on Admiralty and Maritime Jurisdiction

The Constitution's Framers were familiar with the concept of a separate and specialized admiralty jurisdiction. Prior to the Founding, the British Crown commissioned vice-admiralty courts in the American colonies.¹ These courts, which were subordinate to the English admiralty courts, exercised jurisdiction over maritime cases that arose in the colonies independently of the colonial courts of common law and equity.²

In the years leading up to the American Revolution, the jurisdiction of the independent vice-admiralty courts led to disputes between the colonists and the British Crown. For

¹⁷ Federal maritime law incorporates common principles that commercial nations have recognized. The United States has adopted this maritime law through its "laws and usages" with some modifications to account for local conditions. *See The Lottawanna*, 88 U.S. (21 Wall.) 558, 572–73 (1875) ("In this respect it is like international law or the laws of war, which have the effect of law in no country any further than they are accepted and received as such.").

¹⁸ Federal courts have explained the content of the general maritime law. *See generally* *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959); *Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 381–82 (1918); *United States v. Ames*, 99 U.S. 35, 35–36 (1879).

¹⁹ Congress may, consistent with the Constitution, revise federal maritime law. *See* *Crowell v. Benson*, 285 U.S. 22, 55 (1932); *In re Garnett*, 141 U.S. 1, 14 (1891). Congress might also rely, to an extent, on its power to regulate maritime commerce when revising general maritime law. *The Lottawanna*, 88 U.S. (21 Wall.) at 577. *See also, e.g.*, U.S. CONST. art. I, § 8, cl. 10 (granting Congress power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations"); *id.* at § 8, cl. 11 (giving Congress power to "declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water").

²⁰ *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 158–59 (1920). *See also* *Goett v. Union Carbide Corp.*, 361 U.S. 340, 342 (1960) (holding that, in a wrongful death case, a state law may supply the standard for liability in a maritime tort that arises within the state's territorial jurisdiction); *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 320–21 (1955) (holding that state law governed the effect of marine insurance warranties when Congress had left regulation of marine insurance to the states).

²¹ *E.g.*, *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 202, 215 (1996) (holding that state remedies for the wrongful death of a nonseafarer in state territorial waters were not preempted by federal law, where federal law provided no other remedy).

¹ *Waring*, 46 U.S. at 454; 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 68-70 (Philadelphia 1893) (1768). *See also* STORY, *supra* note 3, at § 1659.

² *See supra* note 1.

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example, the colonists objected to the Crown's prosecution of colonists in the vice-admiralty courts, without trial by jury, for allegedly violating a British tax law, the 1765 Stamp Act.³ In 1774, the First Continental Congress's delegates cited this extension of British admiralty courts' jurisdiction "beyond their ancient limits" as one of the major grievances against Great Britain.⁴ Denial to the colonists of trial by jury in the vice-admiralty courts helped to motivate the colonists' 1776 Declaration of Independence, which cited the British King depriving the colonists "in many cases, of the benefits of Trial by Jury" as a justification for separating from Great Britain.⁵

After declaring independence, each state established its own admiralty courts.⁶ State admiralty courts adopted a wide variety of procedural practices, particularly with respect to the availability of jury trials.⁷ Although the Articles of Confederation authorized Congress to establish a tribunal to hear appeals from state admiralty courts in prize cases, this appeal mechanism failed to resolve many conflicts among state admiralty court decisions.⁸

Records of the Federal Convention of 1787 do not provide much insight into the Framers' reasons for conferring admiralty jurisdiction on the Federal Judiciary.⁹ Delegate Charles Pinckney's plan for the federal government, which he had submitted to the Convention, would have authorized Congress to establish separate admiralty courts in each of the states.¹⁰ In addition, the issue of admiralty jurisdiction received a brief mention in a Convention debate over whether the Constitution should specifically create lower federal courts.¹¹ Delegate James Wilson argued that the "national Government" should have jurisdiction over admiralty cases because they would often implicate controversies with foreign parties that should remain outside of state court jurisdiction.¹²

Toward the end of the Convention, the Committee of Detail, which was responsible for drafting the Constitution, included the clause granting the Federal Judiciary admiralty and maritime jurisdiction in one of its drafts.¹³ This clause would establish uniform

³ *Declaration and Resolves of the First Continental Congress*, THE AVALON PROJECT, https://avalon.law.yale.edu/18th_century/resolves.asp. See also *C.J. Hendry Co. v. Moore*, 318 U.S. 133, 141 (1943) (noting that the "rise of the vice-admiralty courts" was "prompted in part by the [British] Crown's desire to have access to a forum not controlled by the obstinate resistance of American juries").

⁴ See *supra* note 3. The colonial vice-admiralty courts had long exercised a more expansive jurisdiction than that of the English admiralty courts. See *Atkins v. Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 304 (1874); *Waring*, 46 U.S. (5 How.) at 454.

⁵ *Declaration of Independence: A Transcription*, NAT'L ARCHIVES, <https://www.archives.gov/founding-docs/declaration-transcript>.

⁶ Harrington Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 461–63 (1925). For example, Virginia established a court to hear cases related to "vessels and their cargoes," which had jurisdiction over prize cases. *Id.*

⁷ THE FEDERALIST NO. 83 (Alexander Hamilton).

⁸ PUTNAM, *supra* note 6, at 463–64. See also ARTICLES OF CONFEDERATION art. IX.

⁹ PUTNAM, *supra* note 6, at 460 (noting that the subject of admiralty courts "received but scant attention in the deliberations of the Federal Constitutional Convention").

¹⁰ *Id.* at 460, 465–66. See also, e.g., 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 159 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS (reproducing one version of the Pinckney Plan in a Committee of Detail draft)].

¹¹ 1 FARRAND'S RECORDS, at 124.

¹² *Id.*

¹³ 2 FARRAND'S RECORDS, *supra* note 11, at 186–87. This draft granted the "Supreme Court" jurisdiction over admiralty cases but vested the federal "Judicial Power" in the Supreme Court and lower federal courts. See *id.*

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federal jurisdiction to resolve conflicts among the states with respect to prize cases, and the Convention delegates appear to have accepted it without controversy.¹⁴

Writing in the *Federalist Papers* in support of the Constitution's ratification, Alexander Hamilton maintained that even the most adamant opponents of a strong central government had acknowledged that the Federal Judiciary should take cognizance of admiralty cases.¹⁵ Such cases, he wrote, "depend on the laws of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace."¹⁶ The Founders believed that admiralty jurisdiction should extend to the adjudication of prize cases involving the capture of foreign ships¹⁷ and torts involving foreign ships,¹⁸ both of which could implicate foreign affairs.¹⁹ Hamilton also argued that federal courts should have exclusive jurisdiction in admiralty cases in order to provide uniform practices with respect to jury trials, which varied widely in state courts.²⁰

By giving the Federal Judiciary jurisdiction over admiralty cases—and authorizing Congress to regulate that jurisdiction²¹—the Framers sought to ensure that federal courts would resolve cases that might implicate the nation's foreign policy.²² The Framers also recognized that uniform federal admiralty jurisdiction could protect maritime commerce from the diverse and unpredictable rules that state admiralty courts had applied under the Articles of Confederation.²³ After the Constitution's ratification, commercial maritime activity continued to expand throughout the United States. The importance of uniform admiralty jurisdiction grew as the Nation acquired new territories with inland waters and new inventions like the steamboat increased commerce on U.S. waterways.²⁴

The Constitution's final text specifically extended the federal "judicial Power" to admiralty cases. U.S. CONST. art. III, § 2, cl. 1.

¹⁴ PUTNAM, *supra* note 6, at 469 ("[T]he experience of prize appeals, and the conflicts in the separate State courts, had prepared the Convention to accept a uniform Federal system, as essential to maritime commerce."). See also 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1658 (1833) ("The propriety of this delegation of power seems to have been little questioned at the time of adopting the constitution.").

¹⁵ THE FEDERALIST No. 80 (Alexander Hamilton).

¹⁶ *Id.* See also STORY, *supra* note 14, at §§ 1664–1667.

¹⁷ STORY, *supra* note 14, at § 1662.

¹⁸ *Id.* § 1664.

¹⁹ See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 475 (1793) (noting that "as the seas are the joint property of nations, whose right and privileges relative thereto, are regulated by the law of nations and treaties, [admiralty and maritime] cases necessarily belong to national jurisdiction.").

²⁰ THE FEDERALIST No. 83 (Alexander Hamilton).

²¹ See U.S. CONST. art. III, § 1; *id.* § 2, cl. 1; *United States v. Hudson & Goodwin*, 11 U.S. (7 Cr.) 32, 33 (1812).

²² *Waring v. Clarke*, 46 U.S. (5 How.) 441, 456–57 (1847); STORY, *supra* note 14, at § 1666.

²³ *Id.*; *Waring*, 46 U.S. (5 How.) at 456–57.

²⁴ *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555, 562 (1867) ("[W]ith the vast increase of inland navigation consequent upon the use of steamboats, and the development of wealth on the borders of the rivers, which thus became the great water highways of an immense commerce, the necessity for an admiralty court, and the value of admiralty principles in settling controversies growing out of this system of transportation, began to be felt.").

ArtIII.S2.C1.13 Cases to Which the United States is a Party
ArtIII.S2.C1.13.4 Suits Against the United States and Sovereign Immunity

In addition to suits brought by the federal government as a plaintiff, “Controversies to which the United States shall be a Party” may include cases brought against the United States as a defendant.¹ Those cases fall within Article III’s grant of federal court jurisdiction;² however, the doctrine of sovereign immunity may limit such suits.

While state sovereign immunity is rooted in part in the Eleventh Amendment,³ no provision of the Constitution expressly grants the federal government immunity from suit. Instead, most judges and commentators agree that federal sovereign immunity is a common law doctrine drawn from pre-Founding English law.⁴ Since the early years of the Republic, the Supreme Court has repeatedly adopted the position that the United States may not be sued unless it consents.⁵ The Court has applied the doctrine of sovereign immunity to bar suits from proceeding without consent against the federal government for actions of its agents or employees⁶ and against federal agencies⁷ and government corporations.⁸ The Court has further held that any waiver of sovereign immunity must come from an act of Congress; Executive officials are powerless either to

¹ U.S. CONST. art III, § 2, cl. 1.

² In addition to falling within federal court jurisdiction as cases to which the United States is a party, these cases may also fall within federal court jurisdiction as cases arising under the Constitution or the laws or treaties of the United States. See ArtIII.S2.C1.11.1 Overview of Federal Question Jurisdiction.

³ See U.S. CONST. amend. XI; see also Amdt11.1 Overview of Eleventh Amendment, Suits Against States to Amdt11.6.4 Tort Actions Against State Officials.

⁴ See, e.g., ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 9.2 (5th ed. 2007). Compare *The Siren*, 74 U.S. (7 Wall.) 152, 153–54 (1869) (“It is a familiar doctrine of the common law, that the sovereign cannot be sued in his own courts without his consent.”); *with* *Kennecott Copper Corp. v. State Tax Com’n*, 327 U.S. 573, 580 (1946) (Frankfurter, J., dissenting) (“Though this immunity from suit without consent is embodied in the Constitution, it is an anachronistic survival of monarchical privilege, and runs counter to democratic notions of the moral responsibility of the State.”).

⁵ This rule first appeared in embryonic form in an obiter dictum by Chief Justice Jay in *Chisholm v. Georgia*, where he indicated that a suit would not lie against the United States because “there is no power which the courts can call to their aid.” 2 U.S. (2 Dall.) 419, 478 (1793). In *Cohens v. Virginia*, also in dictum, Chief Justice John Marshall noted, the universally received opinion is that no suit can be commenced or prosecuted against the United States. 19 U.S. (6 Wheat.) 264, 412 (1821). The issue was more directly in question in *United States v. Clarke*, where Chief Justice John Marshall stated that, as the United States is “not suable of common right, the party who institutes such suit must bring his case within the authority of some act of Congress, or the court cannot exercise jurisdiction over it.” 33 U.S. (8 Pet.) 436, 444 (1834). See also *United States v. McLemore*, 45 U.S. (4 How.) 286 (1846); *Hill v. United States*, 50 U.S. (9 How.) 386, 389 (1850); *De Groot v. United States*, 72 U.S. (5 Wall.) 419, 431 (1867); *United States v. Eckford*, 73 U.S. (6 Wall.) 484, 488 (1868); *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1869); *Nichols v. United States*, 74 U.S. (7 Wall.) 122, 126 (1869); *The Davis*, 77 U.S. (10 Wall.) 15, 20 (1870); *Carr v. United States*, 98 U.S. 433, 437–39 (1879).

⁶ *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 275 (1869); *Peabody v. United States*, 231 U.S. 530, 539 (1913); *Koekuk & Hamilton Bridge Co. v. United States*, 260 U.S. 125, 127 (1922); *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (“there can be no legal right as against the authority that makes the law on which the right depends”). See also *The Western Maid*, 257 U.S. 419, 433 (1922); *Sloan Shipyards v. U.S. Fleet Corp.*, 258 U.S. 549, 570 (1922); cf. 39 Ops. Atty. Gen. 559, 562 (1938).

⁷ *Fed. Hous. Admin., Region No. 4 v. Burr*, 309 U.S. 242, 244 (1940) (“[T]here can be no doubt that Congress has full power to endow the Federal Housing Administration with the government’s immunity from suit or to determine the extent to which it may be subjected to the judicial process.”).

⁸ *Fed. Land Bank v. Priddy*, 295 U.S. 229, 231 (1935). The Court has also held that Indian nations are exempt from suit without further congressional authorization. *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506 (1940).

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waive such immunity or to confer jurisdiction on a federal court.⁹ In the 2019 case *Thacker v. Tennessee Valley Authority*, the Court rejected a separation of powers challenge to a statute that waived the immunity of a government-owned corporation.¹⁰

Congress has waived federal sovereign immunity through statutes such as the Administrative Procedure Act,¹¹ the Federal Tort Claims Act,¹² the Tucker Act. The Supreme Court has founded congressional waiver of sovereign immunity even when a statute does not expressly mention sovereign immunity, such as in the Fair Credit Reporting Act.¹³ In the absence of a waiver of sovereign immunity authorizing suits against the government itself, the Supreme Court has at times allowed suits to go forward against federal officials sued in their individual capacity.¹⁴ For instance, in *Bivens v. Six Unknown Named Agents*¹⁵ and its progeny, the Court allowed individuals to sue federal agents directly under the Constitution without a federal statute authorizing relief.¹⁶ More recent Supreme Court cases have construed *Bivens* narrowly.¹⁷

ArtIII.S2.C2 Supreme Court Jurisdiction

ArtIII.S2.C2.6 Exceptions Clause and Congressional Control over Appellate Jurisdiction

Unlike the Supreme Court's original jurisdiction,¹ Article III provides that the Court's appellate jurisdiction is subject to "Exceptions" and "Regulations" prescribed by Congress.² Congress and the Court have construed this provision, sometimes called the "Exceptions Clause," to grant Congress significant control over the Court's appellate jurisdiction and proceedings. In addition, Congress possesses extensive authority to regulate the jurisdiction of the lower federal courts, and may limit the cases the

⁹ *United States v. N.Y. Rayon Co.*, 329 U.S. 654 (1947). Congress may also grant or withhold immunity from suit on behalf of government corporations. *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575 (1943).

¹⁰ 139 S.Ct. 1435 (2019). Specifically, the Court rejected an argument that allowing suits against the corporation "would conflict with the 'constitutional scheme'—more precisely, with 'separation-of-powers principles'—by subjecting the TVA's discretionary conduct to 'judicial second-guessing.'" *Id.* at 1441 (quoting Resp. Br.).

¹¹ 5 U.S.C. § 702.

¹² 28 U.S.C. § 2674.

¹³ *Dep't of Agriculture Rural Development Rural Housing Service v. Kirtz*, No. 22-846, slip op at 20 (U.S. Feb. 8, 2024) (interpreting 15 U.S.C. §§ 1681n, 1681o).

¹⁴ In addition to the *Bivens* line of cases discussed *infra*, see, e.g., *United States v. Lee*, 106 U.S. 196 (1882).

¹⁵ 403 U.S. 388 (1971). Some have likened the holding in *Bivens* to the creation of federal common law. See, e.g., *Hernandez v. Mesa*, 140 S. Ct. 735, 742 (2020) ("Analogizing *Bivens* to the work of a common-law court, petitioners and some of their *amici* make much of the fact that common-law claims against federal officers for intentional torts were once available. . . . With the demise of federal general common law, a federal court's authority to recognize a damages remedy must rest at bottom on a statute enacted by Congress, . . . and no statute expressly creates a *Bivens* remedy."); *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, (2001) (Scalia, J., concurring) ("*Bivens* is a relic of the heady days in which this Court assumed common-law powers to create causes of action—decreeing them to be 'implied' by the mere existence of a statutory or constitutional prohibition."). Justice John Harlan's concurrence in *Bivens* suggested that liability in that case was not based on common law. 403 U.S. at 403 (Harlan, J., concurring) ("I do not think that the fact that the interest is protected by the Constitution rather than statute or common law justifies the assertion that federal courts are powerless to grant damages in the absence of explicit congressional action authorizing the remedy.").

¹⁶ See also *Davis v. Passman*, 442 U.S. 228 (1979), *Carlson v. Green*, 446 U.S. 14 (1980).

¹⁷ See, e.g., *Egbert v. Boule*, No. 21-147 (U.S. June 8, 2022).

¹ For discussion of the Court's original jurisdiction, see ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

² U.S. CONST. art III, § 2, cl. 2.

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Supreme Court can hear on appeal by generally stripping the federal courts of jurisdiction over certain cases.

Article III, Section 2, Clause 2 provides that the Supreme Court “shall have” appellate jurisdiction over certain categories of cases and controversies, subject to exceptions and regulations by Congress.³ Several Supreme Court decisions have considered whether the Article III grant of Supreme Court appellate jurisdiction is self-executing—that is, whether it would allow the Court to exercise appellate jurisdiction absent express authorization from Congress. In practice, since the first Judiciary Act of 1789, Congress has enacted legislation that affirmatively grants the Supreme Court appellate jurisdiction over only a subset of covered cases rather than providing (or assuming) that the Court can hear all such cases and carving out discrete exceptions.⁴ In the 1796 case *Wiscart v. D’Auchy*, the Court considered whether it could review admiralty cases.⁵ A majority of the Court held that it had jurisdiction to review admiralty cases because such cases fell within the scope of a statute authorizing review of federal circuit court decisions in “civil actions.”⁶ In so holding, the majority noted that that congressional authorization was necessary to create jurisdiction and that, if Congress provided for jurisdiction, the Court must accept it, stating: “If Congress had provided no rule to regulate our proceedings, we cannot exercise an appellate jurisdiction; and if the rule is provided, we cannot depart from it.”⁷ By contrast, in the 1810 case *Durousseau v. United States*, Chief Justice John Marshall accepted the validity of legislation limiting the Court’s jurisdiction but suggested that, in the absence of such congressional action, the Court’s appellate jurisdiction would have been measured by the constitutional grant.⁸ Several cases have taken the view that “the Supreme Court possesses no appellate power in any case, unless conferred upon it by act of Congress.”⁹ However, more recent cases indicate support for the notion that the Supreme Court would have appellate jurisdiction over certain cases and controversies absent legislative action.¹⁰

Congress has on occasion used its power to regulate Supreme Court jurisdiction to forestall a possible adverse decision from the Court. In *Ex parte McCardle*, the Court

³ *Id.*

⁴ See, e.g., Judiciary Act of 1789, 1 Stat. 80.

⁵ 3 U.S. (3 Dall.) 321 (1796).

⁶ *Id.* at 326.

⁷ *Id.* at 327.

⁸ 10 U.S. (6 Cranch) 307, 313–14 (1810) (“Had the judicial act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. . . . [I]n omitting to exercise the right of excepting from its constitutional powers, [Congress] would have necessarily left those powers undiminished. The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject.”). See also *Clarke v. Bazadone*, 5 U.S. (1 Cranch) 212, 213 (1803) (“Congress has made no exception of the present case; and no regulation of congress was necessary to give this court the appellate power. It derives it from the constitution itself.”); *United States v. More*, 7 U.S. (3 Cranch) 159, 173 (1805) (averring that the Constitution would be “the only standard by which [the Supreme Court’s] powers could be tested” in the absence of legislation describing the Court’s jurisdiction, “[b]ut as the jurisdiction of the court has been described, it has been regulated by congress”).

⁹ *Barry v. Mercein*, 46 U.S. (5 How.) 103, 119 (1847); see also *Daniels v. Railroad Co.*, 70 U.S. (3 Wall.) 250, 254 (1865); *Turner v. Bank of North America*, 4 U.S. (4 Dall.) 8, 10 (1799).

¹⁰ See *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 512–13 (1869) (“It is quite true . . . that the appellate jurisdiction of this court is not derived from acts of Congress. It is, strictly speaking, conferred by the Constitution. But it is conferred ‘with such exceptions and under such regulations as Congress shall make.’”); *Felker v. Turpin*, 518 U.S. 651, 661 (1996); *Hamdan v. Rumsfeld*, 548 U.S. 557, 575 (2006).

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granted certiorari to review the denial of a petition for a writ of *habeas corpus* from a civilian convicted of acts obstructing Reconstruction.¹¹ Anticipating that the Court might void, or at least undermine, congressional reconstruction of the Confederate States, Congress overrode the President's veto to enact a provision repealing the statute that authorized the appeal.¹² Although the Court had already heard argument in the case, it dismissed the action for want of jurisdiction. The Court stated, "We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words."¹³ Since its decision in *McCardle*, the Supreme Court has upheld numerous legislative limits on its jurisdiction.¹⁴

Congress also possesses significant power to prevent Supreme Court appellate review by limiting the federal courts' jurisdiction over certain classes of cases, or even specific cases, a practice sometimes called "jurisdiction stripping."¹⁵ The Constitution provides for the existence of a Supreme Court, but leaves to Congress the decision whether to establish inferior federal courts.¹⁶ That broad grant of discretion has been interpreted also to grant Congress expansive authority to regulate the structure and jurisdiction of the lower federal courts.¹⁷ Separation of powers considerations bar Congress from

¹¹ 74 U.S. (7 Wall.) 506 (1869).

¹² By the Act of February 5, 1867, § 1, 14 Stat. 386, Congress had authorized appeals to the Supreme Court from circuit court decisions denying a petition for a writ of *habeas corpus*. Previously, the Court's jurisdiction to review *habeas corpus* decisions, based in Section 14 of the Judiciary Act of 1789, 1 Stat. 81, was somewhat unclear. Compare *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795), and *Ex parte Burford*, 7 U.S. (3 Cranch) 448 (1806), with *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807). The repealing statute was the Act of March 27, 1868, 15 Stat. 44. The repealed act was reenacted March 3, 1885, 23 Stat. 437.

¹³ 74 U.S. (7 Wall.) at 513. As discussed further below, in both *McCardle* and a later case, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1869) the Court indicated that the Judiciary Act of 1789 gave it the authority to review on certiorari a circuit court's denial of a habeas petition, meaning that the repeal at issue in *McCardle* did not deprive the Court of all jurisdiction over the matter but simply eliminated one possible statutory grant. See *infra* note 26.

¹⁴ See *The Francis Wright*, 105 U.S. 381, 385–386 (1882); *Luckenbach S. S. Co. v. United States*, 272 U.S. 533, 537 (1926); *American Construction Co. v. Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 378 (1893); *United States v. Bitty*, 208 U.S. 393 (1908); *United States v. Young*, 94 U.S. 258 (1876); *Insurance Co. v. Ritchie*, 72 U.S. (5 Wall.) 541 (1866); *Railroad Co. v. Grant*, 98 U.S. 398 (1878); *Bruner v. United States*, 343 U.S. 112 (1952); *District of Columbia v. Eslin*, 183 U.S. 62 (1901); *Patchak v. Zinke*, 138 S. Ct. 897 (2018); see also *Walker v. Taylor*, 46 U.S. (5 How.) 64 (1847).

¹⁵ For additional discussion of jurisdiction stripping, see generally CRS Report R44967, *Congress's Power over Courts: Jurisdiction Stripping and the Rule of Klein*, by Joanna R. Lampe, <https://crsreports.congress.gov/product/pdf/R/R44967>.

¹⁶ U.S. CONST. art III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."); U.S. CONST. art I, § 8, cl. 9 (allowing Congress "[t]o constitute Tribunals inferior to the supreme Court").

¹⁷ See, e.g., *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33 (1812); *Rhode Island v. Massachusetts*, 37 U.S. (12 Pet.) 657, 721–722 (1838); *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 233–234 (1922); *Ladew v. Tennessee Copper Co.*, 218 U.S. 357, 358 (1910); *Venner v. Great Northern R. Co.*, 209 U.S. 24, 35 (1908); *Kentucky v. Powers*, 201 U.S. 1, 24 (1906); *Stevenson v. Fain*, 195 U.S. 165, 167 (1904); *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 513–521 (1898); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 251–252 (1868); *South Carolina v. Katzenbach*, 383 U.S. 301, 331 (1966); *Palmore v. United States*, 411 U.S. 389, 400–02 (1973); *Swain v. Pressley*, 430 U.S. 372 (1977). A minority view, articulated by Justice Story in *Martin v. Hunter's Lessee*, argues that the Constitution requires Congress to create inferior federal courts and vest them with all the jurisdiction they are capable of receiving. 14 U.S. (1 Wheat.) 304, 329–336 (1816); see also, e.g., Amar, *A Neo-Federalist View of Article III: Separating the Two-Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499 (1990).

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requiring courts to reopen final judicial decisions¹⁸ or dictating a certain substantive outcome in pending litigation.¹⁹ However, the Court has upheld legislation that deprives the federal courts of jurisdiction over certain matters, including legislation that removed jurisdiction over a specific pending case.²⁰ Jurisdiction stripping statutes may limit the Court's appellate jurisdiction; by contrast, Congress cannot enact legislation to limit the Supreme Court's original jurisdiction.²¹ The Supreme Court's original jurisdiction is not necessarily exclusive.²² To the extent cases excepted from the Court's appellate jurisdiction could also fall within the grant of original jurisdiction, parties may still be able to litigate those matters by filing original cases in the Supreme Court.²³

While the Supreme Court has upheld some limitations on its jurisdiction, it has at times struck down such limitations or interpreted them narrowly. In *United States v. Klein*, the court struck down a statute that limited the jurisdiction of the lower federal courts and the Supreme Court.²⁴ With respect to the limit on its appellate jurisdiction, the Supreme Court held that if the law “simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of Congress to make ‘such exceptions from the appellate jurisdiction’ as should seem to it expedient.”²⁵ However, the Court explained, “the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end,” requiring the courts to reach a specific outcome in certain cases.²⁶ Such a law, the Court said, “is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power,” and, in enacting the law, “Congress has inadvertently passed the limit which separates the legislative from the judicial power.”²⁷

In a line of habeas cases stretching back to *McCardle*, the Supreme Court has read statutes narrowly to avoid finding that Congress has stripped it of all jurisdiction over certain claims.²⁸ In one case when such an interpretation was not available, the Court

¹⁸ *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

¹⁹ *United States v. Klein*, 80 U.S. 128 (1871); *see also* *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (plurality opinion) (Congress cannot usurp the judiciary's power by saying “in *Smith v. Jones*, *Smith* wins.”).

²⁰ *Patchak*, 138 S. Ct. 897 (2018); *cf.* *United States v. Sioux Nation of Indians*, 448 U.S. 371, 374 (1980).

²¹ *See* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

²² *See* 28 U.S.C. § 1251(b) (outlining categories of cases and controversies over which the Supreme Court has “original but not exclusive jurisdiction”).

²³ For instance, the grant of original jurisdiction includes cases where a state is a party. U.S. CONST. art III, § 2, cl. 2.

²⁴ 80 U.S. (13 Wall.) 128 (1872).

²⁵ *Id.* at 145.

²⁶ *Id.*

²⁷ *Id.* at 146, 147.

²⁸ *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) (upholding limitation on appeals in habeas cases but noting that the limit did not apply to original habeas petitions filed in the Supreme Court); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 106 (1869) (confirming that the legislation at issue in *McCardle* had not affected Supreme Court jurisdiction over original habeas petitions); *Felker v. Turpin*, 518 U.S. 651 (1996) (avoiding an Exceptions Clause challenge by narrowly construing a limitation on appellate jurisdiction); *Hamdan v. Rumsfeld*, 548 U.S. 557, 575 (2006) (avoiding constitutional challenges to a jurisdiction stripping statute by construing the statute narrowly, holding that it did not apply to cases pending at the time of its enactment). Several of the habeas cases expressly mention the Exceptions Clause, while others do not, but all concerned limitations on the Court's jurisdiction. For additional discussion of the habeas corpus cases in the context of the Exceptions Clause, *see generally* CRS Report R48250, *The Exceptions Clause and Congressional Control over Supreme Court Jurisdiction*, by Joanna R. Lampe, <https://crsreports.congress.gov/product/pdf/R/R48250>.

struck down a limit on its jurisdiction, notwithstanding the grant of power in the Exceptions Clause.²⁹

In addition to regulating the federal courts' jurisdiction, since the early years of the Republic Congress has enacted legislation regulating court proceedings, for instance by setting the times and places for holding court, even of the Supreme Court, and limiting the courts' power to issue injunctions.³⁰ One striking example of regulating when the Court sits occurred following the repeal of the Judiciary Act of 1801. Congress enacted legislation changing the Court's term to forestall a constitutional attack on the repeal, with the result that the Court did not convene for fourteen months.³¹ Examples of restrictions on injunctions include limitations on injunctions related to taxes³² and the Norris-La Guardia Act, which limits the issuance of injunctions in labor disputes.³³

ArtIII.S2.C3 Trials

ArtIII.S2.C3.1 Jury Trials

Article III, Section 2, Clause 3 is one of two constitutional provisions—the other being the Sixth Amendment—that provide a right to jury trial in federal criminal cases.¹ In addition to providing such a right generally in all criminal cases except impeachment cases,² this Clause also specifies the venue in which a trial must take place: in the state where the crime was committed, or at a place directed by Congress if the crime was not committed within any states.³ The Sixth Amendment later further imposed other requirements related to the right, including that the trial be speedy and public, and that

²⁹ *Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that a jurisdictional limitation effected an unconstitutional suspension of the writ of habeas corpus). The Court's opinion in *Boumediene* rested on the Constitution's Suspension Clause and did not cite the Exceptions Clause. For additional discussion of the Suspension Clause, see ArtI.S9.C2.1 Suspension Clause and Writ of Habeas Corpus.

³⁰ Supreme Court Justices have, at times, opposed legislation that might regulate the Court or its procedures. See, e.g., JOHN G. ROBERTS, JR., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY (2021); Letter from Charles Evans Hughes, C.J., to Burton K. Wheeler, U.S. Sen. (Mar. 21, 1937), reprinted in S. Rep. NO. 75–711, app. c at 40 (1937). In addition, even absent clearly established constitutional limits on Congress's authority to regulate court proceedings, the legislature has often deferred to the courts, and especially the Supreme Court, to regulate their own procedures. For instance, the Rules Enabling Act, 28 U.S.C. § 2071–2077, authorizes the Supreme Court to make procedural rules for the inferior federal courts, subject to approval by Congress, and further allows the Court to make its own procedural rules without legislative oversight.

³¹ 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 222–224 (rev. ed. 1926).

³² Act of March 2, 1867, 10, 14 Stat. 475, as amended, now 26 U.S.C. § 7421 (federal taxes); Act of August 21, 1937, 50 Stat. 738, 28 U.S.C. § 1341 (state taxes). See also Act of May 14, 1934, 48 Stat. 775, 28 U.S.C. § 1342 (state rate-making).

³³ 47 Stat. 70 (1932), 29 U.S.C. §§ 101–115. The Court has upheld the Act and applied it liberally through the years. See *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938); *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938); *Brotherhood of Railroad Trainmen v. Chicago River & I. R.R.*, 353 U.S. 30 (1957); *Boys Markets v. Retail Clerks Union*, 398 U.S. 235 (1970).

¹ The Supreme Court has held that the Sixth Amendment's right to jury, including the requirement that a jury verdict be unanimous, applies to states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145 (1968); see also *Ramos v. Louisiana*, 590 U.S. 83 93–94 (2020) (holding that the Sixth Amendment's requirement of a unanimous verdict applies to states through the Fourteenth Amendment).

² The Supreme Court, however, has long held that the guarantees of jury trial under Article III, Section 2, Clause 3 and the Sixth Amendment do not apply to petty offenses because at the time of the Constitution's adoption, such offenses were tried summarily without a jury under common law. See *Cheff v. Schnackenberg*, 384 U.S. 373, 378–79 (1966).

³ U.S. CONST. art. III, § 2, cl.3.

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the trial take place before a jury summoned from the state and district in which the crime was committed.⁴

On June 15, 2023, the Supreme Court decided *Smith v. United States*,⁵ a case involving whether the Double Jeopardy Clause prevents retrial of a defendant tried and convicted in an improper venue, or by a jury from the wrong district, in violation of the Constitution’s Venue and Vicinage Clauses, respectively.⁶ The Court distinguished between judicial decisions of improper venue and verdicts of acquittal, noting that the Court in earlier decisions recognized no protection from retrial when a trial terminates “on a basis unrelated to factual guilt or innocence of the offence of which [the defendant] is accused.”⁷ Accordingly, the Court found that the Double Jeopardy clause did not bar retrial in a proper venue.

⁴ U.S. CONST. amend. VI; *see generally* Amdt6.1 Overview of Sixth Amendment, Rights in Criminal Prosecutions.

⁵ *Smith v. United States*, No. 21–1576 (U.S. June 15, 2023).

⁶ *See generally* U.S. CONST. art. III, § 2, cl. 3; U.S. CONST. amend. V; U.S. CONST. amend. VI.

⁷ *Smith*, slip op. at 15 (citing *United States v. Scott*, 437 U.S. 82, 99 (1978) (alteration in original)).

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Amdt1.7 Free Speech Clause

Amdt1.7.2 Procedural Matters

Amdt1.7.2.1 The Overbreadth Doctrine, Statutory Language, and Free Speech

The overbreadth doctrine focuses on the need for precision in drafting a statute that may affect First Amendment rights, and more concretely, allows a special kind of facial challenge to statutes.¹ Ordinarily, to prevail in a facial challenge—a claim challenging a statute on its face, rather than only in certain applications—a litigant “must ‘establish that no set of circumstances exists under which the [law] would be valid,’ or show that the law lacks ‘a plainly legitimate sweep.’”² Accordingly, if a statute sweeps in both protected and unprotected activity, the Court will ordinarily invalidate its application only to protected conduct.³ In the context of the First Amendment, however, the Supreme Court has allowed a person whose own conduct may not be constitutionally protected to bring a facial challenge to a law, if the statute is so broadly written that it sweeps in protected speech and could therefore have a “deterrent effect on free expression.”⁴ The overbreadth doctrine thus allows the facial invalidation of a law that “punishes a ‘substantial’ amount of protected free speech, ‘judged in relation to the statute’s plainly legitimate sweep.’”⁵ For example, in *United States v. Stevens*, the Supreme Court applied the overbreadth doctrine to rule unconstitutional a federal law that “criminalize[d] the commercial creation, sale, or possession of certain depictions of animal cruelty.”⁶ The Court described the statute as “a criminal prohibition of alarming breadth,” and concluded that “the presumptively impermissible applications of [the law] . . . far outnumber any permissible ones.”⁷

¹ NAACP v. Button, 371 U.S. 415, 432–33 (1963).

² Ams. for Prosperity Found. v. Bonta, 594 U.S. 595, 615 (2021) (internal citations omitted) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)).

³ See, e.g., *Barr v. Am. Ass’n of Political Consultants*, No. 19-631, slip op at 13–14 (U.S. July 6, 2020) (discussing severability doctrine and the “power and preference” for partial invalidation of a statute); *Salerno*, 481 U.S. at 745 (“[W]e have not recognized an ‘overbreadth’ doctrine outside the limited context of the First Amendment.”). But cf., e.g., *Aptheker v. Secretary of State*, 378 U.S. 500, 515–16 (1964) (concluding a First Amendment overbreadth case provided the appropriate analysis for a right-to-travel challenge to a statute that could not be narrowed due to the law’s indiscriminately cast and overly broad scope).

⁴ *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 798 (1984).

⁵ *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

⁶ *United States v. Stevens*, 559 U.S. 460, 464, 482 (2010).

⁷ *Id.* at 474, 481, see also, e.g., *United States v. Robel*, 389 U.S. 258, 266 (1967) (federal law barring members of registered Communist-action organizations from employment in defense facilities); *Lewis v. City of New Orleans*, 415 U.S. 130, 131–32 (1974) (state law prohibiting using fighting words towards police performing official duties); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217–18 (1975) (city ordinance prohibiting films with nudity from being shown when visible from public streets); *Doran v. Salem Inn*, 422 U.S. 922, 932–34 (1975) (local ordinance prohibiting topless dancing in certain establishments, in the context of an appeal of a preliminary injunction); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 633–39 (1980) (municipal ordinance prohibiting certain charitable organizations from soliciting contributions); *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 949–50 (1984) (charitable solicitation statute placing 25% cap on fundraising expenditures); *City of Houston v. Hill*, 482 U.S. 451, 455, 467 (1987) (city ordinance making it unlawful to “oppose, molest, abuse, or interrupt” police officer in performance of duty); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569, 570, 577 (1987) (resolution banning all “First Amendment activities” at airport); *Reno v. ACLU*, 521 U.S. 844, 874–879 (1997) (statute banning “indecent” material on the internet); *Iancu v. Brunetti*, No. 18-302, slip op. at 11 (June 24, 2019) (federal law prohibiting the registration of immoral or scandalous trademarks); *Ams. for Prosperity Found.*, 594 U.S. at 618 (state law requiring charities to file forms disclosing information about donors).

The Supreme Court has recognized, however, that “there are substantial social costs *created* by the overbreadth doctrine when it blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct.”⁸ The Supreme Court has cautioned that facial “[i]nvalidation for overbreadth is ‘strong medicine’ that is not to be ‘casually employed.’”⁹ The requirement that a law must be “substantially” overbroad accounts for this concern.¹⁰ In addition, the Supreme Court has said “a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts, and its deterrent effect on legitimate expression is both real and substantial.”¹¹ Further, the Court has said “that overbreadth analysis does not normally apply to commercial speech.”¹²

Overbreadth analysis requires a two-step approach. First, a court must determine the scope of the allegedly overbroad law.¹³ The second step “is to decide which of the law[‘s] applications violate the First Amendment, and to measure them against the rest.”¹⁴ These unconstitutional applications “must be realistic, not fanciful, and their number must be substantially disproportionate to the statute’s lawful sweep.”¹⁵ If a court has not been presented with material sufficient to make these determinations, it cannot conclude that a law is unconstitutionally overbroad.¹⁶

Amdt1.7.2.4 State Action Doctrine and Free Speech

The First Amendment by its terms applies only to laws enacted by Congress and not to the actions of private persons.¹ As such, the First Amendment is subject to a “state action” (or “governmental action”) limitation similar to that applicable to the Fifth and Fourteenth Amendments.² The Supreme Court has stated that “a private entity can qualify as a state actor in a few limited circumstances,” such as “[1] when the private entity performs a traditional, exclusive public function; [2] when the government compels the private entity to take a particular action; or [3] when the government acts

⁸ *Hicks*, 539 U.S. at 119 (upholding an ordinance banning from streets within a low-income housing development any person who is not a resident or employee and who “cannot demonstrate a legitimate business or social purpose for being on the premises”). The Supreme Court has also rejected application of the doctrine in, for example, *Arnett v. Kennedy*, 416 U.S. 134, 158–64 (1974) (plurality opinion); *Parker v. Levy*, 417 U.S. 733, 757–61 (1974); and *New York v. Ferber*, 458 U.S. 747, 766–74 (1982).

⁹ *United States v. Williams*, 553 U.S. 285, 293 (2008) (quoting *L.A. Police Dep’t v. United Reporting Publ’g Corp.*, 528 U.S. 32, 39 (1999)).

¹⁰ *Hicks*, 539 U.S. at 119–20.

¹¹ *Erznoznik*, 422 U.S. at 216.

¹² *Bd. of Trs. v. Fox*, 492 U.S. 469, 481 (1989); *see also, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 380 (1977) (“[T]he justification for the application of overbreadth analysis applies weakly, if at all, in the ordinary commercial context.”)

¹³ *See United States v. Hansen*, 599 U.S. 762, 770 (2023); *Moody v. NetChoice, LLC*, No. 22-277, slip op. at 10 (U.S. July 1, 2024).

¹⁴ *Moody*, slip op. at 11.

¹⁵ *Hansen*, 599 U.S. at 770 (citing *N.Y. State Club Ass’n, Inc. v. City of New York*, 487 U.S. 1, 14 (1988); *Members of City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800–01 (1984)).

¹⁶ *See Moody*, slip op. at 12.

¹ Through interpretation of the Fourteenth Amendment, the prohibition extends to the states as well. *See Amdt14.S1.4 Incorporation of Bill of Rights*. Of course, the First Amendment also applies to the non-legislative branches of government—to every “government agency—local, state, or federal.” *Herbert v. Lando*, 441 U.S. 153, 168 n.16 (1979).

² *See, e.g.*, Amdt1.7.2.4 State Action Doctrine and Free Speech.

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jointly with the private entity.”³ In addition, some private entities established by the government to carry out governmental objectives may qualify as state actors for purposes of the First Amendment. For example, in *Lebron v. National Railroad Passenger Corp.*, the Court held that the national passenger train company Amtrak, “though nominally a private corporation,” qualified as “an agency or instrumentality of the United States” for purposes of the First Amendment.⁴ It did not matter, in the Court’s view, that the federal statute establishing Amtrak expressly stated that Amtrak was not a federal agency because Amtrak was “established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees.”⁵

Starting with the “public function” test, the Court extended the First Amendment to apply to the actions of a private party in *Marsh v. Alabama*, barring the punishment of a resident of a company-owned town for distributing religious literature.⁶ While the town was owned by a private corporation, “it ha[d] all the characteristics of any other American town,” including residences, businesses, streets, utilities, public safety officers, and a post office.⁷ Under these circumstances, the Court held that “the corporation’s property interests did not settle the question”⁸: “[w]hether a corporation or a municipality owns or possesses the town[,] the public in either case has an identical interest in the functioning of the community in such manner that the channels of communication remain free.”⁹ Consequently, the corporation could not be permitted “to govern a community of citizens” in a way that “restrict[ed] their fundamental liberties.”¹⁰

Since *Marsh* was issued in 1946, however, it has largely been limited to the facts presented in that case, and applies only if a private entity exercises “powers traditionally *exclusively* reserved to the State.”¹¹ The Supreme Court extended the *Marsh* decision in 1968: in *Amalgamated Food Employees Union v. Logan Valley Plaza*, the Court held that a private shopping mall could not prevent individuals from peacefully picketing on the premises, noting similarities between “the business block in *Marsh* and

³ *Manhattan Cmty. Access Corp. v. Halleck*, No. 17-702, slip op. at 6 (U.S. June 17, 2019) (internal citations omitted) (citing *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352–54 (1974), *Blum v. Yaretsky*, 457 U.S. 991, 1004–05 (1982), and *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 941–42 (1982), respectively).

⁴ 513 U.S. 374, 383, 394 (1995); see also *Dep’t of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 55 (2015) (extending the holding of *Lebron*, such that Amtrak was considered a governmental entity “for purposes of” the Fifth Amendment due process and separation-of-powers claims presented by the case).

⁵ *Lebron*, 513 U.S. at 391–93, 398.

⁶ *Marsh v. Alabama*, 326 U.S. 501, 509 (1946). A state statute “ma[de] it a crime to enter or remain on the premises of another after having been warned not to do so”; the resident had been warned that, pursuant to a company policy, she could not distribute religious literature without a permit, and she subsequently disregarded that warning and refused to leave a sidewalk. *Id.* at 503–04. Accordingly, although the case involved a criminal prosecution brought by the State of Alabama, liability turned on the town’s ability to prevent residents from distributing literature without a permit. See *id.*

⁷ *Id.* at 502–03.

⁸ *Id.* at 505.

⁹ *Id.* at 507. See also *id.* at 508 (noting that residents of company towns, like residents of other towns, “must make decisions which affect the welfare of community and nation,” and that to do this, they must have access to “uncensored” information).

¹⁰ *Id.* at 509.

¹¹ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974) (emphasis added). Accord *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 939 (1982); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158–59 (1978).

the shopping center” at issue in that case.¹² However, the Court subsequently disclaimed *Logan Valley in Hudgens v. NLRB*, rejecting the idea that “large self-contained shopping center[s]” are “the functional equivalent of a municipality.”¹³ Instead, the Court held that in *Hudgens*, where a shopping center manager had threatened to arrest picketers for trespassing, “the constitutional guarantee of free expression ha[d] no part to play.”¹⁴ As a result, the picketers “did not have a First Amendment right to enter this shopping center for the purpose of advertising their strike.”¹⁵ In another decision in which the Supreme Court held that the First Amendment did not prevent a shopping center from banning the distribution of handbills, the Court distinguished *Marsh* by noting that “the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State.”¹⁶ By contrast, the disputed shopping center had not assumed “municipal functions or power.”¹⁷ The fact that the shopping center was generally open to the public did not qualify as a “dedication of [the] privately owned and operated shopping center to public use” sufficient “to entitle respondents to exercise therein the asserted First Amendment rights.”¹⁸

More recently, in *Manhattan Community Access Corp. v. Halleck*, the Supreme Court held that Manhattan Neighborhood Network (MNN), a private, nonprofit corporation designated by New York City to operate public access channels in Manhattan, was not a state actor for purposes of the First Amendment because it did not exercise a “traditional, exclusive public function.”¹⁹ Emphasizing the limited number of functions that met this standard under the Court’s precedents,²⁰ the Court reasoned that operating public access channels “has not traditionally and exclusively been performed by government” because “a variety of private and public actors” had performed the function since the 1970s.²¹ Moreover, the Court reasoned, “merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to First Amendment constraints.”²²

Apart from the factual circumstances presented by the company town that exercises powers “traditionally” and “exclusively” held by the government,²³ the Court has sometimes applied the First Amendment against private parties if they have a “sufficiently close relationship” to the government.²⁴ Such circumstances may exist where a private

¹² 391 U.S. 308, 317 (1968). In dissent, Justice Hugo Black would have ruled that the picketers could not, “under the guise of exercising First Amendment rights, trespass on . . . private property for the purpose of picketing.” *Id.* at 329 (Black, J., dissenting).

¹³ *Hudgens v. NLRB*, 424 U.S. 507, 520 (1976).

¹⁴ *Id.* at 521.

¹⁵ *Id.*

¹⁶ *Lloyd Corp. v. Tanner*, 407 U.S. 551, 569 (1972).

¹⁷ *Id.*

¹⁸ *Id.* at 569–70.

¹⁹ *Manhattan Cmty. Access Corp. v. Halleck*, No. 17-702, slip op. at 2–3, 6 (U.S. June 17, 2019).

²⁰ *Id.* at 6–7 (stating that while “running elections” and “operating a company town” qualify as traditional, exclusive public functions, “running sports associations and leagues, administering insurance payments, operating nursing homes, providing special education, representing indigent criminal defendants, resolving private disputes, and supplying electricity” do not).

²¹ *Id.* at 7.

²² *Id.* at 10.

²³ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974).

²⁴ See *Pub. Utils. Comm’n v. Pollak*, 343 U.S. 451, 462 (1952) (holding that such a relationship existed where the private company operated a public utility that represented a “substantial monopoly” under congressional

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company is subject to extensive state regulation—although government regulation alone is not sufficient to establish the state action requirement.²⁵ Instead, the inquiry in such a case is “whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself.”²⁶ Accordingly, for example, in *Manhattan Community Access Corp.*, the Supreme Court also held that the city’s selection of MNN and the state’s extensive regulation of MNN did not in and of themselves create state action.²⁷

Public officials and government employees may engage in state action, but such persons also have First Amendment rights as private citizens.²⁸ Under the Supreme Court’s broader state action jurisprudence, an official engages in state action if that individual possesses government authority “and purports to act under that authority.”²⁹ In *Lindke v. Freed*, the Court held that this same test applies to an official’s alleged violation of the Free Speech Clause when the official blocked a constituent from viewing or commenting on their social media page.³⁰ The Court observed that officials using social media may speak about public issues—including those relating to their official responsibilities—in their capacity as private citizens, rather than as public officials.³¹ The Court first ruled that for an official’s conduct to be attributable to the state, the official must possess “actual authority” to speak for the government.³² This authority can be explicit or implicit, but must be rooted in “written law or longstanding custom” and must include the authority to speak on the issues that were the subject of the alleged constitutional violation.³³ To determine whether an official with state authority has purported to exercise that authority on social media is a “fact-specific undertaking” that depends principally on the content and function of the social media post.³⁴

The question of when broadcast companies are engaged in governmental action subject to the First Amendment has sometimes been a difficult one. In *Columbia Broadcasting System v. Democratic National Committee*, the Court considered whether a radio station

authority and, more importantly, the company operated “under the regulatory supervision” of a governmental agency, and the particular action being challenged involved action by that agency).

²⁵ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974); *see also* *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

²⁶ *Jackson*, 419 U.S. at 351.

²⁷ *See id.* at 11 (reasoning that absent performance of a traditional and exclusive public function, a private entity is not a state actor merely because the government licenses, contracts with, grants a monopoly to, or subsidizes it); *id.* at 12 (reasoning that state regulations that “restrict MNN’s editorial discretion” and effectively require it to “operate almost like a common carrier” do not make MNN a state actor). The majority also rejected the argument that MNN was simply standing in for New York City in managing government property, reasoning that the record did not show that any government owned, leased, or otherwise had a property interest in the public access channels or the broader cable network in which they operated. *Id.* at 14–15.

²⁸ *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). *See generally* Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech.

²⁹ *Griffin v. Maryland*, 378 U.S. 130, 135 (1964). *See generally* Amdt14.2 State Action Doctrine.

³⁰ *Lindke v. Freed*, No. 22-611, slip op. at 1-2 (U.S. Mar. 15, 2024). (“We hold that such speech is attributable to the State only if the official (1) possessed actual authority to speak on the State’s behalf and (2) purported to exercise that authority when he spoke on social media.”) The Court simultaneously decided another case involving public officials blocking constituents on social media. *O’Connor-Ratcliff v. Garnier*, No. 22-324, slip op. at 2–3 (U.S. Mar. 15, 2024). Both cases were vacated and remanded. *Id.*; *Lindke*, slip op. at 15.

³¹ *Lindke*, slip op. at 12.

³² *Id.*

³³ *Id.* at 11–12.

³⁴ *Id.* at 13.

that had a license from the government to broadcast over airwaves in the public domain needed to comply with the First Amendment when it sold air time to third parties.³⁵ The radio station had a policy of refusing to sell air time to persons seeking to express opinions on controversial issues.³⁶ Three Justices joined a plurality opinion concluding that the radio station was not engaged in governmental action when it enforced this policy.³⁷ They reasoned that the federal government had not partnered with or profited from the broadcaster's decisions and that Congress had "affirmatively indicated" that broadcasters subject to federal law retained certain journalistic license.³⁸ In the view of those Justices, if the Court were "to read the First Amendment to spell out governmental action in the circumstances presented . . . , few licensee decisions on the content of broadcasts or the processes of editorial evaluation would escape constitutional scrutiny."³⁹ In contrast, three other Members of the Court would have held that the radio station was engaged in governmental action because of the degree of governmental regulation of broadcasters' activities and the station's use of the airwaves, a public resource.⁴⁰ And three Justices would not have decided the state action question.⁴¹ Nevertheless, these three Justices joined the Court's opinion concluding that even if the broadcaster was engaged in governmental action, the First Amendment did not require "a private right of access to the broadcast media."⁴²

Amdt1.7.2.5 Retaliatory Prosecution and Arrest

Individuals may initiate legal proceedings against federal or state officials¹ for violating their right to free speech.² One basis for such a claim may be that an official took adverse action against an individual in response to the individual engaging in protected speech. The Supreme Court has said that retaliation for protected speech "threatens to inhibit exercise of the protected right" and "is thus akin to an 'unconstitutional condition' demanded for the receipt of a government-provided benefit."³ Examples of actionable retaliation may include adverse employment action taken against government

³⁵ 412 U.S. 94 (1973).

³⁶ *Id.* at 98.

³⁷ *Id.* at 120 (plurality opinion of Burger, C.J., and Stewart and Rehnquist, JJ.).

³⁸ *Id.* at 119–20.

³⁹ *Id.* at 120.

⁴⁰ *Id.* at 150 (Douglas, J., concurring in the judgment); *id.* at 172–73 (Brennan and Marshall, JJ., dissenting).

⁴¹ *See id.* at 171 (Brennan, J., dissenting) (noting that Justices Byron White, Harry Blackmun, and Lewis Powell would not have reached the state action question).

⁴² *Id.* at 129 (majority opinion).

¹ Although the First Amendment applies only to "state action" and thus does not permit lawsuits against individuals, state or federal officials acting in their official capacity are generally engaging in state action for First Amendment purposes. For more information, see Amdt1.7.2.4 State Action Doctrine and Free Speech.

² An action brought against a federal official for violating constitutional rights is known as a *Bivens* action, after the Supreme Court case that established the right to file such an action. *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971). An individual may bring an action against a state official for violating constitutional rights under a federal civil rights statute known as Section 1983. 42 U.S.C. § 1983. For more information on *Bivens* actions, see ArtII.S2.C1.13.4 Suits Against the United States and Sovereign Immunity.

³ *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998). *See generally* Amdt1.7.15.2 Conditions of Public Employment.

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employees,⁴ certain actions taken by corrections officers against incarcerated persons,⁵ or law enforcement actions such as arrest or prosecution.⁶

One challenge facing courts hearing free speech retaliation claims is how to determine whether adverse action was taken in response to protected speech, rather than for a reason unrelated to constitutionally protected activity. The Supreme Court addressed this issue in *Mt. Healthy City School District Board of Education v. Doyle*, an employment retaliation case.⁷ The Court in *Mt. Healthy* held that a plaintiff claiming to have suffered retaliation in violation of the Free Speech Clause must first demonstrate that the plaintiff engaged in constitutionally protected speech and that such speech was a “motivating factor” behind the official’s adverse action.⁸ If the plaintiff demonstrates this, the burden then shifts to the official to show by a preponderance of the evidence that the official would have taken the same action absent the protected speech.⁹

In *Hartman v. Moore*, the Supreme Court held that a plaintiff alleging retaliatory prosecution—that is, being charged with a crime in retaliation for speech—must *also* prove that their prosecution was not supported by “probable cause,” as required by the Fourth Amendment.¹⁰ The Supreme Court initially declined to extend its holding in *Hartman* to cases alleging retaliatory arrest.¹¹ In *Nieves v. Bartlett*, the Court extended the *Hartman* probable cause requirement to retaliatory arrest claims.¹² The Court identified an exception to the probable cause requirement, holding that a plaintiff alleging retaliatory arrest need not show a lack of probable cause if the plaintiff “presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been.”¹³ The Court has clarified that the exception in *Nieves* does not require evidence of “virtually identical and identifiable comparators.”¹⁴ Instead, the Court has recognized that evidence “that no one has ever been arrested for engaging in a certain kind of conduct—especially when the criminal prohibition is longstanding and the conduct at issue is not novel”—is sufficient to invoke the *Nieves* exception.¹⁵

⁴ See generally Amdt1.7.15.2 Conditions of Public Employment.

⁵ E.g., *Crawford-El v. Britton*, 523 U.S. 574 (withholding the property of an incarcerated individual).

⁶ E.g., *Hartman v. Moore*, 547 U.S. 250 (2006) (alleging retaliatory prosecution).

⁷ *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274 (1977).

⁸ *Id.* at 287.

⁹ *Id.*

¹⁰ *Hartman v. Moore*, 547 U.S. at 265–66; U.S. CONST. amend. IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . .”).

¹¹ E.g., *Reichle v. Howards*, 566 U.S. 658, 668–69 (2012) (declining to decide whether *Hartman* applies to claims of retaliatory arrest); *Lozman v. City of Riviera Beach*, 585 U.S. 87, 99 (2018) (“[W]hether in a retaliatory arrest case the *Hartman* approach should apply . . . or, on the other hand, the inquiry should be governed only by *Mt. Healthy* is a determination that must await a different case.”).

¹² *Nieves v. Bartlett*, 587 U.S. 391, 401–402 (2019).

¹³ *Id.* at 407.

¹⁴ *Gonzalez v. Trevino*, 602 U.S. 653, 658 (2024).

¹⁵ *Id.* at 658.

Amdt1.7.5 Categorical Approach

Amdt1.7.5.6 True Threats

The Supreme Court has cited three “reasons why threats of violence are outside the First Amendment”—“protecting individuals from the fear of violence, from the disruption that fear engenders, and from the possibility that the threatened violence will occur.”¹ In *Watts v. United States*, however, the Court held that only “true” threats are outside ordinary First Amendment protections.² The defendant in *Watts* expressed his opposition to the military draft at a public rally, saying, “If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J.”³ He was convicted of violating a federal statute that prohibited “any threat to take the life of or to inflict bodily harm upon the President of the United States.” The Supreme Court reversed. Interpreting the statute “with the commands of the First Amendment clearly in mind,”⁴ the Court found that the defendant had not made a “true ‘threat,’” but had indulged in mere “political hyperbole.”⁵

In *NAACP v. Claiborne Hardware Co.*, White merchants in Claiborne County, Mississippi, sued the NAACP to recover losses caused by a boycott by Black citizens of their businesses, and to enjoin future boycott activity.⁶ During the course of the boycott, NAACP Field Secretary Charles Evers told an audience of “black people that any ‘uncle toms’ who broke the boycott would ‘have their necks broken’ by their own people.”⁷ The Court acknowledged that this language “might have been understood as inviting an unlawful form of discipline or, at least, as intending to create a fear of violence.”⁸ Yet, no violence had followed directly from Evers’ speeches, and the Court found that Evers’ “emotionally charged rhetoric did not transcend the bounds of protected speech set forth in *Brandenburg*. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech.”⁹ Although the Court held that, under *Brandenburg*, Evers’ speech did not constitute unprotected incitement of lawless action,¹⁰ the Court also cited *Watts*, thereby implying that Evers’ speech also did not constitute a “true threat.”¹¹

In a 2023 decision, *Counterman v. Colorado*, the Supreme Court held that, to convict a person of making true threats, a state must show that the speaker had a subjective understanding as to whether the person to whom his words were directed would

¹ *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992).

² 394 U.S. 705, 708 (1969) (per curiam).

³ 394 U.S. at 706.

⁴ 394 U.S. at 707.

⁵ 394 U.S. at 708.

⁶ 458 U.S. 886 (1982). Claiborne is also discussed below under Amdt1.7.16.4 Public Issue Picketing and Parading.

⁷ 458 U.S. at 900, n.29. See *id.* at 902 for a similar remark by Evers.

⁸ 458 U.S. at 927.

⁹ 458 U.S. at 928.

¹⁰ *Brandenburg v. Ohio*, 395 U.S. 444 (1969). *Brandenburg* is discussed above under Amdt1.7.5.4 Incitement Current Doctrine.

¹¹ *Claiborne*, 458 U.S. at 928 n.71.

perceive them as threatening.¹² The Court explained the *mens rea* or mental state of recklessness would suffice for this showing, adding that, “A person acts recklessly in the most common formulations, when he ‘consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another.’”¹³

In 2003’s *Virginia v. Black*, the Supreme Court considered a First Amendment challenge to a state law that banned cross burning carried out with the intent to intimidate.¹⁴ The Court held that, at least in theory, states could prohibit such cross burnings as a “true threat.”¹⁵ Specifically, intimidation can be prohibited as “a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”¹⁶ Cross burning could fall within this category of “intimidating speech,” given that the “history of cross burning in this country” demonstrated they were often “intended to create a pervasive fear in victims that they are a target of violence.”¹⁷ However, the Court concluded that the specific state law before it was unconstitutional insofar as it allowed the mere fact of cross burning to provide *prima facie* evidence of the intent to intimidate, creating a chill on constitutionally protected speech.¹⁸

Amdt1.7.8 Role of Government

Amdt1.7.8.2 Government Speech and Government as Speaker

As an outgrowth of the government subsidy cases, such as *Rust v. Sullivan*,¹ the Court has established the “government speech doctrine” that recognizes that a government entity “is entitled to say what it wishes”² and to select the views that it wants to express.³ In this vein, when the government speaks, the government is not barred by the Free Speech Clause of the First Amendment from determining the content of what it says and can engage in viewpoint discrimination.⁴ The underlying rationale for the government speech doctrine is that the government could not “function” if the government could not favor or disfavor points of view in enforcing a program.⁵ And the Supreme Court has recognized that the government speech doctrine even extends to when the government receives private assistance in helping deliver a government

¹² *Counterman v. Colorado*, No. 22-138 (U.S. June 27, 2023).

¹³ *Id.* slip op. at 11 (quoting *Voisine v. United States*, 579 U.S. 686, 691 (2016)).

¹⁴ *Virginia v. Black*, 538 U.S. 343, 347 (2003).

¹⁵ *Id.* at 360, 363.

¹⁶ *Id.* at 360.

¹⁷ *Id.*

¹⁸ *Id.* at 364–65 (plurality opinion); *id.* at 386 (Souter, J., concurring in the judgment in part and dissenting in part) (concluding that the law was an impermissibly content-based statute, in part because the *prima facie* evidence provision skews prosecutions . . . toward suppressing ideas.). A cross burning done as a statement of ideology, a symbol of group solidarity, or in movies such as *Mississippi Burning*, however, would be protected speech. *Id.* at 365–366 (plurality opinion).

¹ 500 U.S. 173 (1991).

² *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

³ *Id.* at 833; *accord, e.g., Shurtleff v. City of Boston*, 596 U.S. 243 (2022).

⁴ *See Pleasant Grove City v. Summum*, 555 U.S. 460, 467–68 (2009). Nonetheless, while the First Amendment’s Free Speech Clause has no applicability with regard to government speech, other constitutional provisions—such as the Equal Protection principles of the Fifth and Fourteenth Amendments—may constrain what the government can say. *Id.* at 468–69.

⁵ *See id.* at 468 (Indeed, it is not easy to imagine how government could function if it lacked this freedom.).

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controlled message.⁶ As a consequence, the Court, relying on the government speech doctrine, has rejected First Amendment challenges to (1) regulations prohibiting recipients of government funds from advocating, counseling, or referring patients for abortion;⁷ (2) disciplinary actions taken as a result of statements made by public employees pursuant to their official duties;⁸ (3) mandatory assessments made against cattle merchants when used to fund advertisements whose message was controlled by the government;⁹ (4) a city's decision to reject a monument for placement in a public park;¹⁰ and (5) a state's decision to reject a design for a specialty license plate for an automobile.¹¹

A central issue prompted by the government speech doctrine is determining when speech is that of the government, which can be difficult when the government utilizes or relies on private parties to relay a particular message. In *Johanns v. Livestock Marketing Association*, the Court held that the First Amendment did not prohibit the compelled subsidization of advertisements promoting the sale of beef because the underlying message of the advertisements was “effectively controlled” by the government.¹²

The line can also be blurred when a “government invites the people to participate in a program,” such as when the government opens up its property for use by private speakers.¹³ In *Pleasant Grove City v. Summum*, the Court shifted from an exclusive focus on the “effective control” test in holding that “permanent monuments displayed on public property,” even when provided by private parties, generally “represent government speech.”¹⁴ In so concluding, the Court relied not only on the fact that a government, in selecting monuments for display in a park, generally exercises “effective control” and has “final approval authority” over the monument, but also on (1) the government's long history of “us[ing] monuments to speak for the public”; and (2) the public's common understanding as to monuments and their role in conveying a message from the government.¹⁵ In *Walker v. Texas Division, Sons of Confederate Veterans*, the Court relied on the same analysis used in *Pleasant Grove City* to conclude that the State of Texas, in approving privately crafted designs for specialty license plates, could reject designs the state found offensive without running afoul of the Free Speech Clause.¹⁶ Specifically, the *Walker* Court held that license plate designs amounted to government speech because (1) states historically used license plates to convey government messages; (2) the public closely identifies license plate designs with the state; and (3) the

⁶ See *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 562 (2005).

⁷ See *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

⁸ See *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006).

⁹ See *Livestock Mktg. Ass'n*, 544 U.S. at 562.

¹⁰ See *Pleasant Grove City*, 555 U.S. at 472.

¹¹ See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 203 (2015).

¹² See *Livestock Mktg. Ass'n*, 544 U.S. at 560.

¹³ *Shurtleff v. Boston*, No. 20-1800, slip op. at 5 (U.S. May 2, 2022). In this context, the government speech doctrine sometimes overlaps with the public forum doctrine, discussed in Amdt1.7.7.1 The Public Forum, in determining whether the speech is governmental or private.

¹⁴ See *Pleasant Grove City*, 555 U.S. at 470.

¹⁵ *Id.* at 470–73.

¹⁶ See *Walker*, 576 U.S. at 203–04.

State of Texas maintained effective control over the messages conveyed on its specialty license plates.¹⁷

By contrast, in *Shurtleff v. City of Boston*, the Supreme Court concluded that private flags flown at a city hall plaza did not qualify as government speech.¹⁸ While “the history of flag flying. . . at the seat of government” suggested such flags usually conveyed governmental messages, other factors specific to the city program pointed the other way.¹⁹ Given that the city sometimes flew its own flags but regularly let private groups use the flagpole, the Court suggested the evidence was inconclusive on public perceptions.²⁰ The critical inquiry was government control: the Court concluded that the city exercised no active control over the flag raisings or the messages of the flags.²¹ While the city might have exercised control over scheduling or physical maintenance, there was no evidence it had ever reviewed the flags or denied a group’s request, prior to the denial that formed the basis of the lawsuit.²² Accordingly, while *Shurtleff* looked to multiple factors to analyze whether the flags were government speech, effective control was “the most salient” factor in the case.²³

In 2017’s *Matal v. Tam*, the Supreme Court looked at a different type of activity to hold that trademarks do not constitute government speech, concluding that it is “far-fetched to suggest that the content of a registered mark is government speech.”²⁴ The Court distinguished trademarks from the license plates at issue in *Walker*, a case the Court stated “likely marks the outer bounds of the government-speech doctrine.”²⁵ First, the Court noted that, unlike license plates, trademarks do not have a history of use to convey messages by the government.²⁶ Second, the Court further reasoned that the government does not maintain direct control over the messages conveyed in trademarks—indeed, “[t]he Federal Government does not dream up these marks, and it does not edit marks submitted for registration.”²⁷ And third, the public, according to the *Tam* Court, does not closely identify trademarks with the government.²⁸ Thus, while *Tam* demonstrates the Court’s continuing reliance on the multi-factor test for determining government speech from *Walker* and *Summum*, that test is not so flexible as to allow for expression like trademarks to be deemed the speech of the government.

In both *Shurtleff* and *Tam*, the Supreme Court held that because the flags and trademarks were not government speech, the government had acted unconstitutionally by

¹⁷ See *id.* at 210–13. *Accord Shurtleff*, slip op. at 6 (“Our past cases have looked to several types of evidence to guide the analysis, including: the history of the expression at issue; the public’s likely perception as to who (the government or a private person) is speaking; and the extent to which the government has actively shaped or controlled the expression.”).

¹⁸ *Shurtleff*, slip op. at 12.

¹⁹ *Id.* at 7–9.

²⁰ *Id.* at 9.

²¹ *Id.*

²² *Id.* at 10–11.

²³ *Id.* at 10.

²⁴ *Matal v. Tam*, No. 15-1293, slip op. at 14 (U.S. June 19, 2017).

²⁵ *Id.* at 17–18 (“Trademarks are private, not government, speech.”).

²⁶ *Id.*

²⁷ *Id.* at 2.

²⁸ *Id.* at 17.

creating viewpoint-based distinctions.²⁹ In *Shurtleff*, the Court noted that the city had made the plaza with the flagpole available to the public and had itself described that plaza as a public forum.³⁰ Accordingly, after ruling that the flags were “private, not government, speech,” the Court held that the city had violated the Free Speech Clause by excluding a flag based on its religious viewpoint.³¹ Although the Court’s opinions in *Tam* did not clearly agree on whether public forum analysis applied,³² a majority nonetheless ruled that the federal law barring disparaging trademarks entailed unconstitutional viewpoint discrimination.³³

While the government has broad latitude to “speak for itself”³⁴ and to “say what it wishes,”³⁵ it cannot punish those that disagree with its views or use its authority to suppress conflicting opinions.³⁶ Similarly, the government can “attempt to persuade” private parties to adopt its viewpoints, but it cannot coerce others into suppressing what the government believes to be objectionable views by threatening legal sanctions or using other coercive methods.³⁷ In other words, the government may communicate with third parties as part of its attempts to persuade the public, but it cannot cross the threshold into impermissible “attempts to coerce.”³⁸

To state a claim for unconstitutional coercion of a third party in violation of the First Amendment, a litigant must allege “conduct that, when viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff’s speech.”³⁹ In *National Rifle Association of America v. Vullo*, the Supreme Court held that this standard would be met by a New York state official’s alleged threats of enforcement actions against private entities that refused to disassociate from the National Rifle Association (NRA).⁴⁰

Amdt1.7.8.3 Coercive Government Speech

While the government has broad latitude to “speak for itself”¹ and to “say what it wishes,”² it cannot punish those that disagree with its views or use its authority to suppress conflicting opinions.³ Similarly, the government can attempt to persuade

²⁹ *Shurtleff v. City of Boston*, No. 20-1800, slip op. at 2 (U.S. May 2, 2022); *Tam*, (plurality opinion); *id.* at 1 (Kennedy, J., concurring).

³⁰ *Shurtleff*, slip op. at 3; *see also id.* at 2 (describing the legal question as whether the flagpole was government speech or instead open for citizens’ views).

³¹ *Id.* at 12.

³² *Cf. Tam*, slip op. at 22 (plurality opinion) (saying limited public forum cases were “potentially. . . analogous”). *But see Vidal v. Elster*, No. 22-704, slip op. at 21 (U.S. June 13, 2024) (plurality opinion) (concluding that “there is reason to doubt that the federal trademark register is analogous to a limited public forum.”).

³³ *Id.*; *id.* at 1 (Kennedy, J., concurring).

³⁴ *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217, 229 (2000).

³⁵ *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995).

³⁶ *See Ashcroft v. Am. Civ. Liberties Union*, 535 U.S. 564, 573 (2002).

³⁷ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

³⁸ *Nat’l Rifle Ass’n of Am. v. Vullo*, No. 22-842, slip. op. at 9, (U.S. May 30, 2024) (citing *Bantam Books*, 372 U.S. at 59-62, 71).

³⁹ *Id.* at 12.

⁴⁰ *See id.* at 1.

¹ *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U. S. 217, 229 (2000).

² *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U. S. 819, 833 (1995).

³ *See Ashcroft v. Am. Civ. Liberties Union*, 535 U.S. 564, 573 (2002).

private parties to adopt its viewpoints, but it cannot coerce others into suppressing what the government believes to be objectionable views by threatening legal sanctions or using other coercive methods.⁴ In other words, the government may communicate with third parties as part of its “attempts to persuade” the public, but it cannot cross the threshold into impermissible “attempts to coerce.”⁵

To state a claim for unconstitutional coercion of a third party in violation of the First Amendment, a litigant must allege “conduct that, when viewed in context, could be reasonably understood to convey a threat of adverse government action in order to punish or suppress the plaintiff’s speech.”⁶ In *National Rifle Association of America v. Vullo*, the Supreme Court held that this standard would be met by a New York state official’s alleged threats of enforcement actions against private entities that refused to disassociate from the National Rifle Association (NRA).⁷

In *Murthy v. Missouri*, by contrast, the Supreme Court concluded that the States of Missouri and Louisiana, three doctors, a news website, and a health care activist lacked Article III standing to claim that the government violated the First Amendment by allegedly coercing social media companies to make certain content moderation decisions.⁸ Although the case’s record showed the government “played a role in at least some of the platforms’ moderation choices” affecting the plaintiffs’ online speech,⁹ the record did not show specific causation between the government’s actions and the social media platforms’ discrete acts of moderating the plaintiffs’ speech.¹⁰

Amdt1.7.10 Regulation of the Media

Amdt1.7.10.1 Overview of Regulation of the Media

Media organizations, such as newspapers, must comply with generally applicable laws although such laws may have incidental effects on the exercise of free speech rights.¹ The Supreme Court has, for example, affirmed that government may apply labor and antitrust laws to media organizations.² The First Amendment may, however, inhibit

⁴ *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

⁵ *Nat’l Rifle Ass’n of Am. v. Vullo*, No. 22-842, slip. op. at 9, (U.S. May 30, 2024) (citing *Bantam Books*, 372 U.S. at 59-62, 71).

⁶ *Id.* at 12.

⁷ *See id.* at 1.

⁸ *Murthy v. Missouri*, No. 23-411, slip op. at 1 (June 26, 2024). For additional background on the constitutional requirement for standing, see ArtIII.S2.C1.6.1 Overview of Standing. For additional background on the *Murthy* decision, see Intro.9.2.3 The First Amendment and Government Influence on Social Media Companies’ Content Moderation.

⁹ *Murthy*, No. 23-411, slip op. at 12.

¹⁰ *Id.* at 11.

¹ *See Cohen v. Cowles Media Co.*, 501 U.S. 663, 669 (1991) (describing various federal laws to which media organizations are subject).

² *See Associated Press v. NLRB*, 301 U.S. 103, 132–33 (1937) (holding that a newspaper publisher is subject to the National Labor Relations Act); *Okl. Press Publ’g Co. v. Walling*, 327 U.S. 186, 192–93 (1946) (holding the same for the Fair Labor Standards Act); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (holding the same for the Sherman Act); *see also Citizen Pub’g Co. v. United States*, 394 U.S. 131, 139 (1969) (holding that First Amendment did not protect newspapers from liability under the Sherman Act). The Supreme Court has suggested that antitrust regulation serves the First Amendment’s purpose by promoting “the widest possible dissemination of information from diverse and antagonistic sources.” *Associated Press v. United States*, 326 U.S. at 20; *see also Lorain Journal Co. v. United States*, 342 U.S. 143, 155–56 (1951) (injunction of anticom-

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government's ability to enact laws that target or impact a particular medium.³ The constitutional treatment of the media depends on several factors, including the specific medium being regulated.⁴ While each form of media “tends to present its own peculiar problems,” the basic principles enshrined in the First Amendment do not apply to different forms of media with any less force.⁵ Further, the Supreme Court has suggested there is no distinction between media and nonmedia speakers within a particular medium for First Amendment purposes.⁶ Accordingly, whether a particular media regulation is constitutional frequently depends on the application of general free speech principles, rather than media-specific principles or principles that relate only to the freedom of the press.⁷

Before radio and television became commonplace in American households, government regulation of media focused on print media. The growth of broadcast media precipitated a change in the focus of federal media regulation. The Supreme Court has recognized that broadcast media may be subject to different First Amendment protections than print media.⁸ In the absence of characteristics that justify different First Amendment treatment, the Supreme Court analyzes restrictions on media using the same tools it uses generally to assess restrictions on speech, such as the use of strict or intermediate scrutiny to assess content-based or content-neutral regulations.⁹

Amdt1.7.10.2 Taxation and Financial Regulation of Media

The First Amendment generally inhibits taxes or financial restrictions that target or disfavor the media, as such restrictions are subject to heightened constitutional scrutiny.¹ Similarly, government may not impose a tax as a prior restraint upon the exercise

petitive conduct under the Sherman Act did not violate free press right); *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775, 798 (1978) (federal regulation limiting ownership of broadcast stations and daily newspapers in same geographic market did not violate First Amendment).

³ *E.g.*, *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 582–83 (1983).

⁴ *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557 (1975) (“Each medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems”); *see, e.g.*, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386 (1969) (applying a unique First Amendment standard to radio and television broadcasters); *cf. Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 744–45 (1996) (plurality opinion) (relying in part on the pervasiveness and accessibility of cable television to uphold a law permitting cable operators to prohibit certain programming on leased access channels).

⁵ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952).

⁶ *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352–53 (2010) (declining to recognize a distinction between media and nonmedia speakers for First Amendment purposes); *Bartnicki v. Vopper*, 532 U.S. 514, 525 n.8 (2001) (refusing to recognize a distinction between a radio commentator and a private citizen in a First Amendment challenge).

⁷ The Supreme Court has not directly addressed whether the Free Press Clause offers any different protections than those secured by the Free Speech Clause. *Cf. Gitlow v. New York*, 268 U.S. 652, 666 (1925) (conflating the rights of free speech and press in incorporating the rights against the states through the Fourteenth Amendment's Due Process Clause). For more discussion, see Amdt1.9.1 Overview of Freedom of the Press.

⁸ *Red Lion*, 395 U.S. at 386.

⁹ *See, e.g.*, *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 637, 656–57 (1994) (holding that “the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation . . . does not apply” to cable television, but recognizing unique characteristics of cable television as part of the First Amendment analysis). *See generally* Amdt1.7.3.1 Overview of Content-Based and Content-Neutral Regulation of Speech.

¹ *See Leathers v. Medlock*, 499 U.S. 439, 447 (1991) (explaining that the government must have a “compelling justification . . . to single out the press,” and laws will be constitutionally suspect if they target small groups of speakers or discriminate on the basis of speech's content). *See generally* Amdt1.7.3.1 Overview of Content-

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of a constitutional right itself, such as a license tax on the distribution of religious literature.² However, the Court's jurisprudence seems to permit general taxes upon receipts of publishers and other businesses engaged in communicating protected expression.³

The Supreme Court has invalidated taxes that single out media organizations for payment. In *Grosjean v. American Press Co.*, the Court voided a state two-percent tax on the gross receipts of advertising in periodicals with a circulation exceeding 20,000 copies a week.⁴ The tax at issue was not a general tax but instead focused exclusively upon newspapers, and the Court determined that the tax seemed “to be a deliberate and calculated device . . . to limit the circulation of information to which the public is entitled.”⁵ The Court concluded that the tax had the “plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers.”⁶

In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, the Court invalidated a Minnesota use tax on the cost of paper and ink products used to produce publications.⁷ The court first distinguished the tax in *Minneapolis Star* from the tax in *Grosjean*, interpreting *Grosjean* as suggesting that the state legislature's intention to censor publishers may have been significant in the Court's decision to strike down the tax.⁸ By contrast, the Court found “no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the [Minnesota] legislature.”⁹

Despite the lack of improper motive, the Court struck down Minnesota's tax because of its facial discrimination, holding that the state had not met the “heavy burden” of justifying its different treatment of the press.¹⁰ In analyzing the tax's First Amendment impact, the Court explained that a targeted tax creates greater concern than a generally applicable tax because there are fewer political constraints to singling out a specific group, as opposed to the broader coalition that might oppose taxes of general applicability.¹¹ Accordingly, the power to tax differentially provided the government with a “powerful weapon” against the press.¹² The Court further concluded that such differential treatment, unless justified by some special characteristic of the press, suggests that

Based and Content-Neutral Regulation of Speech; Amdt1.7.3.5 Laws Making Speaker-Based Distinctions in Regulating Speech.

² *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (ruling license tax operating as a prior restraint on distribution of religious material unconstitutional); *Follett v. McCormick*, 321 U.S. 573 (1944) (same). For further discussion of these cases, see Amdt1.4.3.1 Laws Neutral to Religious Practice during the 1940s and 1950s.

³ See *Cammarano v. United States*, 358 U.S. 498, 512–13 (1959) (holding that disallowing business tax deductions for lobbying expenses did not violate First Amendment); *Medlock*, 499 U.S. at 447 (holding that sales tax of general applicability that exempted print media did not violate First Amendment).

⁴ 297 U.S. 233, 250 (1936).

⁵ *Id.*

⁶ *Id.* at 251. The Court emphasized that “the form” of the tax was “itself suspicious”: it was not tied to the volume of advertisements, for example, but to the extent of the newspapers' circulation. *Id.*

⁷ 460 U.S. 575, 592–93 (1983).

⁸ *Id.* at 580 (citing *Grosjean*, 297 U.S. at 250).

⁹ *Id.*

¹⁰ *Id.* at 592–93.

¹¹ *Id.* at 585.

¹² *Id.*

the goal of the regulation is not unrelated to suppression of expression.¹³ The state's asserted interest in raising revenue could not justify the tax's special treatment of the press, because the government could achieve this interest with a general tax that avoided "the censorial threat" of this differential tax.¹⁴

Also subject to heightened scrutiny is taxation that targets specific subgroups within a segment of the press for differential treatment. In *Minneapolis Star*, the Court said the tax also violated the First Amendment because it targeted "a small group of newspapers."¹⁵ To look at another example, an Arkansas sales tax exemption for "religious, professional, trade, and sports journals" published within the state was struck down as an invalid content-based regulation of the press.¹⁶ The Court held that the measure was not narrowly tailored to allegedly "compelling" state interests in raising revenue, encouraging fledgling publishers, and fostering communications.¹⁷ However, the Court left open whether a distinction in state sales tax between different types of media—specifically, an exception for newspapers—would likewise be unconstitutional.¹⁸

The Court confronted this question only a few years later. In *Leathers v. Medlock*, the Court upheld a state tax that discriminated among different types of media on a content-neutral basis, proclaiming that "differential taxation of speakers, even members of the press, does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas."¹⁹ The tax at issue, a sales tax of general applicability, exempted newspaper and magazine sales, but not sales for other forms of media.²⁰ The Court held that although the tax only applied to some types of media, unlike the Minnesota and Arkansas taxes ruled unconstitutional in earlier cases, the state had "not selected a *narrow* group to bear fully the burden of the tax."²¹ Thus, a generally applicable tax may face a lower constitutional barrier than a tax levied specifically on media, even if the generally applicable tax does not apply to all types of media. The Court reiterated that differential taxation will raise constitutional concerns when such taxes "threaten[] to suppress the expression of particular ideas or viewpoints," "single[] out the press," "target[] a small group of speakers," or "discriminate[] on the basis of the content of taxpayer speech," as elucidated in the cases discussed above.²²

¹³ *Id.*

¹⁴ *Id.* at 586.

¹⁵ *Id.* at 591.

¹⁶ *Ark. Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987).

¹⁷ *Id.* at 231–32.

¹⁸ *Id.* at 233.

¹⁹ 499 U.S. 439, 453 (1991).

²⁰ *Id.* at 442.

²¹ *Id.* at 448 (emphasis added). As opposed to the scheme in *Arkansas Writers' Project*, under which "only 'a few' Arkansas magazines paid . . . sales tax," the law in *Medlock* "extended Arkansas' sales tax uniformly to the approximately 100 cable systems then operating in the State." *Id.* (quoting *Ark. Writers' Project*, 481 U.S. at 229). The Court similarly distinguished the tax at issue in *Minneapolis Star*, which fell on only a few publishers. *Id.* at 445. Accordingly, because the law in *Medlock* taxed "a large number of cable operators offering a wide variety of programming throughout the State," it did not "resemble[] a penalty for particular speakers or particular ideas." *Id.* at 449.

²² *Id.* at 447 (collecting cases).

As discussed elsewhere, laws that target speech based on the content of the speech may violate the First Amendment whether they target the media or not.²³ The Arkansas exemption from *Arkansas Writers' Project* violated this principle by taxing magazines based on their content.²⁴ This general principle also motivated the Court's invalidation of a New York state law requiring that an accused or convicted criminal's income from publications describing their crime be placed in an escrow account and then distributed to the crime's victims.²⁵ The Court observed that this law placed a financial burden on income derived from specific expressive activity and therefore disincentivized the publication of certain books based on their content.²⁶ The Court therefore applied heightened scrutiny to the New York law, under which it found that the law was not narrowly tailored.²⁷

Amdt1.7.10.3 Broadcast Radio and Television

Compared to print media, government has played a more active role in regulating broadcast radio and television. The federal government has administered a system for licensing radio broadcasting since 1912.¹ By contrast, the licensure of printed media is among the historical practices that inspired the earliest formations of the free speech and free press rights,² and modern courts presume that such licensing systems would be unconstitutional.³ The Supreme Court recognized in *National Broadcasting Co. v. United States* that broadcast is unique among media because electromagnetic spectrum is a scarce and finite resource, and this scarcity justifies government involvement to allocate the use of those frequencies and mitigate interference between broadcast signals.⁴ The Court suggested, however, that this government authority does not permit regulation based on the content or viewpoint of materials being broadcast.⁵

The Supreme Court relied on the scarcity of radio spectrum to justify certain aspects of the Federal Communications Commission's (FCC's) "fairness doctrine" in *Red Lion Broadcasting Co. v. FCC*.⁶ The fairness doctrine refers to the FCC's practice for many years of requiring radio and television broadcasters to provide coverage of contrasting viewpoints when discussing public issues.⁷ *Red Lion* involved FCC regulations requiring a broadcaster to afford individuals an on-air opportunity to respond to personal attacks aired by the broadcaster. Broadcasters argued these rules abridged their First Amendment right to broadcast whatever they choose, citing the general right of an individual to "say[] or publish[] what he thinks."⁸

²³ See Amdt1.7.3.3 Laws Making Facial Content-Based Distinctions Regarding Speech.

²⁴ *Ark. Writers' Project*, 481 U.S. at 229.

²⁵ *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991).

²⁶ *Id.* at 116.

²⁷ *Id.* at 121–22.

¹ Radio Act of 1912, Pub. L. No. 62-264, 37 Stat. 302.

² See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *150.

³ See generally Amdt1.7.2.3 Prior Restraints on Speech.

⁴ 319 U.S. 190, 226 (1943).

⁵ *Id.*

⁶ 395 U.S. 367, 373 (1969).

⁷ See generally *id.* at 369, 377 (identifying the Federal Radio Commission, an FCC precursor, as first articulating the principles of the fairness doctrine in 1929).

⁸ *Id.* at 386.

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The Supreme Court in *Red Lion* held that “differences in the characteristics of new media justify differences in the First Amendment standards applied to them.”⁹ The Court identified scarcity as a rationale for different treatment because “[w]here there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.”¹⁰ In comparison to other types of media, the then-current state of technology would cause “chaos” if any person were allowed “to use any frequency at whatever power level he wished”—limiting overcrowding on the spectrum was necessary for effective communication.¹¹

Beyond merely justifying a federal licensing scheme for radio spectrum, as had been the case in *National Broadcasting Co.*, the Court used scarcity in *Red Lion* to uphold the government’s ability to regulate the content being broadcast on licensed stations. The Court reasoned that just as government may grant or deny a broadcast license as “the public interest” requires, so too may government require a licensee to act in the public interest in selecting the content to be broadcast.¹² The *Red Lion* court understood this government power as necessary to effect the First Amendment interests of “viewers and listeners,” whose rights outweighed those of broadcasters.¹³ The Court dismissed as “at best speculative” arguments that the FCC’s regulations would result in self-censorship by broadcasters, but admitted that “there will be time enough to reconsider the constitutional implications” if such an outcome occurred.¹⁴

The government power to regulate broadcast recognized in *Red Lion* is not boundless, and the Court has recognized that broadcasters retain “the widest journalistic freedom consistent with [their] public obligations.”¹⁵ In *FCC v. League of Women Voters of California*, the Supreme Court struck down a total ban on editorializing by broadcast stations receiving public funding.¹⁶ In summarizing the principles guiding analysis in this area, the Court reaffirmed that Congress may regulate in ways that would be impermissible in other contexts,¹⁷ but articulated limits on this power: namely, that regulations on broadcast content must be “narrowly tailored to further a substantial

⁹ *Id.*

¹⁰ *Id.* at 388.

¹¹ *Id.* at 388–89.

¹² *Id.* at 389.

¹³ *Id.* at 390. For discussion on weighing these First Amendment interests with respect to other media, see Amdt1.7.12 Governmentally Required Access and Editorial Discretion.

¹⁴ *Red Lion*, 395 U.S. at 392–93. The Court further suggested that if stations chose to self-censor and such self-censorship hindered the effective coverage of controversial public issues, the FCC might be empowered to compel stations to provide additional coverage. *Id.*

¹⁵ *Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 110 (1973); see also, e.g., *Ark. Educ. TV Comm’n v. Forbes*, 523 U.S. 666, 674 (1998) (“When a public broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.”).

¹⁶ 468 U.S. 364, 398–99 (1984).

¹⁷ *Id.* at 376–377. The *League of Women Voters* Court appeared willing to reconsider the scarcity rationale articulated in *Red Lion* in light of technological advances such as cable and satellite television, but declined to do so “without some signal from Congress or the FCC.” *Id.* at 376 n.11.

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governmental interest.”¹⁸ The ban on editorializing at issue in *League of Women Voters* was considered too severe and restrictive to satisfy this narrow tailoring test.¹⁹

The Court pivoted from the reasoning of *Red Lion* in *FCC v. Pacifica Foundation*, a case sustaining FCC discipline of a radio broadcaster for broadcasting indecent material at a time when children could hear the material.²⁰ The FCC’s enforcement action relied on a statute that prohibits the broadcast of “obscene, indecent, or profane language.”²¹ The FCC had interpreted this provision to cover the broadcast of a satiric monologue that was the subject of a consumer complaint before the FCC.²² In seeking judicial review of the FCC’s enforcement action, the broadcaster argued that the FCC could not constitutionally regulate “indecent” speech.²³

Rather than relying on the scarcity of spectrum, the Supreme Court in *Pacifica* identified two distinct features of broadcast that justified government regulation. First, broadcasting is “uniquely pervasive” and may reach individuals in public as well as their homes.²⁴ Second, “broadcasting is uniquely accessible to children,” and a broadcaster has limited control over whether a child receives a particular broadcast.²⁵

The FCC has not enforced the fairness doctrine since the 1980s, but has continued to impose monetary penalties for indecent broadcasting.²⁶ Throughout the Supreme Court’s history, various Justices have expressed the view that *Red Lion* and *Pacifica* were wrongly decided and broadcast media should not be subject to unique First Amendment standards.²⁷ The Supreme Court has declined to revisit either *Red Lion* or *Pacifica*.

¹⁸ *Id.* at 380. This language mirrors the “intermediate scrutiny” standard that courts apply to content-neutral restrictions on speech. *See generally* Amdt1.7.3.1 Overview of Content-Based and Content-Neutral Regulation of Speech.

¹⁹ *League of Women Voters*, 468 U.S. at 384–86.

²⁰ 438 U.S. 726 (1978).

²¹ 18 U.S.C. § 1464.

²² Citizen’s Complaint Against Pacifica Found. Station WBAI (FM), 56 F.C.C.2d 94, 98–99 (1975).

²³ The FCC’s statutory authority also prohibits broadcasting “obscene” material, which is subject to greater government regulation due to being a so-called “unprotected” category of speech. The FCC conceded that its definition of “indecent” material would extend beyond the constitutional category of obscenity. *Id.* at 98. *See generally* Amdt1.7.5.11 Obscenity.

²⁴ *Pacifica*, 438 U.S. at 748.

²⁵ *Id.* at 749.

²⁶ *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009) (upholding FCC enforcement actions taken for indecent broadcasting against statutory challenges). These particular actions were later held unconstitutional under the Due Process Clause of the Fifth Amendment. *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 258 (2012). *See generally* Amdt5.8.2 Laws That Define Criminal Offenses and the Requirement of Definiteness.

²⁷ *E.g., Columbia Broad. Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 148, 155–56 (1973) (Douglas, J., concurring) (concluding that “TV and radio stand in the same protected position under the First Amendment as do newspapers and magazines” and that *Red Lion* was wrongly decided); *FCC v. Fox Television Stations, Inc.*, 567 U.S. at 259 (Ginsburg, J., concurring) (concluding that “[t]ime, technological advances, and the [FCC’s] rulings . . . show why *Pacifica* bears reconsideration”); *FCC v. Fox Television Stations, Inc.*, 556 U.S. at 530–35 (Thomas, J., concurring) (analyzing *Pacifica* and *Red Lion* and suggesting that “changes in factual circumstances might well support a departure from precedent”).

Amdt1.7.10.4 Cable Television

The Court has recognized that operation of a cable television system “implicate[s] First Amendment interests,” in part because a cable operator exercises editorial discretion by selecting original programming and determining which stations to include in its offering.¹ While the Supreme Court has relied on the scarcity of electromagnetic spectrum to justify greater regulation of broadcast television, cable television lacks this scarcity.² Litigants therefore sparred over whether cable television is entitled to special First Amendment treatment.³ In its 1994 decision *Turner Broadcasting System v. FCC*, the Court held that cable as a medium enjoys greater First Amendment protection than broadcast.⁴ The Court nevertheless recognized that certain features of cable television as a medium might justify regulation.⁵ The *Turner* court determined that “must-carry” provisions of law requiring cable operators to carry local broadcast stations were content-neutral restrictions on speech subject to intermediate scrutiny, but did not rule on the constitutionality of these regulations.⁶ In a 1997 follow-up decision, the Court held that government interests in ensuring the continued availability of broadcast programming, promoting the dissemination of information from a variety of sources, and encouraging competition in the television programming marketplace justified must-carry regulations.⁷

In *Denver Area Educational Telecommunications Consortium v. FCC*, a case challenging FCC regulations relating to indecent cable television programming, a plurality of the Court appeared hesitant to categorically impose a specific level of First Amendment scrutiny on cable television regulation.⁸ Writing for four members of the Court, Justice Breyer noted that many factors identified in *FCC v. Pacifica Foundation* as features of broadcast media warranting more relaxed First Amendment treatment—including a “pervasive” presence in Americans’ homes and a unique accessibility to children—could also describe cable television.⁹ The plurality distinguished between *Turner*—where a majority of the court had treated cable television to the same standards as non-broadcast media—by noting that the structural distinction between cable television and broadcast television that was relevant in *Turner* “has little to do with a case that involves the effects of television viewing on children.”¹⁰

¹ *City of Los Angeles v. Preferred Commc’ns, Inc.*, 476 U.S. 488, 494 (1986).

² See Amdt1.7.10.3 Broadcast Radio and Television.

³ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 638–39 (1994) (noting that First Amendment standards applicable to broadcast “are inapposite . . . because cable television does not suffer from the inherent limitations that characterize the broadcast medium”).

⁴ *Id.* at 637.

⁵ *Id.* at 656–57.

⁶ *Id.* at 661–62; *id.* at 665 (plurality opinion).

⁷ *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 213 (1997).

⁸ *Denver Area Educ. Telecommcs. Consortium, Inc. v. FCC*, 518 U.S. 727, 742 (1996) (plurality opinion). Justice Thomas, joined by two other Justices, would have held that cable television is subject to the same level of First Amendment protection as print and other non-broadcast media. *Id.* at 812 (Thomas, J., concurring in the judgment in part and dissenting in part).

⁹ *Id.* at 744–45 (plurality opinion); see Amdt1.7.10.3 Broadcast Radio and Television for more discussion of this case.

¹⁰ *Denver Area Educ. Telecommcs. Consortium*, 518 U.S. at 748 (plurality opinion). Justice Thomas argued in concurrence that Justice Breyer’s opinion “largely disregards” the Court’s attempt in *Turner I* to define a First Amendment standard for cable television. *Id.* at 817–818 (Thomas, J., concurring in the judgment in part and dissenting in part).

In part relying on the similarity between broadcast and cable, but declining to impose a specific First Amendment standard, a plurality held that a law permitting cable operators to decline to broadcast patently offensive material on leased access channels did not pose free speech concerns.¹¹ On the other hand, a Court majority held that a requirement that cable operators must, to protect children, segregate and block programs with patently offensive material, would not survive even a more relaxed level of First Amendment scrutiny.¹²

In *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court made clear that content-based speech restrictions on cable television are subject to the same standards generally applicable to content-based restrictions.¹³ The Court struck down a federal statute that required cable operators to “scramble” sexually explicit channels to nonsubscribers or limit programming on those channels to certain hours.¹⁴ Though the Court again recognized that cable television shared several features of broadcasting identified in *Pacifica*, it also distinguished cable television for having “the capacity to block unwanted channels on a household-by-household basis.”¹⁵ The Court held that this capacity for private blocking presented a less speech-restrictive alternative to government-mandated “scrambling.”¹⁶

In short, despite the equivocal approach taken by the plurality in *Denver Area Educational Telecommunications Consortium*, the Court appears to generally view cable television as subject to the same First Amendment standards as non-broadcast media. However, the broadcast-like features of cable television and the unique features of cable television may be relevant in determining whether a particular regulation is justified.¹⁷

Amdt1.7.11 Print, Telephone, and the Internet

Amdt1.7.11.1 Overview of Print, Telephone, and the Internet

Though the Supreme Court has recognized unique attributes of broadcast radio and television that justify more relaxed First Amendment scrutiny,¹ most media lack these attributes and therefore are not entitled to broadcast’s more permissive standards.² Courts will typically apply ordinary First Amendment principles to analyze restrictions on non-broadcast media, such as the concepts of traditional and designated public

¹¹ *Id.* at 752 (plurality opinion). Justice Thomas, joined by two other Justices, agreed that the law was constitutional, though he would have clarified the applicable First Amendment standard. *Id.* at 812 (Thomas, J., concurring in the judgment in part and dissenting in part).

¹² *Id.* at 755–56 (majority opinion).

¹³ 529 U.S. 803, 813 (2000); see Amdt1.7.3.1 Overview of Content-Based and Content-Neutral Regulation of Speech.

¹⁴ 529 U.S. at 807.

¹⁵ *Id.* at 815.

¹⁶ *Id.* at

¹⁷ See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994) (noting that although cable television was not subject to more relaxed First Amendment treatment, “[t]his is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech”); cf. *Denver Area Educ. Telecomms. Consortium*, 518 U.S. at 744–45 (plurality opinion) (relying in part on the pervasiveness and accessibility of cable television to uphold a law permitting cable operators to prohibit certain programming on leased access channels).

¹ See generally Amdt1.7.10.3 Broadcast Radio and Television.

² See, e.g., *Reno v. ACLU*, 521 U.S. 844, 868–69 (1997) (holding that the internet was not subject to First Amendment standards applicable to broadcast media).

forums³ and the use of “strict” and “intermediate” scrutiny for content-based and content-neutral restrictions on speech.⁴ The court has applied these principles in cases involving such new media as movies,⁵ video games,⁶ and the internet.⁷ As discussed in other essays, the unique characteristics of each medium remain relevant in applying these principles.⁸

Amdt1.7.11.2 Print Media

No medium has a richer historical pedigree in the free speech context than print. The English practice of licensing printing presses, and subsequent critiques of this practice, helped shape the development of the rights of free speech and press in the First Amendment.¹ The Supreme Court has decided cases relating to the freedom of printed expression for hundreds of years, though the Court generally did not analyze issues through a First Amendment lens until the 20th century.² The Court’s contemporary free speech jurisprudence developed in large part through cases involving print media, and accordingly the Court has never addressed the medium’s “unique characteristics” in the same way it has addressed other media.³

Amdt1.7.11.3 Telephone Communications

In addition to having responsibility for regulating broadcast radio and television, the Federal Communications Commission (FCC) regulates telecommunications service providers. Though they share a common regulator, broadcast media and telephone communications serve different purposes and use different technologies. The Supreme Court relied on these differences in *Sable Communications of California, Inc. v. FCC*, a case in

³ See Amdt1.7.7.2 Public and Nonpublic Forums.

⁴ *E.g.*, *Reno*, 521 U.S. at 871–72 (analyzing restriction on certain internet communications as a content-based restriction on speech). See generally Amdt1.7.3.1 Overview of Content-Based and Content-Neutral Regulation of Speech.

⁵ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 503 (1952) (“Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression. . . . But the basic principles of freedom of speech and the press, like the First Amendment’s command, do not vary.”).

⁶ *Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 790 (2011) (quoting *Joseph Burstyn*, 343 U.S. at 503).

⁷ *Reno*, 521 U.S. at 868–69.

⁸ *E.g.*, *id.* (assessing impacts of an internet regulation with reference to characteristics of the internet as a medium); *cf.* *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 639 (1994) (noting that although cable television was not subject to more relaxed First Amendment treatment, “[t]his is not to say that the unique physical characteristics of cable transmission should be ignored when determining the constitutionality of regulations affecting cable speech”).

¹ See *June 1643: An Ordinance for the Regulating of Printing*, ACTS AND ORDINANCES OF THE INTERREGNUM, 1642-1660 184–86 (C. H. Firth & R.S. Rait eds., 1911); 4 WILLIAM BLACKSTONE, COMMENTARIES *150. See generally *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245–49 (1936) (describing the legal landscape for press prior to and leading up to the adoption of the First Amendment).

² See, *e.g.*, *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812) (holding that United States courts would not recognize a common law claim for seditious libel, though reaching this conclusion without reference to the First Amendment); *cf.* *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (first incorporating the freedoms of speech and press against the states through the Fourteenth Amendment).

³ See, *e.g.*, Amdt1.7.10.2 Taxation and Financial Regulation of Media (discussing development of First Amendment jurisprudence of financial regulation based on regulations applied to periodicals); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974) (developing free speech principle that government may not compel speaker to provide a forum for views other than its own); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (developing free speech principles relating to defamation of public figures). See generally Amdt1.7.2.3 Prior Restraints on Speech; Amdt1.7.12.1 Overview of Compelled Speech.

which the Court partially struck down a ban on indecent and obscene commercial telephone messages.¹ The FCC attempted to justify this ban in part by relying on its authority, upheld in *FCC v. Pacifica Foundation*, to regulate indecent broadcasts on radio and television.² The Court observed that *Pacifica* “relied on the ‘unique’ attributes of broadcasting,” which the Court noted are “substantially different” from private telephone communications.³ Among these differences is that broadcast media are “uniquely pervasive,” and particular messages “can intrude on the privacy of the home without prior warning as to program content.”⁴ In contrast, the telephone communications addressed by the ban, which focused on dial-in services paid for by a calling individual, require “affirmative steps to receive the communication.”⁵ Thus, the more relaxed First Amendment standards that may allow greater regulation of broadcast media do not apply to regulation of telephone communications, despite both media falling under the FCC’s jurisdiction.

Amdt1.7.11.4 The Internet

The emergence of the internet as a widespread form of communication at the end of the 20th century prompted questions of how to apply legal principles developed for print and broadcast to the medium. In *Reno v. American Civil Liberties Union*, a 1997 decision, the Supreme Court rejected the notion that the internet as a medium should be subject to more relaxed First Amendment scrutiny.¹ *Reno* involved challenges to the Communications Decency Act, a federal law that created criminal penalties for distributing “indecent” or “patently offensive” content over the internet to individuals under 18 years old.² Arguing for the statute’s constitutionality, the United States relied on the Supreme Court’s decision in *FCC v. Pacifica Foundation* upholding the regulation of indecent broadcasting.³

The Court concluded that the unique features of broadcast media identified in *Pacifica* and *Red Lion Broadcasting Co. v. FCC*⁴—including a “history of extensive Government regulation,” a “scarcity of available frequencies,” and an “invasive” nature—“are not present in cyberspace.”⁵ Rejecting the scarcity rationale described in *Red Lion*, the Court observed that the internet “provides relatively unlimited, low-cost capacity for communication of all kinds.”⁶ The Court also determined that the internet was a less “invasive” means of communication than broadcast, observing that internet users typically must take affirmative steps to view particular internet content.⁷

¹ 492 U.S. 115 (1989). The Court upheld the ban as applied to obscene communications. *Id.* at 124. See generally Amdt1.7.5.11 Obscenity.

² *Id.* at 127 (citing *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)); see Amdt1.7.10.3 Broadcast Radio and Television for more discussion of this case.

³ *Id.* at 127–28.

⁴ *Id.* at 127.

⁵ *Id.* at 128.

¹ 521 U.S. 844, 868–69 (1997).

² Pub. L. No. 104-104, tit. V, § 502, 110 Stat. 133, 133–34 (1996).

³ 438 U.S. 726 (1978); see Amdt1.7.10.3 Broadcast Radio and Television.

⁴ 395 U.S. 367 (1969).

⁵ *Reno*, 521 U.S. at 868.

⁶ *Id.* at 870.

⁷ *Id.* at 869.

Having distinguished the internet from broadcast media, the Supreme Court engaged in a routine First Amendment analysis. The Court determined that the Communications Decency Act posed a content-based restriction on speech and was therefore subject to strict scrutiny.⁸ As discussed in other essays, strict scrutiny requires the government to demonstrate that a law is the “least restrictive means” of advancing a “compelling” governmental interest.⁹ Applying this standard, the Court held that the government had not met this burden,¹⁰ particularly in light of the law’s potential impact on lawful speech between adults.¹¹ The Court further suggested that the law’s vagueness with respect to its prohibited material posed free speech concerns.¹²

Beyond its decision in *Reno* at the end of the 20th century, the Supreme Court has addressed the application of general free speech principles to the internet as a medium on some occasions. In a 2002 decision, the Court held that a federal law’s use of constitutional standards developed for obscenity distributed in print was not *per se* unconstitutional as applied to the internet.¹³ The law at issue criminalized the online distribution of “material that is harmful to minors,” a term that was defined in part as material that “the average person, applying contemporary community standards, would find” appeals to the prurient interest of minors.¹⁴

While a lower court had determined that the use of “community standards” was inappropriate as applied to a geographically limitless medium like the internet,¹⁵ the Court held that the law’s use of “community standards” was insufficient by itself to render the law unconstitutional.¹⁶ However, the Court splintered as to how to apply its precedents to the internet. Three Justices observed that the Court’s earlier precedents had applied “community standards” analysis to material capable of reaching a national audience based on the standards of the community where the material was received, and the Justices saw no reason to treat the internet differently.¹⁷ Two Justices in concurring opinions advocated adopting a nationwide “community standard” to assess online material.¹⁸ In a subsequent 2004 decision, the Court affirmed a preliminary injunction preventing enforcement of the law based on the Court’s application of strict scrutiny analysis and its determination under this standard that the law was not narrowly tailored.¹⁹

⁸ *Id.* at 868.

⁹ *Sable Commc’ns of Cal. V. FCC*, 492 U.S. 115, 126 (1989). *See generally* Amdt1.7.3.1 Overview of Content-Based and Content-Neutral Regulation of Speech.

¹⁰ *Reno*, 521 U.S. at 879.

¹¹ *Id.* at 875–76.

¹² *Id.* at 871–73. For a discussion of vagueness as it relates to free speech, see Amdt1.7.2.2 Vagueness, Statutory Language, and Free Speech.

¹³ *Ashcroft v. ACLU*, 535 U.S. 564, 585 (2002).

¹⁴ *Id.* at 570. This “community standards” language was adopted from the Supreme Court’s test for obscenity articulated in *Miller v. California*, 413 U.S. 15, 24 (1973). *See generally* Amdt1.7.5.11 Obscenity.

¹⁵ *Ashcroft*, 535 U.S. at 575.

¹⁶ *Id.* at 585.

¹⁷ *Id.* at 580–81 (plurality opinion) (citing *Hamling v. United States*, 418 U.S. 87, 106 (1974) and *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 125–26 (1989)).

¹⁸ *Id.* at 586 (O’Connor, J., concurring); *id.* at 589–90 (Breyer, J., concurring).

¹⁹ *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

Some of the Court’s decisions addressing free speech on the internet have directly or indirectly confronted the question of how to apply the doctrine of the public forum to the medium. In a 2003 decision upholding a federal law that conditioned the receipt of federal funding for schools and libraries on the installation of software to block and filter pornographic material, a four-Justice plurality held that internet access provided by public libraries is not a public forum.²⁰ In a 2017 decision striking down a state law prohibiting sex offenders from accessing social media website, the court identified the internet as one of “the most important places . . . for the exchange of views,” underscoring the medium’s importance in modern free speech doctrine.²¹

Amdt1.7.12 Governmentally Required Access and Editorial Discretion

Amdt1.7.12.1 Overview of Access and Editorial Discretion

The Supreme Court has recognized in various cases that regulating media may implicate the First Amendment interests of both the regulated entity and the public.¹ These interests may not always be aligned. For example, a newspaper’s interest in choosing the material it prints to promote a single perspective may conflict with the public’s interest in access to a variety of perspectives on significant issues. This potential conflict raises the question of whether the First Amendment permits government to require media outlets to devote space or airtime to alternative points of view—essentially, to elevate the public’s speech interests over the media outlets. For most forms of media, the answer is no.² Instead, the Court has recognized a protected right of “editorial control and judgment” for a media outlet to choose the speech it transmits.³ One exception to this general rule lies in broadcast, where the “unique characteristics” of the medium justify greater—but not unfettered—government involvement.⁴ Even in that context, however, the Supreme Court has recognized a need to also protect broadcasters’ “editorial discretion.”⁵

In striking down legislative attempts to require access to media facilities, the Supreme Court has relied on the principle that government may not compel a private party to provide a forum for views other than its own.⁶ For example, in *Miami Herald Publishing Co. v. Tornillo*, the Supreme Court was unanimous in holding void under the First Amendment a state law that granted a political candidate a right to equal space to

²⁰ *United States v. Am. Lib. Ass’n, Inc.*, 539 U.S. 194, 205 (2003) (plurality opinion). In a concurring opinion, Justice Breyer agreed with the plurality’s public forum analysis, but would have held the law constitutional using a different approach. *Id.* at 215–16 (Breyer, J., concurring).

²¹ *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). The Court’s opinion analogized the internet to “a street or a park” but did not otherwise engage in any public forum analysis. *Id.* For further discussion, see Amdt1.7.7.2 Public and Nonpublic Forums.

¹ *E.g.*, *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (“But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment.”).

² *Cf.*, *e.g.*, *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721, 749–50 (2011) (rejecting the idea of a compelling government interest in “leveling the playing field” for political speech, describing this type of government intervention as “a dangerous enterprise”).

³ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

⁴ *See Red Lion Broad. Co.*, 395 U.S. at 391–92.

⁵ *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 385 (1984).

⁶ *See, e.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 9 (1986).

answer criticism and attacks on his record by a newspaper.⁷ A newspaper challenged this statute, arguing that the law forced the newspaper to print content it would not have otherwise published.⁸ The government argued that a “right to reply” law was necessary to ensure a broad range of opinions due to the concentration of media ownership and a consequent dearth of diverse perspectives.⁹

The Supreme Court rejected the government’s argument, noting that while “press responsibility” may be a “desirable goal,” it is “not mandated by the Constitution.”¹⁰ The Court’s primary concern in *Tornillo* was instead that the law might “compel[] editors or publishers to publish that which reason tells them should not be published.”¹¹ Because newspapers exercise “editorial control and judgment” and are not “passive receptacle[s]” for news, the Court held that they engage in protected speech when they select material to include in a newspaper or make choices on how to arrange and limit material, and a government effort to supplant the newspaper’s editorial judgment violates the First Amendment.¹² Rather than subjecting the “right to reply” law to a particular level of First Amendment scrutiny, the Court appeared to approach the law as if restrictions on editorial control would be categorically prohibited under the First Amendment.¹³ Following *Tornillo*, the Court began to recognize this right of editorial judgment outside the media context as well, where it similarly treated restrictions on editorial judgment as categorically unconstitutional.¹⁴

Amdt1.7.12.2 Access and Editorial Discretion in Broadcast Media

In cases recognizing a general right to editorial discretion, the Supreme Court has held that government may not force a media outlet to provide space for views that are not its own.¹ The Supreme Court has upheld access requirements for broadcast radio and television due to the attributes of the medium. In *Red Lion Broadcasting Co. v. FCC*, the Court upheld FCC regulations requiring a broadcaster to afford individuals an on-air opportunity to respond to personal attacks aired by the broadcaster.² The Court justified the FCC regulations based on the unique characteristics of broadcast, which warranted government action to protect the free speech rights of “viewers and listeners.”³ The *Red Lion* Court nonetheless observed that First Amendment problems might arise should

⁷ 418 U.S. 241 (1974).

⁸ *Id.* at 245.

⁹ *Id.* at 250–51.

¹⁰ *Id.* at 256.

¹¹ *Id.* (internal quotation marks omitted).

¹² *Id.* at 258.

¹³ *Id.*

¹⁴ *E.g.*, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 9 (1986) (recognizing right of privately-owned utility company to exclude third-party material from commercial mailers); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) (recognizing right of parade organizers to exclude organizations from parade); see *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023) (recognizing website designer’s right to refuse to create websites communicating messages with which the designer disagrees).

¹ See generally Amdt1.7.12.1 Overview of Access and Editorial Discretion.

² *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 373 (1969). For more discussion of *Red Lion* and regulation of broadcast media generally, see Amdt1.7.10.3 Broadcast Radio and Television.

³ *Red Lion*, 395 U.S. at 390.

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government regulation constrain a station's ability to carry programming reflecting its own views.⁴

The Court confronted such an issue in a subsequent decision. In *FCC v. League of Women Voters of California*, the Supreme Court struck down a total ban on editorializing by broadcast stations receiving public funding.⁵ In contrast to the regulations upheld in *Red Lion*, which the Court averred “left room for editorial discretion and simply required broadcast editors to grant others access to the microphone,” the ban in *League of Women Voters* “directly prohibit[ed]” stations from speaking on public issues.⁶ The Court recognized that restrictions permitted in broadcast but not other media—such as those upheld in *Red Lion*—have an effect of denying “the absolute freedom to advocate one’s own positions without also presenting opposing viewpoints” that other media enjoy.⁷ But the Court required that any such restrictions be “narrowly tailored to further a substantial government interest.”⁸

Because of broadcast’s unique attributes, private parties have advanced the theory that the First Amendment does not merely permit, but *requires* a right of access to secure the free speech rights of the public. The Supreme Court’s cases addressing this theory affirm the general principle that broadcasters have a free speech interest in selecting their programming and that these interests are not outweighed by the public’s. In *Columbia Broadcasting System, Inc. v. Democratic National Committee*, political organizations argued that a broadcaster’s policy of not selling advertising time for editorial purposes violated the First Amendment and the Communications Act, which obliges broadcasters to act in the “public interest.”⁹ The Supreme Court rejected this argument, holding that private parties had no right to purchase air time from broadcasters.¹⁰ The Court described broadcasters in language similar to *Miami Herald Publishing Co. v. Tornillo*, saying that broadcasters retain “journalistic discretion.”¹¹ Though it declined to require broadcasters to give political organizations access based on the language of the Communications Act, the Court left open the possibility that “at some future date Congress or the [Federal Communications Commission]—or the broadcasters—may devise some kind of limited right of access that is both practicable and desirable.”¹²

The Court upheld one such right in *CBS, Inc. v. FCC*, a case involving a challenge to a law requiring “reasonable access” to a broadcast station for candidates seeking election

⁴ *Id.* at 396.

⁵ 468 U.S. 364, 398–99 (1984).

⁶ *Id.* at 385.

⁷ *Id.* at 380.

⁸ *Id.* For further discussion, see Amdt1.7.13.5 Restrictions on Editorializing.

⁹ 412 U.S. 94, 98 (1973).

¹⁰ *Id.* at 125. The Court was divided on the question of whether a broadcaster’s role qualified as state action for First Amendment purposes, but resolved the case on statutory grounds without deciding this question. Compare *id.* at 121 (plurality opinion) (determining that broadcaster’s policy was not state action), with *id.* at 148 (Blackmun, J., concurring) (determining that the case could be resolved without reaching the state action issue and “therefore refrain[ing] from deciding it”), and *id.* at 180–81 (Brennan, J., dissenting) (determining that First Amendment should apply to broadcaster’s policy).

¹¹ *Id.* at 111 (majority opinion). For more discussion of *Tornillo* and the general right of editorial discretion, see Amdt1.7.12.1 Overview of Access and Editorial Discretion.

¹² *Democratic Nat’l Comm.*, 412 U.S. at 131.

to federal office.¹³ Citing constitutional protections for journalistic freedom, the Court noted that earlier precedents, such as *Tornillo* and *Democratic National Committee*, had foreclosed a general right of access.¹⁴ The Court held that the right to “reasonable” access for federal candidates, which was limited in terms of who could invoke the right, when it could be invoked, and for what purpose, properly balanced the free speech interests of broadcasters with those of the public and federal candidates.¹⁵

The Supreme Court subsequently rejected a First Amendment challenge brought by a candidate for office who was excluded from a public broadcast station’s televised debate in *Arkansas Educational Television Commission v. Forbes*.¹⁶ Relying on its decisions in *Democratic National Committee* and *League of Women Voters*, the Court held that “broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.”¹⁷ However, the Court concluded the station’s debate—which was, by design, a forum for candidate speech—could be subject to additional First Amendment scrutiny.¹⁸ Applying public forum doctrine, the Court concluded the debate was a nonpublic forum from which the station could exclude candidates, given that the debate was subject to selection criteria established by the station and never designated as open to all candidates.¹⁹ After determining that the debate was not a general access public forum, the court concluded that the station’s exclusion of the candidate seeking access was based on the candidate’s lack of popular support and therefore “was a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment.”²⁰

Amdt1.7.12.3 Access and Editorial Discretion in Cable Television

Government attempts to extend access rights to cable television systems have faced First Amendment challenges. In *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court upheld federal statutory requirements that cable systems carry local broadcast television stations.¹ The Court determined in an earlier case that these “must-carry” requirements were content-neutral² and therefore would be subject to intermediate scrutiny, which requires that a law not “burden substantially more speech than is necessary to further the government’s legitimate interests.”³ In determining that intermediate scrutiny applied, the Court rejected analogies to the “right to reply” law struck down in *Miami Herald Publishing Co. v. Tornillo*, holding that the federal must-carry rules did not require cable operators to carry programming based on the content of

¹³ 453 U.S. 367, 371 (1981).

¹⁴ *Id.* at 395–96.

¹⁵ *Id.*

¹⁶ 523 U.S. 666, 669 (1998).

¹⁷ *Id.* at 673.

¹⁸ *Id.* at 675–76.

¹⁹ *Id.* at 678–80. For more discussion of public and nonpublic forums generally, see Amdt1.7.7.2 Public and Nonpublic Forums.

²⁰ *Forbes*, 523 U.S. at 683.

¹ 520 U.S. 180 (1997).

² *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 645 (1994). Four Justices determined that the requirements were content-based. *Id.* at 676 (O’Connor, J., concurring in part and dissenting in part).

³ *Id.* at 662 (majority opinion) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)). For more discussion of this case, see Amdt1.7.10.4 Cable Television.

operators' existing programming and were unlikely to "force cable operators to alter their own messages."⁴ The Court similarly noted that viewers were unlikely to assume that the messages conveyed by broadcast programming reflected the views of the cable operator.⁵ Applying intermediate scrutiny, the Court held that the must-carry requirements were justified by a government interest in preserving a multiplicity of broadcast sources.⁶

As with broadcast television, some private parties have argued that the First Amendment rights of the public require a right of access to cable television systems.⁷ One hurdle to this theory is that the First Amendment forbids only *government* from abridging a right to free speech—it does not generally require private parties to respect others' free speech rights.⁸ Though this "state action" issue was raised in *Democratic National Committee*, discussed in a previous essay, the Court in that case was divided as to whether a broadcaster's decision to deny access to potential advertisers would occasion a First Amendment analysis.⁹ In *Manhattan Community Access Corp. v. Halleck*, the Court considered whether an operator of public access channels on a cable television system violated the First Amendment when it restricted the access of individuals who had produced a film critical of the operator.¹⁰ The Court noted that while the First Amendment may constrain the ability of a state actor to exclude speakers, a private entity may freely exercise editorial discretion over the speech and speakers in a forum that entity provides.¹¹ Writing for five members of the Court, Justice Kavanaugh observed that under the Court's precedents, a private entity may be treated as a state actor if it exercises functions that "the government [has] traditionally and exclusively performed."¹² The Court found that operating public access channels on a cable system was not "traditionally and exclusively performed" by government, given the history of

⁴ *Turner*, 512 U.S. at 655. The Court also distinguished cable television from newspapers based on technical features of cable as a medium that allow a cable operator to exercise "far greater control over access" to the medium. *Id.* at 656. For more discussion of *Tornillo* and the general right of editorial discretion, see Amdt1.7.12.1 Overview of Access and Editorial Discretion.

⁵ *Turner*, 512 U.S. at 655–56. The Court has suggested in several non-media cases that compelling an entity to provide a forum for other speakers may not violate the First Amendment if, among other factors, the views of the speakers are unlikely to be attributed to the entity. *See, e.g., PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 87 (1980) (holding that shopping center owner's free speech rights were not violated by state constitutional provisions protecting right of individuals to circulate petitions in shopping center); *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 63 (2006) (holding that funding condition for universities requiring equal access for military recruiters did not violate free speech rights of universities).

⁶ *Turner*, 520 U.S. at 213.

⁷ *Cf. Columbia Broad. Sys. Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94, 98 (1973). For more discussion of this case and issues relating to access to broadcast systems, see Amdt1.7.12.2 Access and Editorial Discretion in Broadcast Media.

⁸ *See Pub. Utils. Comm'n v. Pollak*, 343 U.S. 451, 461 (1952). *See generally* Amdt1.7.2.4 State Action Doctrine and Free Speech.

⁹ *Compare Democratic Nat'l Comm.*, 412 U.S. at 121 (plurality opinion) (determining that broadcaster's policy was not state action), *with id.* at 148 (Blackmun, J., concurring) (determining that the case could be resolved without reaching the state action issue and "therefore refrain[ing] from deciding it"), *and id.* at 180–81 (Brennan, J., dissenting) (determining that First Amendment should apply to broadcaster's policy given indicia of government involvement with broadcasting).

¹⁰ 139 S. Ct. 1921, 1926 (2019). For more discussion of this case, see Amdt1.7.2.4 State Action Doctrine and Free Speech.

¹¹ *Id.* at 1930; *cf. Ark. Educ. Television Comm'n v. Forbes*, 523 U.S. 666, 676–81 (1998) (applying public forum principles to a debate broadcast on a state-operated television station, though ultimately concluding that the debate was not a public forum).

¹² *Halleck*, 139 S. Ct. at 1929.

such channels being operated by private entities.¹³ In reaching this conclusion, the Court acknowledged a range of other private establishments that might offer space for speech—from “community bulletin boards” to “open mic nights”¹⁴—and opined that subjecting these establishments to First Amendment constraints would hinder the “exercise of what they deem to be appropriate editorial discretion within that open forum.”¹⁵ The Court thereby reaffirmed the principle that the First Amendment may not “disable private property owners and private lessees from exercising editorial discretion over speech and speakers on their property.”¹⁶

Amdt1.7.14 Compelled Speech

Amdt1.7.14.2 Flag Salutes and Other Compelled Speech

One question the Supreme Court has considered is whether the government may compel a person to declare or affirm publicly a personal belief. In *Minersville School District v. Gobitis*,¹ the Supreme Court had upheld the power of Pennsylvania to expel from its schools children who refused upon religious grounds to join in a flag salute ceremony and recite the pledge of allegiance. The Court explained that “[c]onscientious scruples have not, in the course of the long struggle for religious toleration, relieved the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs.”² But three years later, in *West Virginia State Board of Education v. Barnette*,³ a 6-3 majority of the Court overturned *Gobitis*.⁴ Focusing on free speech arguments rather than protections for religious exercise, the Court said that the state policy constituted a compulsion of students to declare a belief, “requiring” the individual to communicate by word and sign his acceptance of the political ideas [the flag] bespeaks.”⁵ The Court ruled that the power of a state to follow a policy that “requires affirmation of a belief and an attitude of mind,” however, is limited by the First Amendment, which, under the standard then prevailing, required the state to prove that for the students to remain passive during the ritual “creates a clear and present danger that would justify an effort even to muffle expression.”⁶

The rationale of *Barnette* became the basis for the Court’s decision in *Wooley v. Maynard*,⁷ which voided a requirement by the state of New Hampshire that motorists

¹³ *Id.* at 1929–30.

¹⁴ *Id.*

¹⁵ *Id.* at 1931.

¹⁶ *Id.*

¹ 310 U.S. 586 (1940).

² 310 U.S. at 594. Justice Stone alone dissented, arguing that the First Amendment religion and speech clauses forbade coercion of “these children to express a sentiment which, as they interpret it, they do not entertain, and which violates their deepest religious convictions.” *Id.* at 601.

³ 319 U.S. 624 (1943).

⁴ Justice Felix Frankfurter dissented at some length, denying that the First Amendment authorized the Court “to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.” 319 U.S. at 646, 647. Justices Roberts and Stanley Reed simply noted their continued adherence to *Gobitis*. *Id.* at 642.

⁵ 319 U.S. at 631, 633.

⁶ *Id.* at 633, 634. See also *Janus v. AFSCME*, Council 31, No. 16-1466, slip op. at 9 (U.S. June 2018) (noting that compelled speech imposes a distinct harm by “forcing free and independent individuals to endorse ideas they find objectionable”).

⁷ 430 U.S. 705 (1977).

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display passenger vehicle license plates bearing the motto “Live Free or Die.”⁸ Acting on the complaint of a motorist who again raised religious objections to this statement, the Court held that the plaintiff could not be compelled by the state to display a message making an ideological statement on his private property. In a subsequent case, however, the Court found that compelling property owners to facilitate the speech of others by providing access to their property did not violate the First Amendment, at least where the speech was not likely to be identified with the owner and the owner could effectively disavow any connection with the speaker’s message.

The Supreme Court has also held other governmental efforts to compel speech to violate the First Amendment; these include a North Carolina statute that required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations,⁹ a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers’ criticism and attacks on their records,¹⁰ an Ohio statute that prohibited the distribution of anonymous campaign literature,¹¹ a Massachusetts statute that required private citizens who organized a parade to include among the marchers a group imparting a message—in this case support for gay rights—that the organizers did not wish to convey,¹² and a California law that required certain pro-life centers that offer pregnancy-related services to provide certain notices.¹³ The Court also struck down a federal funding condition that required funding recipients to adopt a policy explicitly opposing sex trafficking.¹⁴ And in an as-applied challenge, the Court enjoined enforcement of a Colorado nondiscrimination statute that the Court held would compel a website designer to create wedding websites in support of same-sex marriages that the designer did not support.¹⁵ The principle of *Barnette*, however, does not extend so far as to bar a government from requiring employees or certain persons seeking professional licensing or other benefits to swear an oath that they will uphold and defend the Constitution.¹⁶

⁸ The state had prosecuted vehicle owners who covered the motto on their vehicle’s license plate.

⁹ *Riley v. Nat’l Fed’n of the Blind of N.C.*, 487 U.S. 781 (1988). In *Illinois ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 605 (2003), the Supreme Court held that a fundraiser who has retained eight-five percent of gross receipts from donors, but falsely represented that “a significant amount of each dollar donated would be paid over to” a charitable organization, could be sued for fraud.

¹⁰ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974). In *Pacific Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1 (1986), a Court plurality held that a state could not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees.

¹¹ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995).

¹² *Hurley v. Irish-Am. Gay Grp.*, 515 U.S. 557 (1995).

¹³ See *Nat’l Inst. of Family and Life Advoc. v. Becerra*, 585 U.S. ___, No. 16-1140, slip op. at 7 (U.S. June 2018). Specifically, in *National Institute of Family and Life Advocates v. Becerra*, the Court reviewed a California law that, in relevant part, required medically licensed crisis pregnancy centers to notify women that the State of California provided free or low-cost services, including abortion. *Id.* at 2–4 (describing the California law). For the Court, “[b]y requiring [licensed clinics] to inform women how they can obtain state-subsidized abortions—at the same time [those clinics] try to dissuade women from choosing that option,” the California law “plainly alters the content” of the clinics’ speech, subjecting the law to heightened scrutiny. *Id.* at 7 (internal citations and quotations omitted).

¹⁴ *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 221 (2013). For additional discussion of this case, see Amdt1.7.15.9 Conditions Exceeding the Scope of the Program.

¹⁵ *303 Creative LLC v. Elenis*, 600 U.S. 570, 588 (2023).

¹⁶ *Cole v. Richardson*, 405 U.S. 676 (1972); *Connell v. Higginbotham*, 403 U.S. 207 (1971); *Bond v. Floyd*, 385 U.S. 116 (1966); *Knight v. Bd. of Regents*, 269 F. Supp. 339 (S.D.N.Y. 1967) (three-judge court), *aff’d*, 390 U.S. 36 (1968); *Hosack v. Smiley*, 276 F. Supp. 876 (C.D. Colo. 1967) (three-judge court), *aff’d*, 390 U.S. 744 (1968); *Ohlson v. Phillips*, 304 F. Supp. 1152 (C.D. Colo. 1969) (three-judge court), *aff’d*, 397 U.S. 317 (1970); *L. Students C.R. Rsch. Council v. Wadmond*, 401 U.S. 154, 161 (1971); *Fields v. Askew*, 279 So. 2d 822 (Fla. 1973),

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In contrast to the arguably political speech at issue in *Barnette*, the Supreme Court has at times found no First Amendment violation when government compels the disclosure of information in a commercial or professional setting. Regarding compelled disclosures in commercial speech, the Court held that an advertiser’s “constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal,” and accordingly, a provision requiring a seller to disclose factual information about his goods or services will not violate the First Amendment so long as the requirement is “reasonably related to the State’s interest in preventing deception of consumers.”¹⁷

Moreover, the Court has upheld regulations of professional conduct that only incidentally burden speech. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court considered a law requiring physicians to obtain informed consent before they could perform an abortion.¹⁸ Specifically, the law at issue in *Casey* required doctors to tell their patients prior to an abortion about the nature of the procedure, the health risks involved, the age of the unborn child, and the availability of printed materials from the state about various forms of assistance.¹⁹ In a plurality opinion, the Court rejected a free-speech challenge to the informed consent requirement, viewing the law as “part of the practice of medicine” and a permissible incidental regulation of speech.²⁰

However, the Court has cautioned that reduced scrutiny for compelled commercial and professional speech is limited to particular contexts. For example, limited scrutiny of compelled commercial disclosures only applies to requirements that sellers provide “purely factual” and “uncontroversial information” in their commercial dealings.²¹ As a result, in considering the constitutionality of a California law requiring certain medically licensed, pro-life crisis pregnancy centers to disclose information to patients about the availability of state-subsidized procedures, including abortions, the Court in *National Institute of Family and Life Advocates v. Becerra* concluded that the *Zauderer* rule for compelled disclosures of purely factual, uncontroversial information was inapplicable.²² Specifically, the Court noted that the notice requirements were unrelated to

aff’d per curiam, 414 U.S. 1148 (1974). For additional discussion of cases involving employee oaths, see Amdt1.7.9.4 Pickering Balancing Test for Government Employee Speech and Amdt1.8.2.3 Denial of Employment or Public Benefits.

¹⁷ *Zauderer v. Off. of Disciplinary Couns.*, 471 U.S. 626, 651, 652 n.14 (1985). See *Milavetz, Gallop, & Milavetz v. United States*, 559 U.S. 229 (2010) (requiring advertisement for certain “debt relief” businesses to disclose that the services offered include bankruptcy assistance). For additional discussion of the Court’s treatment of commercial speech, see Amdt1.7.6.1 Commercial Speech Early Doctrine.

¹⁸ See 505 U.S. 833, 881 (1992) (plurality opinion), *overruled on other grounds*, *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

¹⁹ *Id.*

²⁰ *Id.* at 884.

²¹ See, e.g., *Nat’l Inst. of Family and Life Advoc. v. Becerra*, No. 16-1140, slip op. at 8 (U.S. June 2018).

Moreover, even under *Zauderer*, commercial disclosure requirements cannot be unjustified or unduly burdensome. See 471 U.S. at 651. Applying this limit on the *Zauderer* rule, the *National Institute of Family and Life Advocates* Court reviewed a separate provision of the California law discussed above that required *unlicensed* crisis pregnancy centers to notify women that California has not licensed the clinics to provide medical services. *Id.* at 4–5 (describing the requirements for the unlicensed centers). The Court, noting the lack of evidence in the record that pregnant women were unaware that the covered facilities were not staffed by medical professionals and remarking on the breadth of the regulations that required a posting of the notice “no matter what the facilities say on site or in their advertisements,” concluded that the regulations of unlicensed crisis pregnancy centers unduly burdened speech. *Id.* at 18–19.

²² *Id.* at 9.

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services that the clinics provided and that the notice included information about abortion, “anything but an ‘uncontroversial’ topic.”²³

In that same ruling, the Court rejected the argument that the California law’s disclosure requirements were comparable to the informed consent regulations upheld in *Casey*.²⁴ In contrast to the law in *Casey*, the *National Institute of Family and Life Advocates Court* concluded that the disclosure requirements were not tied to a particular medical procedure and did not require disclosure of information about the risks or benefits of any medical procedures the clinics provided.²⁵ In this sense, the California law, unlike the informed consent law in *Casey*, did not incidentally burden speech, but instead “regulat[ed] speech as speech.”²⁶

The Supreme Court has also rejected a First Amendment challenge to the compelled labeling of foreign political propaganda. Specifically, in *Meese v. Keene*, the Court upheld a provision of the Foreign Agents Registration Act of 1938 that required that, when an agent of a foreign principal seeks to disseminate foreign “political propaganda,” he must label such material with certain information, including his identity, the principal’s identity, and the fact that he has registered with the Department of Justice. The Court emphasized that “Congress did not prohibit, edit, or restrain the distribution of advocacy materials,” but only “required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda.”²⁷

²³ *Id.*

²⁴ *Id.* at 11.

²⁵ *Id.*

²⁶ *Id.* Having concluded that the California disclosure requirements for licensed crisis pregnancy centers should be evaluated under a more rigorous form of scrutiny than what the Court employed in *Zauderer* or *Casey*, the *National Institute of Family and Life Advocates Court*, employing intermediate scrutiny, held that the California law likely violated the First Amendment. *Id.* at 14. Specifically, the Court viewed the law to be both underinclusive—the law excluded several similar clinics without explanation—and overinclusive—the state could have employed other methods, such as a state-sponsored advertising campaign, to achieve its purpose of informing low-income women about its services without “burdening a speaker with unwanted speech.” *Id.* at 14–16 (internal citations omitted).

²⁷ *Meese v. Keene*, 481 U.S. 465, 480 (1987).

SECOND AMENDMENT

RIGHT TO BEAR ARMS

Amdt2.7 *Rahimi* and Applying the Second Amendment *Bruen* Standard

In 2022, the Supreme Court addressed the proper standard for analyzing Second Amendment challenges to firearms regulations in *New York State Rifle & Pistol Association v. Bruen* concluding that the standard is rooted solely in text and history.¹ The Court stated the test as follows:

When the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation’s historical tradition of firearm regulation. Only then may a court conclude that the individual’s conduct falls outside the Second Amendment’s unqualified command.²

On June 21, 2024, in an 8-1 decision, the Supreme Court applied *Bruen* for the first time in *United States v. Rahimi*, holding that “[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment.”³

In *Rahimi*, a Texas state court granted a restraining order in a civil proceeding against Zackey Rahimi after finding that he had “committed family violence” and that such violence was “likely to occur again in the future.”⁴ Among other things, the order prohibited Rahimi from possessing a firearm and suspended his handgun license.⁵ Later, the police located guns in Rahimi’s residence after he was identified as a suspect in a series of shootings and a grand jury indicted him for violating 18 U.S.C. § 922(g)(8), which, among other things, prohibits persons subject to a domestic-violence restraining orders from possessing firearms.⁶ Rahimi filed a motion to have the charges dismissed on the grounds that 18 U.S.C. § 922(g)(8) violated his Second Amendment rights.⁷ The District Court rejected Rahimi’s motion, citing Fifth Circuit precedent.⁸ Consequently, Rahimi pleaded guilty to violating 18 U.S.C. § 922(g)(8) and was sentenced to 73 months of imprisonment and three years of supervised release.⁹ Rahimi appealed, among other things, the District Court’s decision that 18 U.S.C. § 922(g)(8) did not violate the Second Amendment but “acknowledge[d] that it is foreclosed by [the Fifth Circuit’s] binding precedent.”¹⁰ While the Fifth Circuit initially affirmed the District Court,¹¹ after the Supreme Court’s *Bruen* decision, the Fifth Circuit withdrew its opinion¹² and issued a new opinion reversing the District Court based on the intervening change of law caused by *Bruen*.¹³ In its new opinion, the Fifth Circuit found that none of the government’s

¹ *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1 (2022).

² *Id.* at 17 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50 n.10 (1961)).

³ *United States v. Rahimi*, No. 22-915, slip op. at 17 (U.S. June 21, 2024).

⁴ Petition for a Writ of Certiorari at 2, *United States v. Rahimi*, No. 22-915 (U.S. Mar. 17, 2023).

⁵ *Id.*

⁶ *Id.* at 3.

⁷ *United States v. Rahimi*, No. 4:21-cr-0083-P (N.D. Tex. 2021) (citing *United States v. McGinnis*, 956 F.3d 747 (5th Cir. 2020)).

⁸ *Id.*

⁹ *United States v. Rahimi*, No. 21-11001 (5th Cir. June 8, 2022), *withdrawn and superseded*, 61 F.4th 443 (2023).

¹⁰ *Id.* at 2 and note 1.

¹¹ *Id.*

¹² *United States v. Rahimi*, No. 21-11001 (5th Cir. July 7, 2022).

¹³ *United States v. Rahimi*, 61 F.4th 443 (5th Cir. 2023).

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***Rahimi* and Applying the Second Amendment *Bruen* Standard**

proposed analogues fit within the nation’s historical tradition of firearm regulation. Accordingly, the Fifth Circuit concluded that 18 U.S.C. § 922(g)(8) was unconstitutional.¹⁴ The government appealed to the Supreme Court on the grounds, among others, that the Fifth Circuit had misapplied *Bruen* by “treat[ing] even minor and immaterial distinctions between historical laws and their modern counterparts as a sufficient reason to find the modern laws unconstitutional.”¹⁵

In *Rahimi*, the Court clarified how the *Bruen* standard was to be applied. Noting that “the right secured by the Second Amendment is not unlimited,”¹⁶ the Court observed that the *Bruen* analysis requires a challenged firearms regulation to be consistent with the Nation’s regulatory tradition and that the *Bruen* standard requires a “relevantly similar”¹⁷ law rather than a “dead ringer” or a “historical twin.”¹⁸ The Court observed that surety laws had been used to prevent spousal abuse at the common law¹⁹ as well as misuse of firearms.²⁰ Looking at “going armed” laws, the Court noted that such laws were part of American jurisprudence²¹ and that in conjunction with the surety laws, they showed that individuals posing a danger of physical violence to another could be disarmed.²² In reaching its decision, the Court stressed that the Fifth Circuit had misapplied *Bruen* by reading it to require a historical twin rather than a historical analogue.²³ The Court further noted that when statutes “brush up against” the Constitution, the court’s task “is to seek harmony, not to manufacture conflict.”²⁴

The Court’s decision prompted five concurring opinions and one dissent. Justice Sotomayor, joined by Justice Kagan, noted that she continued to “think that the means-end approach to Second Amendment analysis is the right one.”²⁵ Justice Gorsuch’s separate concurrence noted that the majority opinion “reinforces the focus on text, history, and tradition.”²⁶ Justice Kavanaugh authored a concurrence emphasizing that constitutional interpretation must take “account of text, pre-ratification and post-ratification history, and precedent.”²⁷ Justice Barrett authored a concurrence that stressed the challenge of applying legal principles derived from historical examples at the right level of generality.²⁸ Justice Jackson concurred but wrote separately to express caution about the difficulty in applying the *Bruen* standard. Justice Thomas dissented, noting that *Rahimi* had never been accused or convicted of a crime.²⁹

¹⁴ *Id.* at 460 (internal quotations omitted).

¹⁵ Petition for a Writ of Certiorari at 16, *United States v. Rahimi*, No. 22-915 (U.S. Mar. 17, 2023).

¹⁶ *Id.* at 6 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)).

¹⁷ *Id.* at 7. The Court further stated: “A court must ascertain whether the new law is ‘relevantly similar’ to laws that our tradition is understood to permit, ‘apply[ing] faithfully the balance struck by the founding generation to modern circumstances.’” *Id.* (quoting *New York State Rifle & Pistol Ass’n v. Bruen*, 597 U.S. 1, 29 & n.7 (2022)).

¹⁸ *Id.* at 8 (quoting *Bruen*, 597 U.S. at 30).

¹⁹ *Id.* at 11.

²⁰ *Id.*

²¹ *Id.* at 12-13.

²² *Id.* at 13.

²³ *Id.* at 16.

²⁴ *Id.* (internal quotations omitted).

²⁵ *Id.* at 6 (Sotomayor, J. concurring).

²⁶ *Id.* at 7 (Gorsuch J. concurring).

²⁷ *Id.* at 24 (Kavanaugh, J. concurring).

²⁸ *Id.* at 4 (Barrett, J. concurring).

²⁹ *Id.* at 32 (Thomas, J. dissenting).

FOURTH AMENDMENT

SEARCHES AND SEIZURES

Amdt4.3 Scope of Protected Rights

Amdt4.3.7 Unreasonable Seizures of Persons

That the Fourth Amendment was intended to protect against arbitrary arrests as well as against unreasonable searches was early assumed by Chief Justice John Marshall¹ and is now established law.² At common law, warrantless arrests of persons who had committed a breach of the peace or a felony were permitted,³ and this history is reflected in the fact that the Fourth Amendment is satisfied if the arrest is made in a public place on probable cause, regardless of whether a warrant has been obtained.⁴ To determine whether an officer has probable cause to make a warrantless arrest, courts consider the “totality of the circumstances,” examining “the events leading up to the arrest” and deciding “whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to” probable cause.⁵ Probable cause is not a “high bar,”⁶ requiring only a “probability or substantial chance of criminal activity, not an actual showing of such activity.”⁷ However, in order to effectuate an arrest in the home, absent consent or exigent circumstances, police officers must have a warrant.⁸

The Fourth Amendment applies to “seizures,” and it is not necessary that a detention be a formal arrest in order to bring to bear the requirements of warrants, or probable cause in instances in which warrants are not required.⁹ Some objective justification must be

¹ *Ex parte Burford*, 7 U.S. (3 Cr.) 448 (1806).

² *Giordenello v. United States*, 357 U.S. 480, 485–86 (1958); *United States v. Watson*, 423 U.S. 411, 416–18 (1976); *Payton v. New York*, 445 U.S. 573, 583–86 (1980); *Steagald v. United States*, 451 U.S. 204, 211–13 (1981).

³ 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 193 (1883). At common law warrantless arrest was also permissible for some misdemeanors not involving a breach of the peace. *See* the lengthy historical treatment in *Atwater v. City of Lago Vista*, 532 U.S. 318, 326–45 (2001).

⁴ *United States v. Watson*, 423 U.S. 411 (1976). *See also* *United States v. Santana*, 427 U.S. 38 (1976) (sustaining warrantless arrest of suspect in her home when she was initially approached in her doorway and then retreated into house). However, a suspect arrested on probable cause but without a warrant is entitled to a prompt, nonadversary hearing before a magistrate under procedures designed to provide a fair and reliable determination of probable cause in order to keep the arrestee in custody. *Gerstein v. Pugh*, 420 U.S. 103 (1975). A “prompt” hearing now means a hearing that is administratively convenient. *See* *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (authorizing “as a general matter” detention for up to 48 hours without a probable-cause hearing, after which time the burden shifts to the government to demonstrate extraordinary circumstances justifying further detention).

⁵ *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (internal citations and quotations omitted). The totality of circumstances approach requires courts to consider the “whole picture” and to not look at each fact as presented to the reasonable officer in isolation. *See* *District of Columbia v. Wesby*, 138 S. Ct. 577, 588 (2018). Moreover, the existence of an “innocent explanation” for a particular circumstance is insufficient to deny probable cause for an arrest when, in considering all of the circumstances, including any plausible innocent explanations, a reasonable officer can conclude that there is a “substantial chance of criminal activity.” *Id.* at 588.

⁶ *Kaley v. United States*, 571 U.S. 320, 338 (2014).

⁷ *Illinois v. Gates*, 462 U.S. 213, 232 (1983).

⁸ *Payton v. New York*, 445 U.S. 573 (1980) (voiding state law authorizing police to enter private residence without a warrant to make an arrest); *Steagald v. United States*, 451 U.S. 204 (1981) (officers with arrest warrant for A entered B’s home without search warrant and discovered incriminating evidence; violated Fourth Amendment in absence of warrant to search the home); *Hayes v. Florida*, 470 U.S. 811 (1985) (officers went to suspect’s home and took him to police station for fingerprinting).

⁹ *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (“a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave”). *See also* *Reid v. Georgia*, 448 U.S. 438 (1980); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975); *Terry v. Ohio*, 392 U.S. 1, 16–19 (1968); *Kaupp v. Texas*, 538 U.S. 626 (2003). Apprehension by the use of deadly force is a seizure subject to the Fourth Amendment’s reasonableness requirement. *See, e.g., Tennessee v. Garner*, 471 U.S. 1 (1985) (police officer’s fatal shooting of

FOURTH AMENDMENT—SEARCHES AND SEIZURES

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shown to validate all seizures of the person,¹⁰ including seizures that involve only a brief detention short of arrest, although the nature of the detention will determine whether probable cause or some reasonable and articulable suspicion is necessary.¹¹

The Fourth Amendment does not require an officer to consider whether to issue a citation rather than arresting (and placing in custody) a person who has committed a minor offense—even a minor traffic offense. In *Atwater v. City of Lago Vista*,¹² the Court, even while acknowledging that the case before it involved “gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment,” refused to require that “case-by-case determinations of government need” to place traffic offenders in custody be subjected to a reasonableness inquiry, “lest every discretionary judgment in the field be converted into an occasion for constitutional review.”¹³ Citing some state statutes that limit warrantless arrests for minor offenses, the Court contended that the matter is better left to statutory rule than to application of broad constitutional principle.¹⁴ Thus, *Atwater and County of Riverside v. McLaughlin*¹⁵ together mean that—as far as the Constitution is concerned—police officers have almost unbridled discretion to decide whether to issue a summons for a minor traffic offense or whether instead to place the offending motorist in jail, where she may be kept for up to

a fleeing suspect); *Brower v. County of Inyo*, 489 U.S. 593 (1989) (police roadblock designed to end car chase with fatal crash); *Scott v. Harris*, 550 U.S. 372 (2007) (police officer’s ramming fleeing motorist’s car from behind in attempt to stop him); *Plumhoff v. Rickard*, 572 U.S. 765 (2014) (police use of fifteen gunshots to end a police chase). The “application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.” *Torres v. Madrid*, No. 19-292, slip op. at 17 (U.S. Mar. 25, 2021).

The Court has also made clear that the Fourth Amendment applies to pre-trial detention. *See Manuel v. Joliet*, 137 S. Ct. 911, 914 (2017) (holding that a petitioner who “was held in jail for seven weeks after a judge relied on allegedly fabricated evidence to find probable cause that he had committed a crime” could “challenge his pretrial detention on the ground that it violated the Fourth Amendment”).

¹⁰ The justification must be made to a neutral magistrate, not to the arrestee. There is no constitutional requirement that an officer inform an arrestee of the reason for his arrest. *Devenpeck v. Alford*, 543 U.S. 146, 155 (2004) (the offense for which there is probable cause to arrest need not be closely related to the offense stated by the officer at the time of arrest).

¹¹ *Delaware v. Prouse*, 440 U.S. 648, 650 (1979) (“unreasonable seizure . . . to stop an automobile . . . for the purpose of checking the driving license of the operator and the registration of the car, where there is neither probable cause to believe nor reasonable suspicion” that a law was violated); *Brown v. Texas*, 443 U.S. 47, 51 (1979) (detaining a person for the purpose of requiring him to identify himself constitutes a seizure requiring a “reasonable, articulable suspicion that a crime had just been, was being, or was about to be committed”); *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (requesting ticket stubs and identification from persons disembarking from plane not reasonable where stated justifications would apply to “a very large category of innocent travelers,” for example, travelers arrived from “a principal place of origin of cocaine”); *Michigan v. Summers*, 452 U.S. 692, 705 (1981) (“it is constitutionally reasonable to require that [a] citizen . . . remain while officers of the law execute a valid warrant to search his home”); *Illinois v. McArthur*, 531 U.S. 326 (2001) (approving “securing” of premises, preventing homeowner from reentering, while a search warrant is obtained); *Los Angeles County v. Rettele*, 550 U.S. 609 (2007) (where deputies executing a search warrant did not know that the house being searched had recently been sold, it was reasonable to hold new homeowners, who had been sleeping in the nude, at gunpoint for one to two minutes without allowing them to dress or cover themselves, even though the deputies knew that the homeowners were of a different race from the suspects named in the warrant).

¹² 532 U.S. 318 (2001).

¹³ *Id.* at 346–47.

¹⁴ *Id.* at 352.

¹⁵ 500 U.S. 44 (1991).

FOURTH AMENDMENT—SEARCHES AND SEIZURES

Scope of Protected Rights, Unreasonable Seizures of Persons

48 hours with little recourse. Even when an arrest for a minor offense is prohibited by state law, the arrest will not violate the Fourth Amendment if it was based on probable cause.¹⁶

Until relatively recently, the legality of arrests was seldom litigated in the Supreme Court because of the rule that a person detained pursuant to an arbitrary seizure—unlike evidence obtained as a result of an unlawful search—remains subject to custody and presentation to court.¹⁷ But the application of self-incrimination and other exclusionary rules to the states and the heightening of their scope in state and federal cases alike brought forth the rule that verbal evidence, confessions, and other admissions, like all derivative evidence obtained as a result of unlawful seizures, could be excluded.¹⁸ Thus, a confession made by one illegally in custody must be suppressed, unless the causal connection between the illegal arrest and the confession had become so attenuated that the latter should not be deemed “tainted” by the former.¹⁹ Similarly, fingerprints and other physical evidence obtained as a result of an unlawful arrest must be suppressed.²⁰

The Court has also recognized that the Fourth Amendment prohibits “unreasonable seizure[s] pursuant to legal process,” sometimes referred to as “malicious prosecution.”²¹ Malicious prosecution is actionable as a Fourth Amendment violation “to the extent that

¹⁶ *Virginia v. Moore*, 128 S. Ct. 1598 (2008). *See also* *Heien v. North Carolina*, 574 U.S. 54, 60–61 (2014) (holding that a mistake of law can give rise to the reasonable suspicion necessary to uphold the seizure of a vehicle). The law enforcement officer in *Heien* had stopped the vehicle because it had only one working brake light, which the officer understood to be a violation of the North Carolina vehicle code. *Id.* at 57–58. However, a North Carolina court subsequently held, in a case of first impression, that the vehicle code only requires one working brake light. *Id.* at 58–59. In holding that reasonable suspicion can rest on a mistaken understanding of a legal prohibition, a majority of the Supreme Court noted prior cases finding that mistakes of fact do not preclude reasonable suspicion and concluded that “reasonable men make mistakes of law, too.” *Id.* at 61 (citing *Illinois v. Rodriguez*, 497 U.S. 177, 183–86 (1990), and *Hill v. California*, 401 U.S. 797, 802–05 (1971), as cases involving mistakes of fact).

¹⁷ *Ker v. Illinois*, 119 U.S. 436, 440 (1886); *see also* *Albrecht v. United States*, 273 U.S. 1 (1927); *Frisbie v. Collins*, 342 U.S. 519 (1952).

¹⁸ *Wong Sun v. United States*, 371 U.S. 471 (1963). Such evidence is the “fruit of the poisonous tree,” *Nardone v. United States*, 308 U.S. 338, 341 (1939), that is, evidence derived from the original illegality. Previously, if confessions were voluntary for purposes of the self-incrimination clause, they were admissible notwithstanding any prior official illegality. *Colombe v. Connecticut*, 367 U.S. 568 (1961).

¹⁹ Although there is a presumption that the illegal arrest is the cause of the subsequent confession, the presumption is rebuttable by a showing that the confession is the result of “an intervening . . . act of free will.” *Wong Sun v. United States*, 371 U.S. 471, 486 (1963). The factors used to determine whether the taint has been dissipated are the time between the illegal arrest and the confession, whether there were intervening circumstances (such as consultation with others, *Miranda* warnings, etc.), and the degree of flagrancy and purposefulness of the official conduct. *Brown v. Illinois*, 422 U.S. 590 (1975) (*Miranda* warnings alone insufficient); *Dunaway v. New York*, 442 U.S. 200 (1979); *Taylor v. Alabama*, 457 U.S. 687 (1982); *Kaupp v. Texas*, 538 U.S. 626 (2003). In *Johnson v. Louisiana*, 406 U.S. 356 (1972), the fact that the suspect had been taken before a magistrate who advised him of his rights and set bail, after which he confessed, established a sufficient intervening circumstance.

²⁰ *Davis v. Mississippi*, 394 U.S. 721 (1969); *Taylor v. Alabama*, 457 U.S. 687 (1982). In *United States v. Crews*, 445 U.S. 463 (1980), the Court, unanimously but for a variety of reasons, held proper the identification in court of a defendant, who had been wrongly arrested without probable cause, by the crime victim. The court identification was not tainted by either the arrest or the subsequent in-custody identification. *See also* *Hayes v. Florida*, 470 U.S. 811, 815 (1985), suggesting in dictum that a “narrowly circumscribed procedure for fingerprinting detentions on less than probable cause” may be permissible.

²¹ *Thompson v. Clark*, 596 U.S. 36, 42 (2022) (noting that “[t]his Court’s precedents recognize such a claim,” (citing *Manuel v. Joliet*, 580 U.S. 357, 363–64, 367–68 (2017); *Albright v. Oliver*, 510 U.S. 266, 271 (1994) (plurality opinion))).

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the defendant's actions cause the plaintiff to be 'seized' without probable cause."²² In *Thompson v. Clark*, a plaintiff brought a claim for malicious prosecution in violation of the Fourth Amendment under 42 U.S.C. § 1983.²³ When determining the elements of a constitutional tort claim under § 1983, the Court must first look to the elements of "the most analogous tort as of 1871, when § 1983 was enacted."²⁴ In *Thompson*, the Court identified the tort of malicious prosecution as the most analogous to plaintiff's Fourth Amendment claim.²⁵ The Court held that a malicious prosecution may constitute a Fourth Amendment "seizure" for purposes of Section 1983 if the plaintiff proves the "favorable termination" of the underlying criminal case against him, a standard that does not require some affirmative indication of the plaintiff's innocence.²⁶

²² *Id.* at 5 (quoting *Pitt v. District of Columbia*, 491 F. 3d 494, 510–11 (D.C. Cir. 2007)). When an individual is detained on suspicion of multiple crimes and some—but not all—charges are supported by probable cause, the valid charges do not insulate the government official from a malicious prosecution claim for the unsupported charges. *Chiaverini v. City of Napoleon*, No. 23-250, slip. op. at 1 (U.S. June 20, 2024).

²³ *Thompson*, 596 U.S. at 42 (quoting *Pitt v. District of Columbia*, 491 F. 3d 494, 510–11 (D.C. Cir. 2007)).

²⁴ *Id.* at 43.

²⁵ *Id.*

²⁶ *Id.* at 39.

FIFTH AMENDMENT

RIGHTS OF PERSONS

Amdt5.3 Double Jeopardy Clause

Amdt5.3.4 Re-Prosecution After Mistrial

The common law generally provided that jeopardy attached only after a judgment of conviction or acquittal. But the constitutional rule is that jeopardy attaches much earlier, in jury trials when the jury is sworn, and in trials before a judge without a jury, when the first evidence is presented.¹ Therefore, if after jeopardy attaches the trial is terminated for some reason, it may be that a second trial, even if the termination was erroneous, is barred.²

The Supreme Court has justified this rule on the grounds that a defendant has a “valued right to have his trial completed by a particular tribunal.”³ According to the Court, this right is rooted in a defendant’s interest in completing the trial “once and for all” and “conclud[ing] his confrontation with society,”⁴ so as to be spared the expense and ordeal of repeated trials, the anxiety and insecurity of having to live with the possibility of conviction, and the possibility that the prosecution may strengthen its case with each try as it learns more of the evidence and of the nature of the defense.⁵ These reasons both inform the determination of when jeopardy attaches and the evaluation of the permissibility of retrial depending upon the reason for a trial’s premature termination.

A second trial may be permitted where a mistrial is the result of “manifest necessity”⁶—for example, when the jury cannot reach a verdict⁷ or circumstances plainly prevent the

¹ The rule traces back to *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824). *See also* *Kepner v. United States*, 195 U.S. 100 (1904); *Downum v. United States*, 372 U.S. 734 (1963) (trial terminated just after jury sworn but before any testimony taken). In *Crist v. Bretz*, 437 U.S. 28 (1978), the Court held this standard of the attachment of jeopardy was “at the core” of the Clause and it therefore binds the states. *But see id.* at 40 (Powell, J., dissenting). An accused is not put in jeopardy by preliminary examination and discharge by the examining magistrate, *Collins v. Loisel*, 262 U.S. 426 (1923), by an indictment which is quashed, *Taylor v. United States*, 207 U.S. 120, 127 (1907), or by arraignment and pleading to the indictment. *Bassing v. Cady*, 208 U.S. 386, 391–92 (1908). A defendant may be tried after preliminary proceedings that present no risk of final conviction. E.g., *Ludwig v. Massachusetts*, 427 U.S. 618, 630–32 (1976) (conviction in prior summary proceeding does not foreclose trial in a court of general jurisdiction, where defendant has absolute right to demand a trial de novo and thus set aside the first conviction); *Swisher v. Brady*, 438 U.S. 204 (1978) (double jeopardy not violated by procedure under which masters hear evidence and make preliminary recommendations to juvenile court judge, who may confirm, modify, or remand).

² *Cf.* *United States v. Jorn*, 400 U.S. 470 (1971); *Downum v. United States*, 372 U.S. 734 (1963). The Supreme Court has stated: “Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.” *Arizona v. Washington*, 434 U.S. 497, 503–05 (1978) (citations omitted).

³ *Wade v. Hunter*, 336 U.S. 684, 689 (1949).

⁴ *Jorn*, 400 U.S. at 486 (plurality opinion).

⁵ *Arizona*, 434 U.S. at 503–05; *Crist v. Bretz*, 437 U.S. 28, 35–36 (1978). *See* Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 86–97.

⁶ *United States v. Perez*, 22 U.S. (9 Wheat.) 579, 580 (1824).

⁷ *Perez*, 22 U.S. (9 Wheat.) 579; *Logan v. United States*, 144 U.S. 263 (1892). *See* *Renico v. Lett*, 559 U.S. 766 (2010) (in a habeas review case, discussing the broad deference given to trial judge’s decision to declare a mistrial because of jury deadlock). *See also*, *Yeager v. United States*, 557 U.S. 110, 118 (2009); *Blueford v. Arkansas*, 566 U.S. 599 (2012) (re-prosecution for a greater offense allowed following jury deadlock on a lesser included offense).

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continuation of the trial.⁸ The question of whether there is double jeopardy becomes more difficult, however, with mistrials triggered by events within the prosecutor's control, prosecutorial misconduct, or judicial error. In such cases, courts ordinarily balance the defendant's right in having the trial completed against the public interest in fair trials.⁹

Thus, when a lower court granted a mistrial because of a defective indictment, the Supreme Court held that retrial was not barred. Instead, the Court explained in *Illinois v. Somerville* that a trial judge “properly exercises his discretion” in cases in which an impartial verdict cannot be reached or in which a verdict on conviction would have to be reversed on appeal because of an obvious error.¹⁰ The Court stated: “If an error could make reversal on appeal a certainty, it would not serve ‘the ends of public justice’ to require that the government proceed with its proof when, if it succeeded before the jury, it would automatically be stripped of that success by an appellate court.”¹¹

On the other hand, in *Downum v. United States*, the Court held that a re-trial was not permissible when a prosecutor knew prior to jury selection that a key witness would be unavailable but later moved for a mistrial on the basis of that unavailability.¹² Although *Downum* appeared to establish the principle that a prosecutorial or judicial error could never constitute a “manifest necessity” for terminating a trial, *Illinois v. Somerville* distinguished and limited *Downum* to situations in which the error lends itself to prosecutorial manipulation.¹³

Another kind of case arises when the prosecutor moves for mistrial because of prejudicial misconduct by the defense. In *Arizona v. Washington*,¹⁴ defense counsel made prejudicial comments about the prosecutor's past conduct, and the prosecutor's motion for a mistrial was granted over defendant's objections. The Court ruled that retrial was not barred by double jeopardy. While the Court acknowledged that mistrial was not literally “necessary” because the trial judge could have given limiting instructions to the jury, it deferred to the trial judge's determination that defense counsel's comments had likely impaired the jury's impartiality.¹⁵

The Supreme Court has considered the trial judge's motivation when the trial judge has erred in exercising discretion to declare a mistrial sua sponte or a prosecutor's motion. In *Gori v. United States*,¹⁶ the Court permitted a defendant's retrial when the trial judge had, on his own motion and with no indication of the wishes of defense counsel, declared a mistrial because he thought the prosecutor's line of questioning was intended to

⁸ *Simmons v. United States*, 142 U.S. 148 (1891) (juror's impartiality became questionable during trial); *Thompson v. United States*, 155 U.S. 271 (1884) (discovery during trial that one of the jurors had served on the grand jury that had indicted defendant and was therefore disqualified); *Wade*, 336 U.S. 684 (court-martial discharged because enemy advancing on site).

⁹ *Illinois v. Somerville*, 410 U.S. 458, 463 (1973).

¹⁰ *Id.* at 464.

¹¹ *Id.*

¹² *Downum v. United States*, 372 U.S. 734 (1963).

¹³ *Somerville*, 410 U.S. at 464–65, 468–69.

¹⁴ 434 U.S. 497 (1978).

¹⁵ *Id.* at 497.

¹⁶ 367 U.S. 364 (1961). See also *United States v. Tateo*, 377 U.S. 463 (1964) (re-prosecution permitted after the setting aside of a guilty plea found to be involuntary because of coercion by the trial judge).

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expose the defendant's criminal record, which would have constituted prejudicial error. Although the Court thought that the judge's action was an abuse of discretion, the Court approved retrial on the grounds that the judge had intended to benefit the defendant by his decision to declare a mistrial.¹⁷

The Court, however, reached the opposite conclusion in other cases. For example, in *United States v. Jorn*, the Court refused to permit retrial where the trial judge discharged the jury erroneously because he disbelieved the prosecutor's assurance that certain witnesses had been properly apprised of their constitutional rights.¹⁸ The Court observed that the "doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to go to the first jury and perhaps obtain an acquittal] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."¹⁹

Later cases appear to accept *Jorn* as an example of a case where the trial judge "acts irrationally or irresponsibly."²⁰ But if the trial judge acts deliberately, giving prosecution and defense the opportunity to explain their positions, and according respect to defendant's interest in concluding the matter before the one jury, then he is entitled to deference. This approach perhaps rehabilitates the result if not the reasoning in *Gori* and maintains the result and much of the reasoning of *Jorn*.²¹

In *Jorn*, the Supreme Court recognized that "a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to re-prosecution, even if the defendant's motion is necessitated by a prosecutorial or judicial error."²² Similarly, in *United States v. Scott*, the Supreme Court noted that "Such a motion by the defendant is deemed to be a deliberate election on his part to forgo his valued right to have his guilt or innocence determined before the first trier of fact."²³ In *United States v. Dinitz*,²⁴ the trial judge had excluded defendant's principal attorney for misbehavior and had then given defendant the option of recess while he appealed the exclusion, a mistrial, or continuation with an assistant defense counsel.

Holding that the defendant could be retried after he sought a mistrial, the Court reasoned that, although the exclusion might have been in error, it was not done in bad faith to goad the defendant into requesting a mistrial or to prejudice his prospects for acquittal.²⁵ The Court explained that the defendant's choice to terminate the trial and go on to a new trial should be respected. To hold otherwise would require defendants to

¹⁷ *Id.*

¹⁸ *United States v. Jorn*, 400 U.S. 470, 483 (1971).

¹⁹ *Id.* at 485. The opinion of the Court was by a plurality of four, but two other Justices joined it after first arguing that jurisdiction was lacking to hear the government's appeal.

²⁰ *Arizona*, 434 U.S. at 514.

²¹ *Id.* at 515–16. *See also* *Illinois v. Somerville*, 410 U.S. 458, 462, 465–66, 469–71 (1973) (discussing *Gori* and *Jorn*).

²² *Jorn*, 400 U.S. at 485 (plurality opinion).

²³ *United States v. Scott*, 437 U.S. 82, 93 (1978).

²⁴ 424 U.S. 600 (1976). *See also* *Lee v. United States*, 432 U.S. 23 (1977) (defendant's motion to dismiss because the information was improperly drawn made after opening statement and renewed at close of evidence was functional equivalent of mistrial and when granted did not bar retrial, Court emphasizing that defendant by his timing brought about foreclosure of opportunity to stay before the same trial).

²⁵ *Dinitz*, 424 U.S. 600.

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shoulder the burden and anxiety of proceeding to a probable conviction followed by an appeal and possible re-trial.²⁶

But the Court has also reserved the possibility that the defendant's motion might be necessitated by prosecutorial or judicial overreaching motivated by bad faith or undertaken to harass or prejudice, and in those cases retrial would be barred.²⁷ It is unclear what types of prosecutorial or judicial misconduct would constitute such overreaching.²⁸ But in *Oregon v. Kennedy*,²⁹ the Court adopted a narrow "intent" test, so that "[o]nly where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." Therefore, ordinarily, a defendant who moves for or acquiesces in a mistrial is bound by his decision and may be required to stand for retrial.

Amdt5.3.5 Re-Prosecution After Conviction

A basic purpose of the Double Jeopardy Clause is to protect a defendant "against a second prosecution for the same offense after conviction."¹ It is "settled" that "no man can be twice lawfully punished for the same offense."² The defendant's interest in finality, which informs much of double jeopardy jurisprudence, is quite attenuated following conviction, and he will most likely appeal, whereas the prosecution will ordinarily be content with its judgment.³ Double jeopardy issues involving re-prosecution ordinarily arise, therefore, only in the context of successful defense appeals and controversies over punishment.

Generally, a defendant who is successful in having his conviction set aside on appeal may be tried again for the same offense, on the grounds that defendants "waived" objections to further prosecution by appealing.⁴ An exception to this rule exists, however, when a defendant tried for one offense is convicted of a lesser offense and succeeds in having that conviction set aside. In *Green v. United States*,⁵ the defendant had been tried for first-degree murder but convicted of second-degree murder. The Court held that, following reversal of that conviction, the defendant could not be tried again for

²⁶ *Id.* at 609.

²⁷ *Id.* at 611.

²⁸ Compare *Id.*, at 611, with *United States v. Tateo*, 377 U.S. 463, 468 n.3 (1964).

²⁹ 456 U.S. 667, 676 (1982). The Court thought a broader standard requiring an evaluation of whether acts of the prosecutor or the judge prejudiced the defendant would be unmanageable and would be counterproductive because courts would be loath to grant motions for mistrials knowing that re-prosecution would be barred. *Id.* at 676–77. The defendant had moved for mistrial after the prosecutor had asked a key witness a prejudicial question. Four Justices concurred, noting that the question did not constitute overreaching or harassment and objecting both to the Court's reaching the broader issue and to its narrowing the exception. *Id.* at 681.

¹ *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

² *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874).

³ A prosecutor dissatisfied with the punishment imposed upon the first conviction might seek another trial in order to obtain a greater sentence. *Cf. Ciucci v. Illinois*, 356 U.S. 571 (1958) (under Due Process Clause, Double Jeopardy Clause not then applying to states).

⁴ *United States v. Ball*, 163 U.S. 662 (1896). The English rule precluded a new trial in these circumstances, and circuit Justice Joseph Story adopted that view. *United States v. Gilbert*, 25 F. Cas. 1287 (No. 15204) (C.C.D.Mass. 1834). The history is briefly surveyed in Justice Felix Frankfurter's dissent in *Green v. United States*, 355 U.S. 184, 200–05 (1957).

⁵ 355 U.S. 184 (1957).

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first-degree murder, on the theory that the first verdict was an implicit acquittal of the first-degree murder charge.⁶ The defendant could, however, be re-tried for second-degree murder.⁷

Another exception to the “waiver” theory involves appellate reversals grounded on evidentiary insufficiency. Thus, in *Burks v. United States*,⁸ the appellate court set aside the defendant’s conviction on the basis that the prosecution had failed to rebut defendant’s proof of insanity. The Court explained that the Double Jeopardy Clause foreclosed the prosecution from having another opportunity to supply evidence which it failed to muster in the first proceeding. On the other hand, if a reviewing court reverses a jury conviction because of its disagreement on the *weight*—as opposed to the *sufficiency* of the evidence—retrial is permitted.⁹ Also, the *Burks* rule does not bar re-prosecution following a reversal based on erroneous admission of evidence, even if the remaining properly admitted evidence would be insufficient to convict.¹⁰

Following the reasoning of *Burks*, the Supreme Court in *Smith v. United States* held that a defendant tried and convicted in an improper venue and by a jury from the wrong district, in violation of the Constitution’s Venue and Vicinage Clauses, respectively, could face re-prosecution.¹¹ The Court distinguished between judicial decisions of improper venue and verdicts of acquittal, noting that the Court in earlier decisions recognized no protection from retrial when a trial terminates “on a basis unrelated to factual guilt or innocence of the offence of which [the defendant] is accused.”¹² Accordingly, the Court found that the Double Jeopardy clause did not bar retrial in a proper venue.

Amdt5.3.6 Re-Prosecution After Acquittal

Amdt5.3.6.2 Acquittal by Jury and Re-Prosecution

Little or no controversy accompanies the rule that once a jury has acquitted a defendant, government may not, through appeal of the verdict or institution of a new prosecution, place the defendant on trial again.¹ Thus, the Court early held that, when the results of

⁶ The decision necessarily overruled *Trono v. United States*, 199 U.S. 521 (1905), although the Court purported to distinguish the decision. *Green*, 355 U.S. at 194–97 (1957). See also *Brantley v. Georgia*, 217 U.S. 284 (1910) (no due process violation where defendant is convicted of higher offense on second trial).

⁷ See *Green*, 355 U.S. at 190.

⁸ 437 U.S. 1 (1978).

⁹ *Tibbs v. Florida*, 457 U.S. 31 (1982). The decision was 5-4, the dissent arguing that weight and insufficiency determinations should be given identical Double Jeopardy Clause treatment. *Id.* at 47 (Justices White, Brennan, Marshall, and Blackmun).

¹⁰ *Lockhart v. Nelson*, 488 U.S. 33 (1988) (state may re-prosecute under habitual offender statute even though evidence of a prior conviction was improperly admitted; at retrial, state may attempt to establish other prior convictions as to which no proof was offered at prior trial).

¹¹ *Smith v. United States*, 599 U.S. 236, 252–53 (2023). See generally U.S. CONST. art. III, § 2, cl. 3; amend. V; amend. VI.

¹² *Smith*, 599 U.S. at 253 (citing *United States v. Scott*, 437 U.S. 82, 99 (1978) (alteration in original)).

¹ What constitutes a jury acquittal may occasionally be uncertain. See, e.g., *McElrath v. Georgia*, No. 22-9721, slip op. at 1 (U.S. Feb. 21, 2024) (determining that a jury verdict of “not guilty by reason of insanity” on a “malice murder” count amounted to an acquittal barring re-prosecution for the same offense even if the jury had returned verdicts of “guilty but mentally ill” on “felony murder” and “aggravated assault” counts related to the same homicide). In *Blueford v. Arkansas*, 566 U.S. 599 (2012), the defendant was charged with capital murder in an “acquittal-first” jurisdiction, in which the jury must unanimously agree that a defendant is not guilty of a greater offense before it may begin to consider a lesser included offense. After several hours of

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a trial are set aside because the first indictment was invalid or for some reason the trial's results were voidable, a judgment of acquittal must nevertheless remain undisturbed.²

Amdt5.6 Procedural Due Process and Federal Government

Amdt5.6.2 Deportation and Exclusion Proceedings

Amdt5.6.2.2 Exclusion of Aliens Seeking Entry into the United States

According to the Supreme Court, aliens seeking initial entry into the United States have no constitutional rights regarding their applications for admission.¹ The Court has reasoned that the government has the inherent, sovereign authority to admit or exclude aliens, and that aliens standing outside of the geographic boundaries of the United States have no vested right to be admitted into the country.²

Thus, in its 1953 decision in *Shaughnessy v. United States ex rel. Mezei*, the Court held that the government could deny entry to an alien without a hearing, notwithstanding

deliberations, the foreperson of the jury stated in open court that the jury was unanimously against conviction for capital murder and the lesser included offense of first degree murder, but was deadlocked on manslaughter, the next lesser included offense. After further deliberations, the judge declared a mistrial because of a hung jury. Six Justices of the Court subsequently held that the foreperson's statement on capital murder and first degree murder lacked the necessary finality of an acquittal, and found that Double Jeopardy did not bar a subsequent prosecution for those crimes. Three dissenting Justices held that Double Jeopardy required a partial verdict of acquittal on the greater offenses under the circumstances.

In *Schiro v. Farley*, 510 U.S. 222 (1994), the Court ruled that a jury's action in leaving the verdict sheet blank on all but one count did not amount to an acquittal on those counts, and that consequently conviction on the remaining count, alleged to be duplicative of one of the blank counts, could not constitute double jeopardy. In any event, the Court added, no successive prosecution violative of double jeopardy could result from an initial sentencing proceeding in the course of an initial prosecution.

² In *United States v. Ball*, 163 U.S. 662 (1896), three defendants were placed on trial; Ball was acquitted and the other two were convicted, and the two appealed and obtained a reversal on the ground that the indictment had been defective; all three were again tried and all three were convicted. Ball's conviction was set aside as violating the clause; the trial court's action was not void but only voidable, and Ball had taken no steps to void it while the government could not take such action. Similarly, in *Benton v. Maryland*, 395 U.S. 784 (1969), the defendant was convicted of burglary but acquitted of larceny; the conviction was set aside on his appeal because the jury had been unconstitutionally chosen. He was again tried and convicted of both burglary and larceny, but the larceny conviction was held to violate the Double Jeopardy Clause. On the doctrine of constructive acquittals by conviction of a lesser included offense, see discussion under Amdt5.3.5 Re-Prosecution After Conviction.

¹ See *Dep't of Homeland Sec. v. Thuraissigiam*, No. 19-161, slip op. at 36 (U.S. June 25, 2020) (recognizing that an alien seeking initial entry into the United States "has only those rights regarding admission that Congress has provided by statute"); *Trump v. Hawaii*, No. 17-965, slip op. at 30 (U.S. June 26, 2018) (noting that "foreign nationals seeking admission have no constitutional right to entry" into the United States); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("It is clear that Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise.") (citations omitted); *Leng May Ma v. Barber*, 357 U.S. 185, 187 (1958) ("It is important to note at the outset that our immigration laws have long made a distinction between those aliens who have come to our shores seeking admission, such as petitioner, and those who are within the United States after an entry, irrespective of its legality. In the latter instance the Court has recognized additional rights and privileges not extended to those in the former category who are merely 'on the threshold of initial entry.'") (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953)).

² See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (noting that "the power to admit or exclude aliens is a sovereign prerogative"); *Mezei*, 345 U.S. at 210 ("Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control."); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) ("Admission of aliens to the United States is a privilege granted by the sovereign United States Government.").

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the alien’s “temporary harborage” on Ellis Island pending the government’s attempts to remove him from the United States.³ More recently, in *Department of Homeland Security v. Thuraissigiam*, the Court in 2020 rejected an alien’s constitutional challenge to a federal statute that limits judicial review of an expedited order of removal, reasoning that the alien—who was apprehended shortly after entering the United States unlawfully—could be considered to be an applicant for admission at the border.⁴ In short, for aliens seeking admission into the United States, the decision to permit or deny entry by an executive or administrative officer, acting within powers expressly conferred by Congress, is due process of law.⁵

In certain cases, the exclusion of an alien has been seen to implicate the rights of U.S. citizens. In its 1972 decision in *Kleindienst v. Mandel*, for example the Supreme Court appeared to recognize that U.S. citizens’ First Amendment rights were affected by the denial of a nonimmigrant visa to a Marxist journalist who had been invited to speak in the United States by a group of university professors.⁶ In *Mandel*, however, the Court also recognized that because the “plenary congressional power to make policies and rules for exclusion of aliens has long been firmly established,” the Court would uphold, in the face of a constitutional challenge, an alien’s exclusion as long as there is “a facially legitimate and bona fide reason” for the decision.⁷ Thus, even when reviewing constitutional challenges brought by U.S. citizens, the Court has limited the scope of judicial

³ *Mezei*, 345 U.S. at 210–12, 215. The Court reasoned that, although the alien was being detained inside the United States during the pendency of his exclusion proceedings, he had not effected an “entry” for purposes of immigration law, and could be “treated as if stopped at the border.” *Id.* at 212–15. *See also Knauff*, 338 U.S. at 542, 544 (upholding the exclusion of an alien without a hearing, and reasoning that the U.S. government had the “inherent executive power” to deny her admission and that “[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned”); *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 342–43 (1909) (holding that Congress’s broad power over the entry of aliens enabled it to pass legislation making it unlawful to bring into the United States any alien who had a contagious disease).

⁴ *Thuraissigiam*, slip op. at 34–35.

⁵ *See id.* at 36 (“[A]n alien in respondent’s position [detained shortly after unlawful entry] has only those rights regarding admission that Congress has provided by statute.”); *United States v. Ju Toy*, 198 U.S. 253, 263 (1905) (noting that “the almost necessary result of the power of Congress to pass exclusion laws” was that the decision to exclude an alien “may be entrusted to an executive officer, and that his decision is due process of law”); *see also Landon*, 459 U.S. at 32; *Knauff*, 338 U.S. at 544; *Nishimura Ekiu v. United States*, 142 U.S. 651, 660 (1892). The Supreme Court, however, has held that Congress’s largely unencumbered power over the entry of aliens does not extend to lawful permanent residents returning from trips abroad, who retain the same constitutional rights they had before leaving the United States, including the right to due process. *Landon*, 459 U.S. at 33; *Rosenberg v. Fleuti*, 374 U.S. 449, 460 (1963), *superseded by statute*, *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009–546; *Kwong Hai Chew v. Colding*, 344 U.S. 590, 600–02 (1953). *See also Kwock Jan Fat v. White*, 253 U.S. 454, 458 (1920) (stating that the exclusion of an alien returning to the United States who claimed to be a U.S. citizen could be made only after a hearing based on “adequate support in the evidence”).

⁶ *See* 408 U.S. 753, 762 (1972); *see also Kerry v. Din*, 576 U.S. 86 (2015) (plurality and concurring opinions, taken together, suggesting that at least a majority of the Court accepts that *Mandel* allows U.S. citizens to challenge visa denials that affect other rights beyond their First Amendment rights); *cf. Trump v. Int’l Refugee Assistance Project*, Nos. 16-1436 & 16-1540, slip op. at 11 (U.S. June 26, 2017) (per curiam) (noting that “foreign nationals abroad who have no connection to the United States at all” can be denied entry as such a denial does not “impose any legally relevant hardship” on the foreign nationals themselves).

⁷ *Mandel*, 408 U.S. at 769–70. Applying this test, the Court upheld the alien’s exclusion based on the government’s explanation that the alien had abused visas in the past, and refused to “look behind” the government’s justification to determine whether it was supported by any evidence. *Id.*

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review and adopted a highly deferential standard for reviewing the decision to exclude an alien.⁸

U.S. citizens have also asserted that the exclusion of an alien has impinged upon their due process rights.⁹ In *Kerry v. Din*, five Justices in 2015 agreed that denying an immigrant visa to the husband of a U.S. citizen on the grounds that he was inadmissible under a provision of federal immigration law (pertaining to “terrorist activities”) did not violate the due process rights of the U.S. citizen spouse.¹⁰ These Justices differed in their reasoning, though. A three-Justice plurality held that the U.S. citizen spouse had no protected liberty interest under the Due Process Clause in her husband’s ability to come to the United States, and did not decide whether the government had established a facially legitimate and bona fide reason for excluding her husband.¹¹ A two-Justice concurrence did not reach the question of whether the U.S. citizen wife had asserted a protected liberty interest, but instead concluded that the consular officials’ citation of a particular statutory ground for inadmissibility as the basis for denying the visa application satisfied due process under *Mandel*, which requires only that the government state a “facially legitimate and bona fide reason” for the denial.¹²

In *Trump v. Hawaii*, the Supreme Court in 2018 reaffirmed that there is limited judicial review of executive decisions to exclude aliens seeking admission from abroad.¹³ The Court rejected an Establishment Clause challenge brought by U.S. citizens and other challengers to a presidential proclamation that provided for the exclusion of specified categories of nonresident aliens from mostly Muslim-majority countries.¹⁴ The Court recognized that decisions concerning the admission or exclusion of aliens generally lie beyond the scope of judicial review, and are subject only to a “highly constrained” judicial inquiry when an exclusion “allegedly burdens the constitutional rights of a U.S. citizen.”¹⁵ The Court upheld the proclamation, ruling that it was rationally related to the

⁸ See also *Fiallo v. Bell*, 430 U.S. 787, 792–94, 798–800 (1977) (rejecting U.S. citizens’ and lawful permanent residents’ (LPR) equal protection challenge to a statute that granted special immigration preferences to the children and parents of U.S. citizens and LPRs, unless the parent-child relationship was that of a father and an illegitimate child, and recognizing the “limited scope of judicial inquiry into immigration legislation” and Congress’s “exceptionally broad power to determine which classes of aliens may lawfully enter the country”).

⁹ See, e.g., *Bustamante v. Mukasey*, 531 F.3d 1059, 1062 (9th Cir. 2008).

¹⁰ 576 U.S. 86 (2015).

¹¹ *Id.* at 100 (Scalia, J., joined by Roberts, C.J. & Thomas, J.) (plurality opinion). According to the plurality, the U.S. citizen spouse’s alleged interests had been variously formulated as a “liberty interest in her marriage”; a “right of association with one’s spouse”; a “liberty interest in being reunited with certain blood relatives”; and the “liberty interest of a U.S. citizen under the Due Process Clause to be free from arbitrary restrictions on his right to live with his spouse.” *Id.* at 93. The plurality also expressly noted that no fundamental right to marriage, as such, had been infringed, because the “Federal Government has not attempted to forbid a marriage.” *Id.* at 94 (contrasting the case at hand with *Loving v. Virginia*, 388 U.S. 1 (1967), *Zablocki v. Redhail*, 434 U.S. 374 (1978), and *Turner v. Safley*, 482 U.S. 78 (1987), *superseded by statute*, Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb)).

¹² *Id.* at 106 (Kennedy, J., concurring, joined by Alito, J.).

¹³ No. 17-965, slip op. at 30 (U.S. June 26, 2018).

¹⁴ *Id.* at 38–39. In *Trump v. Hawaii*, the Supreme Court had determined that a U.S. citizen’s “interest in being united with his relatives,” when those relatives were foreign nationals seeking to enter the United States, was “sufficiently concrete and particularized to form the basis of an Article III injury in fact” for purposes of establishing legal standing to challenge the presidential proclamation. *Id.* at 25.

¹⁵ *Id.* at 30–32.

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stated government objective of protecting national security by excluding aliens from countries with deficient information-sharing practices.¹⁶

In its 2024 decision in *Dep’t of State v. Muñoz*, the Supreme Court ruled that a U.S. citizen lacks a constitutionally protected liberty interest in her noncitizen spouse’s admission into the United States.¹⁷ Justice Barrett, writing for five members of the majority, explained that the Fifth Amendment’s Due Process Clause “provides heightened protection against government interference with certain fundamental rights and liberty interests.”¹⁸ Nonetheless, the Court determined that a U.S. citizen’s asserted right to have her noncitizen spouse admitted into the United States so that he could reside with her did not qualify as a fundamental liberty interest.¹⁹ In reversing the lower court’s judgment to the contrary, the Court concluded that such a right was not “deeply rooted in this Nation’s history and tradition” because the federal government had long exercised the sovereign power to “set the terms governing the admission and exclusion of noncitizens” without granting spouses a right to immigrate.²⁰ Consequently, because the U.S. citizen lacked a fundamental liberty interest that would allow her to invoke an exception to the doctrine of consular nonreviewability, the State Department’s denial of her husband’s visa application was not subject to judicial review.²¹

Amdt5.9 Takings

Amdt5.9.3 Property Interests Subject to Takings Clause

If the government condemns real property, the government must pay the market value of that property to the owner. Likewise, the Supreme Court held in *Tyler v. Hennepin* that when government seizes property from a taxpayer in order to recover unpaid taxes, the government may not retain more of the proceeds from the sale of such property than the taxpayer owed.¹ But there are many kinds of property and many uses of property which cause problems in computing just compensation. It is not only the full fee simple interest in land that is compensable “property,”² but also such lesser interests as easements³ and leaseholds. If only a portion of a tract is taken, the owner’s compensation includes any element of value arising out of the relation of the part taken to the entire tract.⁴ Government action that does not encroach on private property does not

¹⁶ *Id.* at 38–39.

¹⁷ *Dep’t of State v. Muñoz*, slip op at 1–2 (U.S. June 21, 2024).

¹⁸ *Id.* at 8–9 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997)).

¹⁹ *Id.* at 10.

²⁰ *Id.* 10–13.

²¹ *Id.* at 18.

¹ See *Tyler v. Hennepin Cnty.*, No. 22–166 (U.S. May 25, 2023). The Court distinguished *Tyler* from *Nelson v. City of New York*, 352 U.S. 103 (1956), a case where a property owner was denied a surplus, on the grounds that in *Nelson*, the city had adopted a process through which property owners could recover the surplus and the owner had not followed the process. *Tyler*, No. 22–166, slip op. at 10–11.

² *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).

³ *United States v. Welch*, 217 U.S. 333 (1910).

⁴ *Bauman v. Ross*, 167 U.S. 548 (1897); *Sharp v. United States*, 191 U.S. 341, 351–52, 354 (1903). Where the taking of a strip of land across a farm closed a private right-of-way, an allowance was properly made for the value of the easement. *Welch*, 217 U.S. 333.

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result in a taking requiring just compensation, even if the action impairs the use of the private property.⁵

If the taking has in fact benefited the owner in some way, however, the benefit may be set off against the value of the land condemned,⁶ although any supposed benefit which the owner may receive in common with all from the public use to which the property is appropriated may not be set off.⁷ For example, when certain lands were condemned for park purposes, with resulting benefits set off against the value of the property taken, the Court held that the subsequent erection of a fire station on the property instead did not deprive the owner of any part of his just compensation.⁸ The Supreme Court has also held that civil forfeitures do not constitute a taking even if the owner of the property is not alleged to have committed a crime, as property is considered to be the offender in forfeiture actions.⁹

The Court has made clear that the prohibition on taking property without compensation extends to Indian lands held in trust by the United States government.¹⁰ The Court has also held that the government has a “categorical duty to pay just compensation” when it physically takes personal property, just as when it takes real property.¹¹ For example, in *Horne v. Department of Agriculture*, the Court held that a raisin marketing order issued under a Depression-era statute requiring raisin growers to reserve a percentage of their total crop for the federal government to dispose of in its discretion constituted “a clear physical taking” because, even though the scheme was intended to benefit growers by maintaining stable markets for raisins, the “[a]ctual raisins are transferred from the growers to the Government.”¹² The Court further held the government could not avoid paying just compensation for this physical taking by providing for the return to the raisin growers of any net proceeds from the government’s sale of the reserve raisins.¹³ The majority also rejected the government’s argument that the reserve requirement was not a physical taking because raisin growers voluntarily participated in

⁵ *Transp. Co. v. Chicago*, 99 U.S. 635 (1878) (construction of a tunnel by the city that limited access to a particular dock did not amount to a taking).

⁶ *Bauman*, 167 U.S. 548.

⁷ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

⁸ *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932).

⁹ *Calero-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663 (1974).

¹⁰ See, e.g., *United States v. Creek Nation*, 295 U.S. 103 (1935) (government error in surveying that carved out tribal land requires just compensation); *Shoshone Tribe v. United States*, 299 U.S. 476 (1937) (requiring tribe to share its land with another tribe constitutes taking); *Chippewa Indians v. United States*, 305 U.S. 479 (1939) (creation of national forest inside land held in trust for tribe is a taking); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) (statute that abrogated Indian land interest established by treaty constitutes a taking). But see *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955) (taking of timber from Indian-occupied lands not a taking, Court found that the tribe’s claims of occupancy did not amount to possession of the land and the timber).

¹¹ See *Horne v. Dep’t of Agric.*, 135 S. Ct. 2419, 2426 (2015). In deciding this case, the Court presumably intended to leave intact established exceptions when the government seizes personal property (e.g., confiscation of adulterated drugs). See, e.g., *Bennis v. Michigan*, 516 U.S. 442, 452 (1996) (“Petitioner also claims that the forfeiture in this case was a taking of private property for public use in violation of the Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment. But if the forfeiture proceeding here in question did not violate the Fourteenth Amendment, the property in the automobile was transferred by virtue of that proceeding from petitioner to the State. The government may not be required to compensate an owner for property which it has already lawfully acquired under the exercise of governmental authority other than the power of eminent domain.”).

¹² *Horne*, 135 S. Ct. 2419, 2422 (2015).

¹³ *Id.* at 2428–30.

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the raisin market.¹⁴ In so doing, the Court reasoned that selling produce in interstate commerce is not a “special government benefit that the Government may hold hostage, to be ransomed by the waiver of constitutional protection.”¹⁵ In addition, the Court determined that the value of the raisins for takings purposes was their fair market value, with no deduction for the offsetting benefits of the overall statutory scheme, which was intended to maintain stable markets for raisins.¹⁶

Interests in intangible, as well as tangible property, are subject to protection under the Taking Clause. Thus compensation must be paid for the taking of contract rights,¹⁷ patent rights,¹⁸ and trade secrets.¹⁹ The franchise of a private corporation has also been deemed property that cannot be taken for public use without compensation. For example, on condemning a lock and dam system belonging to a navigation company, the government was required to compensate the company for taking its authority to take tolls as well as for the tangible property.²⁰

Takings challenges to requisitions present their own valuation challenges for the government and the courts. The Court has held that frustrating a private contract by requisitioning the entire output of a steel manufacturer is not a taking for which compensation is required,²¹ but requisitioning from a power company all the electric power which could be produced by using water diverted through its intake canal and thereby cutting off the supply of a lessee which had a right, amounting to a corporeal hereditament under state law, to draw a portion of that water, entitles the lessee to compensation for the rights taken.²² When a ship builder defaulted and the government took title to the builder’s uncompleted boats pursuant to a contract, the Court found that

¹⁴ The government’s argument might have carried more weight had the marketing order been viewed as a regulatory taking. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 321–22 (2002) (“The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property.”); *Bowles v. Willingham*, 321 U.S. 503, 519 (1944) (rent control cannot be a taking of premises if “[t]here is no requirement that the apartments be used for purposes which bring them under the [rent control] Act”).

¹⁵ *Horne*, 135 S. Ct. at 2430–31. Here, the Court expressly rejected the argument that the raisin growers could avoid the physical taking of their property by growing different crops, or making different uses of their grapes, by quoting its earlier decision in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439 n.17 (1982) (“[A] landlord’s ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation.”). The Court also distinguished the raisin reserve provisions from the requirement that companies manufacturing pesticides, fungicides, and rodenticides disclose trade secrets in order to sell those products at issue in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). It did so because the manufacturers in *Ruckelshaus* were seen to have taken part in a voluntary exchange of information that included their trade secrets, recognized as property under the Takings Clause, in exchange for a “valuable Government benefit” in the form of a license to sell dangerous chemicals. No such government benefit was seen to be involved with the raisin growers because they were making “basic and familiar uses” of their property.

¹⁶ *Horne*, 135 S. Ct. at 2431–32.

¹⁷ *Omnia Com. Corp. v. United States*, 261 U.S. 502, 508 (1923); *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106 (1924); *Lynch v. United States*, 292 U.S. 571, 579 (1934).

¹⁸ *James v. Campbell*, 104 U.S. 356, 358 (1882). See also *Hollister v. Benedict Mfg. Co.*, 113 U.S. 59, 67 (1885).

¹⁹ *Ruckelshaus*, 467 U.S. 986.

²⁰ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 345 (1893).

²¹ *Omnia*, 261 U.S. 502.

²² *Int’l Paper Co. v. United States*, 282 U.S. 399 (1931).

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the builder's suppliers, who had liens under state law, had a compensable interest equal to the value the liens when the government "took" or destroyed them in perfecting its title.²³

As a general rule, there is no property interest in the continuation of a rule of law.²⁴ For example, even though state participation in the social security system was originally voluntary, a state had no property interest in its right to withdraw from the program when Congress had expressly reserved the right to amend the law and the agreement with the state.²⁵ Similarly, there is no right to the continuation of governmental welfare benefits.²⁶

Amdt5.9.7 Per Se Takings and Exactions

Penn Central is not the only guide to when an inverse condemnation has occurred; other criteria have emerged from other cases before and after *Penn Central*. The Court has long recognized a per se takings rule for certain physical invasions: when government permanently¹ occupies property (or authorizes someone else to do so), the action constitutes a taking regardless of the public interests served or the extent of damage to the parcel as a whole.² One modern case dealt with a law that required landlords to permit a cable television company to install its cable facilities upon their buildings; although the equipment occupied only about one and a half cubic feet of space on the exterior of each building and had only a de minimis economic impact, a divided Court held that the regulation authorized a permanent physical occupation of the property and thus constituted a taking.³ The Court further sharpened the distinction between regulatory takings and permanent physical occupations by declaring it "inappropriate" to use case law from either realm as controlling precedent in the other.⁴

²³ *Armstrong v. United States*, 364 U.S. 40, 50 (1960).

²⁴ *Duke Power Co. v. Carolina Env't. Study Group*, 438 U.S. 59, 88 n.32 (1978).

²⁵ *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986).

²⁶ "Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level." *Bowen v. Gilliard*, 483 U.S. 587, 604 (1987).

¹ By contrast, the per se rule is inapplicable to *temporary* physical occupations of land. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 428, 434 (1982); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980).

² The rule emerged from cases involving flooding of lands and erection of poles for telegraph lines, e.g., *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1872); *City of St. Louis v. W. Union Tel. Co.*, 148 U.S. 92 (1893); *W. Union Tel. Co. v. Pa. R.R.*, 195 U.S. 540 (1904).

³ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court distinguished *Loretto* in *FCC v. Florida Power Corp.*, 480 U.S. 245 (1987), holding that the regulation of the rates that utilities may charge cable companies for pole attachments does not constitute a taking without any requirement that utilities allow attachment and acquiesce in physical occupation of their property. *See also Yee v. City of Escondido*, 503 U.S. 519 (1992) (no physical occupation was occasioned by regulations in effect preventing mobile home park owners from setting rents or determining who their tenants would be; owners could still determine whether their land would be used for a trailer park and could evict tenants in order to change the use of their land); *Cedar Point Nursery v. Hassid*, No. 20-107 (U.S. June 23, 2021) (state law requiring agricultural employers to allow union organizers on their business properties for up to three hours per day, 120 days per year, constituted a per se taking requiring just compensation).

⁴ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 323 (2002). *Tahoe-Sierra's* sharp physical-regulatory dichotomy is hard to reconcile with dicta in *Lingle v. Chevron United States Inc.*, 544 U.S. 528, 539 (2005), to the effect that the *Penn Central* regulatory takings test, like the physical occupations rule of *Loretto*, "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain."

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A second per se taking rule is of more recent vintage. In *Agins v. City of Tiburon*, the Court stated that land use controls constitute takings if they do not “substantially advance legitimate governmental interests,” or if they deny a property owner “economically viable use of his land.”⁵ The Court later erased the *Agins* “substantially advances” test, explaining that regulatory takings law concerns the magnitude, character, and distribution of burdens that a regulation imposes on property rights.⁶ The second *Agins* criterion, however, has persisted as a categorical rule: when the landowner “has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”⁷ The only exceptions, the Court explained in *Lucas v. South Carolina Coastal Council*, are for those restrictions that come with the property as title encumbrances or other legally enforceable limitations in place prior to acquisition of the property. Regulations “so severe” as to prohibit all economically beneficial use of land, the Court stated, “cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership. A law or decree with such an effect must, in other words, do no more than duplicate the result that could have been achieved in the courts—by adjacent land owners (or other uniquely affected persons) under the State’s law of private nuisance, or by the State under its complementary power to abate [public] nuisances . . . , or otherwise.”⁸

The “or otherwise” reference, the Court explained in *Lucas*,⁹ was principally directed to cases holding that in times of great public peril, such as war, spreading municipal fires, and the like, property may be taken and destroyed without necessitating compensation. Thus, in *United States v. Caltex, Inc.*,¹⁰ the Court held owners of property destroyed by retreating United States armies in Manila during World War II were not entitled to compensation, and in *United States v. Central Eureka Mining Co.*,¹¹ the Court held that a federal order suspending the operations of a nonessential gold mine for the duration of the war in order to redistribute the miners, unaccompanied by governmental possession and use or a forced sale of the facility, was not a taking entitling the owner to compensation for loss of profits. Similarly, in *Juragua Iron Co. v. United States*,¹² the

⁵ 447 U.S. 255, 260 (1980).

⁶ *Lingle*, 544 U.S. at 542 (noting that the first *Agins* test—whether land use controls “substantially advance legitimate governmental interests”—addresses the means-end efficacy of a regulation more in the nature of a due process inquiry).

⁷ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992). The *Agins/Lucas* total deprivation rule does not create an all-or-nothing situation, since “the landowner whose deprivation is one step short of complete” may still be able to recover through application of the *Penn Central* economic impact and distinct [or reasonable] investment-backed expectations criteria. *Id.* at 1019 n.8. See also *Palazzolo v. Rhode Island*, 533 U.S. 606, 632 (2001).

⁸ 505 U.S. at 1029.

⁹ *Id.* at 1029 n.16.

¹⁰ 344 U.S. 149 (1952). In dissent, Justices Hugo Black and William Douglas advocated the applicability of a test formulated by Justice Louis Brandeis in *Nashville, Chattanooga & St. Louis Railway v. Walters*, 294 U.S. 405, 429 (1935), a regulation case, to the effect that “when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured.” See also *United States v. Pac. R.R.*, 120 U.S. 227 (1887) (government did not owe property power for damage to property during Civil War, but also could not charge landowners for wartime improvements to property).

¹¹ 357 U.S. 155 (1958).

¹² 212 U.S. 297 (1909).

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Court found that the destruction of a U.S. company's property within enemy territory, done to prevent the spread of yellow fever, did not constitute a taking. The Court noted that property held by domestic interests in enemy territory is considered enemy property and thus not entitled to the protections of the Constitution.¹³ Finally, the Court held that when federal troops occupied several buildings during a riot in order to dislodge rioters and looters who had already invaded the buildings, the action was taken as much for the owners' benefit as for the general public benefit and the owners must bear the costs of damage inflicted on the buildings subsequent to the occupation.¹⁴

With the investment-backed expectations factor of *Penn Central*, many lower courts employed a "notice rule" under which a taking claim was absolutely barred if it was based on a restriction imposed under a regulatory regime predating plaintiff's acquisition of the property. In *Palazzolo v. Rhode Island*,¹⁵ the Court forcefully rejected the absolute version of the notice rule. Under such a rule, it said, "[a] State would be allowed, in effect, to put an expiration date on the Takings Clause."¹⁶ Whether any role is left for pre-acquisition regulation in the takings analysis, however, the Court's majority opinion did not say, leaving the issue to dueling concurrences from Justice Sandra Day O'Connor (who argued that prior regulation remains a factor) and Justice Antonin Scalia (who would have held that prior regulation is irrelevant). Less than a year later, Justice O'Connor's concurrence was reflected in the Court's extended dicta in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*,¹⁷ though the decision failed to elucidate the factors affecting the weighting to be accorded the pre-existing regime.

A third type of inverse condemnation, in addition to regulatory and physical takings, is the exaction taking. An "exaction" is a government-imposed requirement that a project developer provide certain public benefits to offset the impacts of the project on the public. A two-part test has emerged to evaluate alleged exaction takings. The first part debuted in *Nollan v. California Coastal Commission*¹⁸ and holds that in order not to be a taking, an exaction condition on a development permit approval must substantially advance a purpose related to the underlying permit. There must, in short, be an "essential nexus" between the two; otherwise, the condition is "an out-and-out plan of extortion."¹⁹ The second part of the exaction-takings test, announced in *Dolan v. City of Tigard*,²⁰ specifies that the condition, to not be a taking, must be related to the proposed development not only in nature, per *Nollan*, but also in degree. Government must establish a "rough proportionality" between the burden imposed by such conditions on the property owner and the impact of the property owner's proposed development on the

¹³ *Id.* at 308.

¹⁴ Nat'l Bd. of YMCA v. United States, 395 U.S. 85 (1969); United States v. Sponenbarger, 308 U.S. 256, 265 (1939) ("An undertaking by the government to reduce the menace from flood damages which were inevitable but for the Government's work does not constitute the Government a taker of all lands not fully and wholly protected. When undertaking to safeguard a large area from existing flood hazards, the government does not owe compensation under the Fifth Amendment to every landowner which it fails to or cannot protect.").

¹⁵ 533 U.S. 606 (2001).

¹⁶ *Id.* at 627.

¹⁷ *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 335 (2002).

¹⁸ 483 U.S. 825 (1987).

¹⁹ *Id.* at 837.

²⁰ 512 U.S. 374 (1994).

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community. To the argument that nothing is “taken” when a permit is denied for failure to agree to a condition precedent, the Court stated that what is at stake is not whether a taking has occurred, but whether the right not to have property taken without just compensation has been burdened impermissibly.²¹ While *Nollan* and *Dolan* had addressed adjudicated (rather than legislated) permit conditions, the Supreme Court held in its 2024 decision, *Sheetz v. County of El Dorado*, that the *Nollan/Dolan* test applies to permit exactions that are authorized by legislation.²² Observing that there is “no basis for affording property rights less protection in the hands of legislatures than administrators,” the Court stated: “The Takings Clause applies equally to both—which means that it prohibits legislatures and agencies alike from imposing unconstitutional conditions on land-use permits.”²³

Nollan and *Dolan* occasioned considerable debate over the breadth of what became known as the “heightened scrutiny” test. Where heightened scrutiny applies, it lessens the traditional judicial deference to local police power and places the burden of proof as to rough proportionality on the government. In *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*,²⁴ the Court unanimously confined the *Dolan* rough proportionality test, and, by implication, the *Nollan* nexus test, to the exaction context that gave rise to those cases. The Court did not resolve in *Monterey*, however, whether *Dolan* applies to exactions of a purely monetary nature, or only to physically invasive dedication conditions.²⁵ The Court clarified this uncertainty in *Koontz v. St. Johns River Water Management District* by holding that monetary exactions imposed under land use permitting were subject to essential nexus/rough proportionality analysis.²⁶

The Court’s announcement following *Penn Central* of the per se rules in *Loretto* (physical occupations), *Agins* and *Lucas* (total elimination of economic use), and *Nollan* and *Dolan* (exaction conditions) prompted speculation that the Court was replacing its ad hoc *Penn Central* approach with a more categorical takings jurisprudence. Such speculation was put to rest, however, by three decisions from 2001 to 2005 expressing distaste for categorical regulatory takings analysis. These decisions endorsed *Penn Central* as the dominant mode of analysis for inverse condemnation claims, confining the Court’s per se rules to the “relatively narrow” physical occupation and total loss of value circumstances, and the “special context” of exactions.²⁷

²¹ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606–07 (2013).

²² *Sheetz v. El Dorado*, No. 22-1074, slip op. at 1 (U.S. Apr. 12, 2024) (“The Takings Clause does not distinguish between legislative and administrative permit conditions.”).

²³ *Id.* at 10.

²⁴ 526 U.S. 687 (1999).

²⁵ A strong hint that monetary exactions are indeed outside *Nollan/Dolan* was provided in *Lingle v. Chevron U.S. Inc.*, 544 U.S. 528, 546 (2005), explaining that these decisions were grounded on the doctrine of unconstitutional conditions as applied to *easement* conditions that would have been per se *physical* takings if condemned directly.

²⁶ *Koontz*, 570 U.S. 595. See also *Sheetz*, No. 22-1074 (*Nollan/Dolan* test applies to a legislatively-imposed traffic impact fee).

²⁷ *Lingle*, 544 U.S. at 538. The other decisions are *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

SIXTH AMENDMENT

RIGHTS IN CRIMINAL PROSECUTIONS

Amdt6.4 Right to Trial by Jury

Amdt6.4.3 When the Right Applies

Amdt6.4.3.4 Increases to Minimum or Maximum Sentences and Apprendi Rule

Since the landmark case *Apprendi v. New Jersey*,¹ decided in 2000, Supreme Court jurisprudence on the applicability of the jury trial right has focused on the constitutionality of sentencing laws that delegate to judges rather than juries the determination of certain facts that affect the range of potential sentences for a crime. Before *Apprendi*, the Court had upheld such laws on the reasoning that although the jury trial right extended to every element of a criminal offense,² it did not extend to “sentencing factors.”³ *Apprendi* changed this doctrine. The defendant in the case was convicted of a firearms offense punishable by a maximum prison term of ten years.⁴ Under a separate sentencing-enhancement statute, however, the maximum penalty increased to twenty years after a trial judge determined by a preponderance of the evidence—at a hearing held after the defendant pleaded guilty—that the defendant committed the offense with the purpose of intimidating a group of individuals due to their race.⁵ The trial court sentenced the defendant to twelve years in prison for the offense, two years above the statutory maximum that would have applied absent the judge-found fact.⁶

The Supreme Court held that this sentencing procedure violated the Sixth Amendment.⁷ The Court articulated its essential holding as follows: “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”⁸ The jury trial right serves as a bulwark against unjust loss of liberty at the

¹ 530 U.S. 466 (2000).

² See *United States v. Gaudin*, 515 U.S. 506, 510 (1995) (holding that the Fifth and Sixth Amendments together “require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”); *id.* at 511 (“The Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged; one of the elements in the present case is materiality; respondent therefore had a right to have the jury decide materiality.”).

³ *McMillan v. Pennsylvania*, 477 U.S. 79, 85–86, 93 (1986) (upholding against due process and Sixth Amendment challenges a statutory sentencing scheme under which a judge’s factual determination that the defendant “visibly possessed a firearm” during the commission of certain felonies triggered an otherwise inapplicable five-year mandatory minimum sentence) (“[T]he Pennsylvania Legislature has expressly provided that visible possession of a firearm is not an element of the crimes enumerated in the mandatory sentencing statute, but instead is a sentencing factor that comes into play only after the defendant has been found guilty of one of those crimes beyond a reasonable doubt.”) (citation omitted), *overruled by* *Alleyne v. United States*, 570 U.S. 99, 103 (2013); see also *Walton v. Arizona*, 497 U.S. 639, 649 (1990) (upholding a statutory scheme that conditioned imposition of the death penalty upon a judge’s finding of certain aggravating factors), *overruled by* *Ring v. Arizona*, 536 U.S. 584, 589 (2002)).

⁴ *Apprendi*, 530 U.S. at 468 (noting that the offense was “possession of a firearm for an unlawful purpose,” punishable by imprisonment for between five and ten years).

⁵ *Id.* at 468–69, 471.

⁶ *Id.* at 471.

⁷ *Id.* at 490.

⁸ *Id.* A passage in *Jones v. United States*, decided the year before, anticipated *Apprendi*’s holding, although the Court decided *Jones* on statutory grounds and did not make a clear constitutional holding. *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999) (“[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. . . . [O]ur prior cases suggest rather than establish this principle.”). As for the exception for

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hands of government tyranny or oppression, the Court reasoned.⁹ Accordingly it does not comport with the Sixth Amendment to take the determination of facts that can lead to increased punishment away from the jury,¹⁰ especially in light of the historic connection between offense and punishment in the Anglo-American legal tradition.¹¹

Amdt6.4.6 Right to Local Jury

Amdt6.4.6.2 Local Juries and Vicinage Requirement

To date, the Supreme Court has applied the Sixth Amendment right to a trial before a jury of “the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law”—known as the vicinage requirement¹—in federal prosecutions only.² The Court has not considered whether the requirement applies to state-level prosecutions via the Due Process Clause of the Fourteenth Amendment.³

Under the vicinage requirement, the “location of the commission of the criminal acts” determines the propriety of the trial venue.⁴ The defendant cannot be tried in a federal district if the charged offense was not committed there.⁵ Thus, a defendant could not be tried in Missouri for money-laundering when the financial transactions that constituted

the fact of a prior conviction, the Court held before *Apprendi* that judges could constitutionally determine such facts. *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998) (“[W]e reject petitioner’s constitutional claim that his recidivism must be treated as an element of his offense.”). The Court has reaffirmed that holding after *Apprendi* while carefully delimiting its scope. *See Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016) (“This Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction. That means a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense. . . . [The judge] can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of.”). *Erlinger v. United States*, No. 23-370, slip op. at 11 (U.S. June 21, 2024) (declining to apply *Almendarez-Torres* and holding that a jury must determine whether prior offenses were committed on separate occasions or as part of a single criminal episode).

⁹ *Id.* at 477.

¹⁰ *Id.* at 484 (“If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not—at the moment the State is put to proof of those circumstances—be deprived of protections that have, until that point, unquestionably attached.”).

¹¹ *Id.* at 480 (“Just as the circumstances of the crime and the intent of the defendant at the time of commission were often essential elements to be alleged in the indictment [at common law], so too were the circumstances mandating a particular punishment.”); *id.* at 484 (noting “the historic link between verdict and judgment and the consistent limitation on judges’ discretion to operate within the limits of the legal penalties provided [by statute]”).

¹ *See Williams v. Florida*, 399 U.S. 78, 93 n.35 (1970) (“[V]icinage’ means neighborhood, and ‘vicinage of the jury’ meant jury of the neighborhood or, in medieval England, jury of the county.”).

² *See, e.g. United States v. Cabrales*, 524 U.S. 1, 6 (1998); *Johnston v. United States*, 351 U.S. 215, 220–21 (1956); *see generally* 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 2.6(b) (4th ed. 2015) (explaining that Supreme Court precedent has not “addressed the incorporation of the Sixth Amendment’s vicinage requirements” and reviewing various strains of lower court caselaw on the issue).

³ *See Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir. 2004); LAFAVE, *supra* note 2, at § 2.6(b); *cf. Nashville, Chicago & St. Louis Ry. v. Alabama*, 128 U.S. 96, 101 (1888) (holding that the Article III, § 2 provision requiring that a criminal jury trial “shall be held in the State where the said Crimes shall have been committed” applies only in federal courts).

⁴ *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999); *Cabrales*, 524 U.S. at 6–7; *United States v. Cores*, 356 U.S. 405, 407 (1958); *Johnston v. United States*, 351 U.S. 215 (1956).

⁵ *Salinger v. Loisel*, 265 U.S. 224, 232 (1924).

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the charged offenses occurred entirely in Florida.⁶ Although the drug trafficking activity that generated the illicit funds occurred in Missouri, the defendant was charged only in connection with the money laundering, and venue was therefore proper only in Florida.⁷

If the charged criminal acts occur in multiple districts, the trial may occur in any one of those districts.⁸ In a prosecution for conspiracy, the accused may be tried in the district where the conspiracy was formed⁹ or, more broadly, in any district where the accused or a co-conspirator carried out an overt act.¹⁰ The offense of obtaining transportation of property in interstate commerce at less than the carrier's published rates may be tried in any district through which the forbidden transportation is conducted.¹¹ Similarly, where an offense consists of sending illicit material through the mail, the Sixth Amendment permits the trial to take place in any district through which the material passes, although for policy reasons Congress may limit this range of permissible venues by statute.¹²

The Sixth Amendment does not entitle the accused to a preliminary hearing before being removed for trial to the federal district in which the charged offenses are alleged to have occurred.¹³ The assignment of a district judge from one district to another, pursuant to statute, does not violate the vicinage requirement—that is, such assignment does not create a new judicial district whose boundaries are undefined or subject the accused to trial in a district not established when the offense with which he is charged was committed.¹⁴

For offenses against federal laws not committed within any state, Congress has the sole power to prescribe the place of trial; such an offense is not local and may be tried at such place as Congress may designate.¹⁵ The place of trial may be designated by statute after the offense has been committed.¹⁶

⁶ *Cabralles*, 524 U.S. at 3–4.

⁷ *Id.* at 7.

⁸ *Rodriguez-Moreno*, 526 U.S. at 281–82; *United States v. Lombardo*, 241 U.S. 73, 77 (1916) (“Undoubtedly where a crime consists of distinct parts which have different localities the whole may be tried where any part can be proved to have been done”); *Palliser v. United States*, 136 U.S. 257, 266 (1890) (“Where a crime is committed partly in one district and partly in another it must, in order to prevent an absolute failure of justice, be tried in either district, or in that one which the legislature may designate”); *see also Hagner v. United States*, 285 U.S. 427, 429 (1932) (reasoning that offense of scheming to defraud a corporation by mail is committed both in the place where the letter is mailed and, by virtue of a delivery presumption, also in the place to which the letter is addressed).

⁹ *Burton v. United States*, 202 U.S. 344, 388–89 (1906).

¹⁰ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 252–53 (1940); *Brown v. Elliott*, 225 U.S. 392, 401–02 (1912); *Hyde v. United States*, 225 U.S. 347, 367 (1912); *Haas v. Henkel*, 216 U.S. 462, 474 (1910).

¹¹ *Armour Packing Co. v. United States*, 209 U.S. 56, 76–77 (1908).

¹² *United States v. Johnson*, 323 U.S. 273, 274 (1944) (“Congress may constitutionally make the practices which led to the Federal Denture Act triable in any federal district through which an offending denture is transported.”).

¹³ *United States ex rel. Hughes v. Gault*, 271 U.S. 142, 149 (1926); *see also Beavers v. Henkel*, 194 U.S. 73, 84–85 (1904) (reasoning that the sufficiency of an indictment may be challenged in the trial venue but generally not prior to removal to that venue); *cf. Tinsley v. Treat*, 205 U.S. 20 (1907) (distinguishing *Beavers* and holding that the federal removal statute entitled the accused to at least offer evidence as to lack of probable cause).

¹⁴ *Lamar v. United States*, 241 U.S. 103, 117–118 (1916).

¹⁵ *Jones v. United States*, 137 U.S. 202, 211 (1890); *United States v. Dawson*, 56 U.S. (15 How.) 467, 488 (1853).

¹⁶ *Cook v. United States*, 138 U.S. 157, 181–83 (1891) (holding that retroactive designation of the trial venue for a crime committed in federal territory did not violate the Sixth Amendment vicinage requirement, the Article III jury trial provision, or the *ex post facto* clause).

As with most other protections in the Sixth Amendment, violation of the vicinage requirement may typically be remedied by retrying the defendant before a proper jury.¹⁷

Amdt6.5 Confrontation Clause

Amdt6.5.2 Confrontation Clause Cases During the 1960s through 1990s

In 1965, the Supreme Court broke from its early doctrine limiting Confrontation Clause protections to federal court proceedings and held that the right to confrontation is “fundamental” and “made obligatory on the States by the Fourteenth Amendment.”¹ Alongside that pronouncement, and in the years immediately following, the Court’s opinions further discussed the relationship between the confrontation right and the bar on hearsay evidence.² The Court seemingly associated the two concepts, concluding that a key purpose of the right to confrontation is to give criminal defendants “an opportunity to cross-examine the witnesses against him,” absent an applicable hearsay exception.³ In *Pointer v. Texas*,⁴ the Court rejected the admission of testimony from a prior preliminary hearing on confrontation grounds, because no exception to the hearsay rule applied, and the testimony was taken in circumstances insufficient to secure “an adequate opportunity to cross-examine” the witness through counsel.⁵ The Court further emphasized the importance of cross examination in satisfying the confrontation right in *Douglas v. Alabama*,⁶ concluding that the Confrontation Clause barred the admission of the confession of an alleged accomplice who invoked his Fifth Amendment right to avoid self-incrimination, leaving the defendant unable to “cross-examine [the witness] as to the alleged confession.”⁷ Three years later, cross-examination was again integral to the

¹⁷ *Smith v. United States*, 599 U.S. 236, 239, 241–42 (2023). The Supreme Court has identified violations of the right to a speedy trial as one exception to this general rule. *Id.* at 242 (citing *Barker v. Wingo*, 407 U.S. 514, 519 (1972)).

¹ *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

² Hearsay is “a statement (either a verbal assertion or nonverbal assertive conduct), other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” *Hearsay*, BLACK’S LAW DICTIONARY (11th ed. 2019)

³ See *Pointer*, 380 U.S. at 406–07 (explaining that although the confrontation right generally requires cross-examination, there are recognized exceptions such as dying declarations and “testimony of a deceased witness who has testified at a former trial”).

⁴ 380 U.S. 400, 403 (1965).

⁵ *Id.* at 407.

⁶ 380 U.S. 415 (1965).

⁷ *Id.* at 419–20; see also *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987) (plurality opinion) (“The opinions of this Court show that the right to confrontation is a trial right, designed to prevent improper restrictions on the types of questions that defense counsel may ask during cross-examination.”); *Barber v. Page*, 390 U.S. 719, 725 (1968) (“The right to confrontation is basically a trial right. It includes both the opportunity to cross-examine and the occasion for the jury to weigh the demeanor of the witness.”). The Court has given weight to the importance of cross-examination for confrontation purposes in a number of other opinions. See *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) (“By thus cutting off all questioning about an event that the State conceded had taken place and that a jury might reasonably have found furnished the witness a motive for favoring the prosecution in his testimony, the court’s ruling violated respondent’s rights secured by the Confrontation Clause.”); *Mancusi v. Stubbs*, 408 U.S. 204, 216 (1972) (“Since there was an adequate opportunity to cross-examine [the witness] at the first trial, and counsel . . . availed himself of that opportunity, the transcript of [the witness]’ testimony in the first trial bore sufficient ‘indicia of reliability’ and afforded ‘the trier of fact a satisfactory basis for evaluating the truth of the prior statement.’” (quoting *Dutton v. Evans*, 400 U.S. 74, 89 (1970) (plurality opinion))); *Smith v. State of Illinois*, 390 U.S. 129, 131 (1968) (concluding that trial court’s refusal to permit defendant to cross-examine the “principal prosecution witness” on “either his name or where he lived” was “effectively to emasculate the right of cross-examination itself”). Notably, the Supreme Court has

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Court's Confrontation Clause analysis in *Bruton v. United States*.⁸ In *Bruton*, the Court concluded that the Confrontation Clause barred the admission of the confession of a non-testifying co-defendant in a joint jury trial, where that confession implicated another defendant.⁹ According to the Court, introduction of that confession added "substantial, perhaps even critical, weight to the Government's case in a form *not subject to cross-examination*."¹⁰

In 1970, the Court again reexamined the relationship between the Confrontation Clause and the hearsay rule, holding that they "are generally designed to protect similar values," but that the "overlap is [not] complete" and that the Confrontation Clause is more "than a codification of the rules of hearsay and their exceptions as they existed historically at common law."¹¹ According to the Court, the Confrontation Clause may be violated even when the hearsay rule is not and, conversely, "evidence . . . admitted in

also observed the importance of cross-examination in the context of Constitutional due process rights. See *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (holding that a defendant's due process rights had been violated where his ability to cross-examine witnesses on key points had been barred by state hearsay and common-law trial rules); *In re Oliver*, 333 U.S. 257, 259 (1948); *Alford v. United States*, 282 U.S. 687, 691 (1931) ("Cross-examination of a witness is a matter of right").

⁸ 391 U.S. 123 (1968).

⁹ *Id.* In a subsequent opinion, the Court held that *Bruton* applies retroactively. *Roberts v. Russell*, 392 U.S. 293, 293 (1968) (per curiam). Depending on the details, the Court has reached different outcomes on the extent to which redacted codefendant confessions violate *Bruton*. Compare *Samia v. United States*, No. 22-196, slip op. at 1-2 (U.S. Jun. 23, 2023) (holding that the Confrontation Clause does not bar "the admission of a nontestifying codefendant's confession where (1) the confession has been modified to avoid directly identifying the nonconfessing codefendant and (2) the court offers a limiting instruction that jurors may consider the confession only with respect to the confessing codefendant.") and *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) ("We hold that the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."), with *Gray v. Maryland*, 523 U.S. 185, 188 (1998) (holding that "*Bruton's* protective rule" applied where the prosecution "redacted the codefendant's confession by substituting for the defendant's name in the confession a blank space or the word 'deleted.'").

¹⁰ *Bruton*, 391 U.S. at 128 (emphasis added); see also *Cruz v. New York*, 481 U.S. 186, 193 (1987), *abrogating Parker v. Randolph*, 442 U.S. 62 (1979) ("We hold that, where a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant" the "Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him"); *Lee v. Illinois*, 476 U.S. 530, 539 (1986) (concluding that "confession of an accomplice" "was presumptively unreliable and . . . did not bear sufficient independent 'indicia of reliability' to overcome that presumption"); but see *Tennessee v. Street*, 471 U.S. 409, 410 (1985) (holding that admission of accomplice confession was permissible for "the nonhearsay purpose of rebutting respondent's testimony that his own confession was coercively derived from the accomplice's statement"); *Nelson v. O'Neil*, 402 U.S. 622, 629-30 (1971) ("We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments."). In some cases, the Court concluded that *Bruton* violations amounted to harmless error where other evidence of guilt was overwhelming. See *Schneble v. Fla.*, 405 U.S. 427, 432 (1972); *Harrington v. California*, 395 U.S. 250, 254 (1969). Under current doctrine, the confession of a non-testifying co-defendant "in a jury trial" may still be inadmissible on confrontation grounds in federal courts "if it implicates the defendant." *United States v. King*, 910 F.3d 320, 328 (7th Cir. 2018). However, pursuant to subsequent Supreme Court doctrine, as a threshold matter the confession must be testimonial in nature before its admission implicates the Confrontation Clause. *Crawford v. Washington*, 541 U.S. 36, 51 (2004); accord *United States v. Dale*, 614 F.3d 942, 956 (8th Cir. 2010) (holding that the "out-of-court statement of a co-defendant made unknowingly to a government agent is not 'testimonial'" and therefore not barred by the Confrontation Clause); *United States v. Smalls*, 605 F.3d 765, 768 n.2 (10th Cir. 2010) ("[T]he *Bruton* rule, like the Confrontation Clause upon which it is premised, does not apply to nontestimonial hearsay statements.").

¹¹ *California v. Green*, 399 U.S. 149, 155 (1970); see also *Dutton*, 400 U.S. at 80 ("It is not argued, nor could it be, that the constitutional right to confrontation requires that no hearsay evidence can ever be introduced. That the two evidentiary rules are not identical must be readily conceded.").

violation of a long-established hearsay rule does not lead to the automatic conclusion that confrontation rights have been denied.”¹² Thus, in *California v. Green*,¹³ the Court held that the admission of prior statements made by a witness while in custody and in a preliminary hearing did not violate a defendant’s confrontation rights, even though the statements would have been hearsay in some jurisdictions.¹⁴ The Court reasoned that the witness was available for “full cross-examination at trial,” including for questioning into inconsistencies between his prior statement and “his present version of the events in question.”¹⁵ Similarly, in *Dutton v. Evans*,¹⁶ a plurality of four Justices held that the admission of an out-of-court statement pursuant to Georgia’s coconspirator hearsay exception did not violate the Confrontation Clause, even though the same statement would have been inadmissible hearsay under the federal rules of evidence.¹⁷ The Court reasoned that the “limited contours” of the federal hearsay exception in conspiracy trials are not “required by the Sixth Amendment’s Confrontation Clause” but rather a product of the Court’s “rule-making power in the area of the federal law of evidence.”¹⁸

Then, in its 1980 opinion *Ohio v. Roberts*, the Supreme Court again revisited the “relationship between the Confrontation Clause and the hearsay rule with its many exceptions.”¹⁹ In *Roberts*, the Court explained that the Confrontation Clause “operates in two separate ways to restrict the range of admissible hearsay.”²⁰ First, “when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable.”²¹ Second, if unavailable, “his statement is admissible only if it bears adequate ‘indicia of reliability.’”²² Indicia of reliability, according to the Court, could “be inferred . . . in a case where the evidence falls within a firmly rooted hearsay exception.”²³ Otherwise, reliability would require “a showing of particularized guarantees of trustworthiness.”²⁴ The Court’s focus in *Roberts* on reliability or trustworthiness became the primary lens through which the Court

¹² *Green*, 399 U.S. at 156.

¹³ *Id.*

¹⁴ *Id.* at 164.

¹⁵ *Id.* at 164. The Court also observed that the witnesses’ preliminary hearing testimony would have been admissible on confrontation grounds even without “opportunity for confrontation at the subsequent trial.” *Id.* at 165. According to the Court, at the preliminary hearing the witness “was under oath” and the defendant “was represented by counsel—the same counsel in fact who later represented him at the trial.” *Id.* Thus, the Court noted that “respondent had every opportunity to cross-examine [witness] as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings.” *Id.*

¹⁶ 400 U.S. at 74.

¹⁷ *Id.* at 81. The statement was made during the concealment stage of the conspiracy, which would place it beyond the co-conspirator exception in federal courts. *Id.* at 78–79, 81.

¹⁸ *Id.* at 82.

¹⁹ *Ohio v. Roberts*, 448 U.S. 56, 62 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2004).

²⁰ *Id.* at 65.

²¹ *Id.* at 66; *but see* *United States v. Inadi*, 475 U.S. 387, 394 (1986) (“*Roberts* cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable.”).

²² *Id.*

²³ *Roberts*, 448 U.S. at 66; *see also* *Bourjaily v. United States*, 483 U.S. 171, 183 (1987) (“We think that the co-conspirator exception to the hearsay rule is firmly enough rooted in our jurisprudence that, under this Court’s holding in *Roberts*, a court need not independently inquire into the reliability of such statements.”).

²⁴ *Roberts*, 448 U.S. at 66.

examined Confrontation Clause challenges involving extrajudicial statements until 2004, when the Court again changed course.²⁵

Amdt6.5.3 Modern Doctrine

Amdt6.5.3.1 Admissibility of Testimonial Statement

In the years following *Ohio v. Roberts*,¹ the Supreme Court applied, revisited, and narrowed the Confrontation Clause standard that *Roberts* had set forth,² which generally permitted the admission of out-of-court statements only if the declarant was unavailable and the statement was sufficiently reliable.³ In 2004 the Court in *Crawford v. Washington*⁴ overruled *Roberts* and introduced a new standard for determining whether an out-of-court statement implicates the Confrontation Clause.⁵

Under *Crawford*, the key to whether evidence implicates the Confrontation Clause is not its reliability, but rather whether it is *testimonial*.⁶ Pursuant to *Crawford*, non-testimonial evidence does not implicate the Confrontation Clause.⁷ In contrast, testimonial evidence may only be admitted consistently with the Confrontation Clause in limited circumstances.⁸ Testimonial evidence may be admitted if the declarant: is available at trial for cross examination,⁹ or is unavailable but the defendant previously had opportunity to cross-examine the declarant about the statement.¹⁰ The Court in *Crawford* also recognized the existence of two common law Confrontation Clause exceptions that historically permitted the admission of testimonial statements¹¹—but it did not expressly approve or disapprove of either.¹²

²⁵ Amdt6.5.3.1 Admissibility of Testimonial Statements.

¹ 448 U.S. 56 (1980), *abrogated by* *Crawford v. Washington*, 541 U.S. 36 (2004).

² *See Lilly v. Virginia*, 527 U.S. 116, 133 (1999) (“[O]ur cases consistently have viewed an accomplice’s statements that shift or spread the blame to a criminal defendant as falling outside the realm of reliable hearsay exceptions”); *White v. Illinois*, 502 U.S. 346, 354 (1992) (holding that unavailability “is a necessary part of the Confrontation Clause inquiry only when the challenged out-of-court statements were made in the course of a prior judicial proceeding”); *Idaho v. Wright*, 497 U.S. 805, 827 (1990) (determining that the out-of-court statements of a child to an examining pediatrician were insufficiently reliable under *Roberts* when admitted under a state’s residual hearsay exception); *United States v. Inadi*, 475 U.S. 387, 394, 400 (1986) (affirming “the validity of the use of co-conspirator statements” and rejecting a broad reading of *Roberts* that would prohibit introduction by the government of any such “out-of-court statement[s]” absent “a showing that the declarant is unavailable”); *Lee v. Illinois*, 476 U.S. 530, 546 (1986) (concluding that a codefendant confession was insufficiently reliable “to overcome the weighty presumption against the admission of such uncross-examined evidence,” although its content largely “interlocked” or overlapped with the defendant’s own confession).

³ *Roberts*, 448 U.S. at 66.

⁴ 541 U.S. 36 (2004).

⁵ *Id.* at 54, 60. In a subsequent opinion, the Court held that *Crawford* is not “retroactive to cases already final on direct review.” *Whorton v. Bockting*, 549 U.S. 406, 409 (2007).

⁶ *Crawford*, 541 U.S. at 51; *see also* *Hemphill v. New York*, No. 20-637, slip op. at 10–11 (U.S. Jan. 20, 2022) (explaining that if “*Crawford* stands for anything, it is that the history, text, and purpose of the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees”—cross-examination).

⁷ *Crawford*, 541 U.S. at 68.

⁸ *Id.* at 68–69.

⁹ *Id.*

¹⁰ *Id.* Further, *Crawford* “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” *Id.* at 59 n.9.

¹¹ The two potential exceptions—dying declarations and forfeiture by wrongdoing—are discussed in Amdt6.5.3.3 Dying Declarations and Forfeiture by Wrongdoing.

¹² *Crawford*, 541 U.S. at 56, n.6, 62 (recognizing the dying declarations and forfeiture by wrongdoing exceptions to the Confrontation Clause but declining to expressly adopt either).

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The *Crawford* Court expressly declined to provide a “comprehensive definition” of “testimonial.”¹³ However, drawing from a variety of sources, the Court offered several possible formulations of “core” testimonial statements, including “ex parte in-court testimony or its functional equivalent” such as “affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.”¹⁴ As additional possible formulations of “testimonial,” the Court listed extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, and “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.”¹⁵ Regardless of the exact formulation of “testimonial” the Court in *Crawford* specified that at a minimum, “testimonial” includes police interrogations and “prior testimony at a preliminary hearing, before a grand jury, or at a former trial.”¹⁶

In subsequent opinions, the Court has further examined what it means for evidence to be “testimonial” for Confrontation Clause purposes—particularly in the context of forensic laboratory reports and analysis. For example, in *Melendez-Diaz v. Massachusetts*¹⁷ the Court held that the admission of forensic lab analysts’ affidavits—reporting that material seized from the defendant was cocaine—violated the Confrontation Clause because affidavits were testimonial and the “analysts were ‘witnesses’ for purposes of the Sixth Amendment.”¹⁸ In *Bullcoming v. New Mexico*¹⁹ the Court clarified that when the government seeks to introduce laboratory reports containing testimonial certifications “made for the purpose of proving a particular fact,” the “accused’s right is to be confronted with the analyst who made the certification, unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist.”²⁰ Testimony by a surrogate witness who is familiar with general laboratory procedures, but otherwise uninvolved in the relevant certification, is insufficient to satisfy a defendant’s constitutional right.²¹ Likewise, testimony by a surrogate witness that relies on conclusions from a report prepared by an out-of-court witness will not satisfy the Confrontation Clause.²²

In its 2012 opinion *Williams v. Illinois*,²³ the Court again revisited the relationship between the Confrontation Clause and laboratory analysis.²⁴ In *Williams*, an expert witness testified at trial regarding conclusions she drew by comparing DNA profiles, including one from an outside-laboratory that she had not participated in creating and

¹³ See *id.* at 68 (“We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’”).

¹⁴ *Id.* at 51 (citations omitted), cited with approval in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 310 (2009).

¹⁵ *Id.* at 52 (citations omitted), cited with approval in *Melendez-Diaz*, 557 U.S. at 310.

¹⁶ *Id.* at 68.

¹⁷ 557 U.S. 305 (2009).

¹⁸ *Id.* at 308, 311.

¹⁹ 564 U.S. 647 (2011).

²⁰ *Id.* at 652.

²¹ *Id.*

²² *Smith v. Arizona*, No. 22-899, slip op. at 21 (U.S. June 21, 2024). The Court’s decision in *Smith* did not determine whether or not the statements at issue were testimonial. See *id.* at 19.

²³ 567 U.S. 50 (2012) (plurality opinion).

²⁴ *Id.* at 56–58.

therefore lacked personal knowledge about.²⁵ In her testimony and on cross-examination, the expert witness identified the source material for that outside-laboratory’s DNA profile.²⁶ The defendant argued that by allowing the substance of a testimonial forensic laboratory report through the trial testimony of an expert witness (who took no part in the reported forensic analysis), the prosecution violated the Confrontation Clause.²⁷ A plurality of four Justices disagreed, and rejected the argument that because the expert was not involved in performing, observing, or certifying the creation of the outside-laboratory’s DNA profile, the testimony regarding the source material for that profile ran afoul of *Melendez-Diaz* and *Bullcoming*.²⁸ According to the plurality, the Confrontation Clause “has no application to out-of-court statements that are not offered to prove the truth of the matter asserted.”²⁹ The plurality concluded that the underlying DNA results were “[o]ut-of-court statements . . . related by the expert solely for the purpose of explaining” her underlying assumptions, rather than statements “offered for their truth.”³⁰ As a result, the testimony regarding the source material of the outside-laboratory’s DNA profile fell “outside the scope of the Confrontation Clause.”³¹

In *Samia v. United States* the Court explained that a criminal defendant’s rights under the Confrontation Clause are not violated by the admission of a nontestifying codefendant’s confession during a joint trial when the confession does not directly identify the criminal defendant and the court had instructed the jurors to consider the confession only with respect to the codefendant.³²

Amdt6.6 Right to Counsel

Amdt6.6.5 Right to Effective Assistance of Counsel

Amdt6.6.5.6 Prejudice Resulting from Deficient Representation Under Strickland

For deficient representation to constitute a constitutional violation, the Court established in *Strickland v. Washington* that there must be (1) deficient representation and (2) resulting prejudice to the defense so serious as to bring the outcome of the proceeding into question.¹ Meeting the second requirement of *Strickland*—whether the deficient representation resulted in prejudice—can be challenging. The touchstone of “prejudice” under *Strickland* is that the defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have

²⁵ *Id.* at 62.

²⁶ *Id.* at 61–62.

²⁷ *Id.* at 56–57.

²⁸ *Id.* at 79–80.

²⁹ *Id.* at 57–58.

³⁰ *Id.* at 58.

³¹ *Id.* The plurality in *Williams* also appeared to give weight to the fact that the underlying proceedings involved a bench trial, rather than a jury trial, and “assumed that the trial judge understood” the admissibility limits of the expert witness’ testimony. *Id.* at 72–73. Further, according to the plurality, “even if the report produced by [the outside laboratory] had been admitted into evidence, there would have been no Confrontation Clause violation” because it was “produced before any suspect was identified,” sought “not for the purpose of obtaining evidence to be used against petitioner . . . but for the purpose of finding a rapist who was on the loose,” and was not “inherently inculpatory.” *Id.* at 58.

³² *Samia v. United States*, No. 22-196 (U.S. June 23, 2023).

¹ *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

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been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.”² Defendants frequently fall short on the prejudice requirement.³

Beyond *Strickland*’s “reasonable probability of a different result” test for determining prejudice, there are issues of when an “outcome determinative” test alone suffices, what exceptions exist, and whether the general rule should be modified. In *Lockhart v. Fretwell*, the Court appeared to refine the *Strickland* test when it stated that an “analysis focusing solely on mere outcome determination” is “defective” unless attention is also given to whether the result was fundamentally unfair or unreliable.⁴ However, the Court subsequently characterized *Lockhart* as limited to a class of exceptions to the “outcome determinative” test and not supplanting it.⁵ According to *Williams v. Taylor*, it would disserve justice in some circumstances to find prejudice premised on a likelihood of a different outcome.⁶ For example, fundamental fairness precluded finding prejudice where defense counsel had failed to object to the use sentencing of an aggravating factor barred by a recent appellate case, but where that case was subsequently overturned.⁷

² See *Strickland v. Washington*, 466 U.S. 668, 694 (1984). This standard does not require that a defendant show “that counsel’s deficient conduct more likely than not altered the outcome in the case.” See *Id.* at 693. At the same time, the Court has concluded that the “prejudice inquiry under *Strickland*” applies to cases beyond those in which there was only “little or no mitigation evidence” presented. *Sears v. Upton*, 561 U.S. 945, 954 (2010) (per curiam); *Porter v. McCollum*, 558 U.S. 30, 40–42 (2009) (per curiam) (evaluating the totality of mitigating evidence to conclude that there was a “reasonable probability that the advisory jury—and the sentencing judge—would have struck a different balance” but for the counsel’s deficiencies (*Wiggins v. Smith*, 539 U.S. 510, 537 (2003))). For an example of a criminal defendant who succeeded on the prejudice prong of the *Strickland* test, see *Buck v. Davis*, No. 15–8049, slip op. at 18–20 (U.S. Feb. 22, 2017) (holding that, in a case where the focus of a capital sentencing proceeding was on the defendant’s likelihood of recidivism, defense counsel had been ineffective by introducing racially charged testimony about the defendant’s future dangerousness, and [r]easonable jurors might well have valued [the testimony] concerning the central question before them). Where a defendant alleges that ineffective assistance of counsel resulted in an increased term of imprisonment, it is not necessary that the increased prison term be of significant duration. See *Glover v. United States*, 531 U.S. 198, 203 (2001) (“Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance.”).

³ *E.g.*, *Smith v. Spisak*, 558 U.S. 139, 154–56 (2010); *Thornell v. Jones*, No. 22–982, slip op. at 9 (May 30, 2024). In *Hill v. Lockhart*, the Court applied the *Strickland* test to attorney decisions to accept a plea bargain, holding that a defendant must show a reasonable probability that, but for counsel’s errors, the defendant would not have pleaded guilty and would have insisted on going to trial. 474 U.S. 52, 59 (1985). As a result, the prejudice question with respect to when a counsel’s deficient performance leads the defendant to accept a guilty plea rather than go to trial is not whether the trial would have resulted in a not guilty verdict. See *Roe v. Flores-Ortega*, 528 U.S. 470, 482–83 (2000). Instead, the issue is whether the defendant was prejudiced by the “denial of the entire judicial proceeding . . . to which he had a right.” *Id.* at 483. As a result, prejudice may be very difficult to prove if the defendant’s decision about going to trial turns on his prospects of success and those chances are affected by an attorney’s error. See *Premo v. Moore*, 562 U.S. 115, 118, 123–24 (2011). However, when a defendant’s choice to accept a plea bargain has nothing to do with his chances of success at trial, such as if the defendant is primarily concerned with the respective consequences of a conviction after trial or by plea, a defendant can show prejudice by providing evidence contemporaneous with the acceptance of the plea that he would have rejected the plea if not for the erroneous advice of counsel. See *Lee v. United States*, No. 16–327, slip op. at 7–10 (U.S. Mar. 28, 2017) (holding that a defendant whose fear of deportation was the determinative factor in whether to accept a plea agreement could show prejudice resulting from his attorney’s erroneous advice that a felony charge would not lead to deportation even when a different result at trial was remote).

⁴ 506 U.S. 364, 368–70 (1993).

⁵ See *Glover*, 531 U.S. at 203 (“The Court explained last Term that our holding in *Lockhart* does not supplant the *Strickland* analysis.”); *Williams v. Taylor*, 529 U.S. 362, 391 (2000) (“The Virginia Supreme Court erred in holding that our decision in [*Lockhart*] . . . modified or in some way supplanted the rule set down in *Strickland*.”) (internal citation omitted).

⁶ 529 U.S. at 391–92.

⁷ *Id.* at 392–93.

SIXTH AMENDMENT—RIGHTS IN CRIMINAL PROSECUTIONS
Right to Counsel, Right to Effective Assistance of Counsel

According to the Court, finding prejudice based on defense counsel's failure to object in the narrow window where it would have been permissible based on the shifting precedent would have been nothing more than a fortuitous windfall for the defendant.⁸ As another example, the Court has said it would be unjust to find legitimate prejudice in a defense attorney's interference with a defendant's perjured testimony, even if that testimony could have altered a trial's outcome.⁹

A second category of recognized exceptions to the application of the "outcome determinative" prejudice test includes the relatively limited number of cases in which prejudice is presumed. This presumption occurs when there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified."¹⁰ These situations, the Court explained in *United States v. Cronin* involve some kind of "breakdown of the adversarial process," and include actual or constructive denial of counsel, denial of such basics as the right to effective cross-examination, or failure of counsel to subject the prosecution's case to meaningful adversarial testing.¹¹ Moreover, prejudice is presumed "when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken."¹² "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show [prejudice],"¹³ and consequently most claims of inadequate representation continue to be measured by the *Strickland* standard.¹⁴

⁸ *Id.*

⁹ *Id.* (citing and discussing *Nix v. Whiteside*, 475 U.S. 157, 175–76 (1986)).

¹⁰ *United States v. Cronin*, 466 U.S. 648, 658 (1984).

¹¹ *Id.* at 657–59.

¹² *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000). In *Garza v. Idaho*, the Court clarified that the presumption of prejudice that applies when counsel's deficient performance forfeits an appeal that a defendant otherwise would have taken remains even when the defendant has signed an appeal waiver, because issues may remain as to the scope or validity of the waiver and the presumption-of-prejudice rule does not depend upon the prospects of the defendant's appeal. No. 17–1026, slip op. at 3–6, 9 (U.S. Feb. 27, 2019).

¹³ *Cronin*, 466 U.S. at 659 n.26.

¹⁴ See, e.g., *Weaver v. Massachusetts*, No. 16–240, slip op. at 12 (U.S. June 22, 2017) (holding that "when a defendant raises a public-trial violation via an ineffective-assistance-of-counsel claim, *Strickland* prejudice is not shown automatically"); *Florida v. Nixon*, 543 U.S. 175, 189–90 (2004) (holding that a concession-of-guilt strategy in a capital trial does not automatically rank as prejudicial ineffective assistance of counsel); *Bell v. Cone*, 535 U.S. 685, 697–98 (2002) (concluding that *Cronin's* rule that prejudice can be presumed when counsel "entirely fails" to subject the prosecution's case to meaningful adversarial testing does not extend to situations where counsel's failings were limited to specific points in the trial); *Mickens v. Taylor*, 535 U.S. 162, 173–74 (2002) (holding that, to demonstrate a Sixth Amendment violation where the trial court fails to inquire into a potential conflict of interest, the defendant must establish that the conflict adversely affected his counsel's performance).

SEVENTH AMENDMENT

CIVIL TRIAL RIGHTS

Amdt7.2 Right to a Trial by Jury in Civil Cases

Amdt7.2.2 Identifying Civil Cases Requiring a Jury Trial

The Seventh Amendment grants a right to a jury trial in “Suits at common law,” which the Supreme Court has long interpreted as “limited to rights and remedies peculiarly legal in their nature, and such as it was proper to assert in courts of law and by the appropriate modes and proceedings of courts of law.”¹ The drafters of the Seventh Amendment used the term “common law” to clarify that the Amendment does not provide a right to a jury in civil suits involving the types of equitable rights and remedies that courts enforced at the time of the Amendment’s framing.²

Two unanimous decisions, in which the Supreme Court held that civil juries were required, illustrate the Court’s treatment of this distinction. In the first suit, a landlord sought to recover, based on District of Columbia statutes, possession of real property from a tenant allegedly behind on rent. The Court reasoned that whether “a close equivalent to [the statute in question] existed in England in 1791 [was] irrelevant for Seventh Amendment purposes.”³ Instead, the Court stated that its Seventh Amendment precedents “require[d] trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than in an action at equity or admiralty.”⁴ The statutory cause of action, the Court found, had several analogs in the common law, all of which involved a right to trial by jury.⁵ In a second case, the plaintiff sought damages for alleged racial discrimination in the rental of housing in violation of federal law, arguing that the Seventh Amendment was inapplicable to new causes of action Congress created. The Court disagreed: “The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.”⁶

In *SEC v. Jarkesy*,⁷ the Supreme Court provided additional guidance on how to determine whether an action constitutes a “Suit[] at common law”⁸ for Seventh Amendment

¹ *Shields v. Thomas*, 59 U.S. (18 How.) 253, 262 (1856).

² *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433, 447 (1830); *Barton v. Barbour*, 104 U.S. 126, 133 (1881). Formerly, the Amendment did not apply to cases where recovery of money damages was incidental to equitable relief even though damages might have been recovered in an action at law. *Clark v. Wooster*, 119 U.S. 322, 325 (1886); *Pease v. Rathbun-Jones Eng’g Co.*, 243 U.S. 273, 279 (1917). *But see Dairy Queen v. Wood*, 369 U.S. 469 (1962) (legal claims must be tried before equitable ones).

³ *Pernell v. Southall Realty Co.*, 416 U.S. 363, 375 (1974).

⁴ *Id.*

⁵ *Id.* at 375–76.

⁶ *Curtis v. Loether*, 415 U.S. 189, 194–95 (1974) (reasoning that “[a] damage action under the statute sounds basically in tort—the statute merely defines a new legal duty and authorizes the court to compensate a plaintiff for the injury caused by the defendants’ wrongful breach” such that “this cause of action is analogous to a number of tort actions recognized at common law.” *See also* *Chauffeurs, Teamsters & Helpers Loc. 391 v. Terry*, 494 U.S. 558 (1990) (suit against union for back pay for breach of duty of fair representation is a suit for compensatory damages, hence plaintiff is entitled to a jury trial); *Wooddell v. Int’l Bhd. of Elec. Workers Loc. 71*, 502 U.S. 93 (1991) (similar suit against union for money damages entitles union member to jury trial; a claim for injunctive relief was incidental to the damages claim); *Feltner v. Columbia Pictures Television*, 523 U.S. 340 (1998) (jury trial required for copyright action with close analog at common law, even though the relief sought is not actual damages but statutory damages based on what is “just”).

⁷ *SEC v. Jarkesy*, No. 22-859, slip op. at 27 (U.S. June 27, 2024). The Supreme Court affirmed a Fifth Circuit decision and remanded the case for further proceedings consistent with the Court’s opinion. *Id.* For additional

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purposes. In *Jarkesy*, the Court held that George Jarkesy, Jr., a defendant in a Securities and Exchange Committee (SEC) fraud action for civil penalties, had a right to a jury trial under the Seventh Amendment. The Court identified two pertinent factors for whether an action was covered by the Seventh Amendment: (1) whether the action was akin to a common law cause of action and (2) whether the remedy was the type that could only be obtained in a court of law.⁹ Because the civil penalties in *Jarkesy* were designed “to punish and deter, not to compensate,” they were, according to the Court, the “type of remedy at common law that could only be enforced in courts of law.”¹⁰ Turning to the nature of federal securities fraud actions, the Court reasoned that because securities fraud actions, like common law fraud actions, address “misrepresenting or concealing material facts”¹¹ and because Congress and the SEC had adopted common law fraud concepts into federal securities fraud law,¹² the securities fraud actions were “legal in nature.”¹³ As such, the case constituted a “Suit[] at common law” for Seventh Amendment purposes, entitling Jarkesy to a jury trial.

In contrast, the Court has upheld the lack of a jury provision in certain actions on the ground that the suit in question was not a suit at common law within the meaning of the Amendment, or that the issues raised were not particularly legal in nature.¹⁴ When there is no direct historical antecedent dating to the Amendment’s adoption, the court may also consider whether existing precedent and the sound administration of justice favor resolution by judges or juries.¹⁵

discussion on SEC v. Jarkesy, see Intro.9.2.2 Enforcement Actions, Seventh Amendment Jury Trials, Non-Delegation Doctrine, and Removal Authority.

⁸ U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

⁹ *Jarkesy*, slip op. at 9.

¹⁰ *Id.* at 11 (quoting *Tull v. United States*, 481 U.S. 412, 422 (1987)).

¹¹ *Id.*

¹² *Id.* at 11–12.

¹³ *Id.* at 13. (quoting *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53 (1989)). Discussing the similarities between securities fraud actions and common law fraud, the Court noted that “both target the same basic concept: misrepresenting or concealing material facts.” *Id.* at 11.

¹⁴ Such actions or issues include, for example: (1) enforcement of claims against the United States, *McElrath v. United States*, 102 U.S. 426, 440 (1880); see also *Galloway v. United States*, 319 U.S. 372, 388 (1943); (2) suit under a territorial statute authorizing a special nonjury tribunal to hear claims against a municipality having no legal obligation, but based on moral obligation only, *Guthrie Nat’l Bank v. Guthrie*, 173 U.S. 528, 534 (1899); see also *United States v. Realty Co.*, 163 U.S. 427, 439 (1896); *New Orleans v. Clark*, 95 U.S. 644, 653 (1877); (3) cancellation of a naturalization certificate for fraud, *Luria v. United States*, 231 U.S. 9, 27 (1913); (4) reversal of an order to deport an alien, *Gee Wah Lee v. United States*, 25 F.2d 107 (5th Cir. 1928), *cert. denied*, 277 U.S. 608 (1928); (5) damages for patent infringement, *Filer & Stowell Co. v. Diamond Iron Works*, 270 F. 489 (2d Cir. 1921), *cert. denied*, 256 U.S. 691 (1921); (6) reversal of an award under the Longshoremen’s and Harbor Workers’ Compensation Act, *Crowell v. Benson*, 285 U.S. 22, 45 (1932); (7) reversal of a decision of customs appraisers on the value of imports, *Auffmordt v. Hedden*, 137 U.S. 310, 329 (1890); (8) a summary disposition by referee in bankruptcy of issues regarding voidable preferences as asserted and proved by the trustee, *Katchen v. Landy*, 382 U.S. 323 (1966); (9) a determination by a judge in calculating just compensation in a federal eminent domain proceeding of the issue as to whether the condemned lands were originally within the scope of the government’s project or were adjacent lands later added to the plan, *United States v. Reynolds*, 397 U.S. 14 (1970); and (10) fair use determinations in copyright cases, *Google v. Oracle*, No. 18-956, slip op. at 20–21 (U.S. Apr. 2021).

¹⁵ See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 389–90 (1996) (holding that patent construction is exclusively within the court’s province, taking into account, among other considerations, whether “as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question”).

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The Seventh Amendment does *not* apply to cases in admiralty and maritime jurisdiction in which the court conducts a trial without a jury.¹⁶ Nor does it reach statutory proceedings unknown to the common law, such as an application to a court of equity to enforce an administrative body's order.¹⁷ For example, Congress, under the Occupational Safety and Health Act, authorized an administrative agency to make findings of a workplace safety violation and to assess civil penalties related to such a violation. Under the statute, an employer that has been assessed a penalty may obtain judicial review of the administrative proceeding in a federal court of appeal.¹⁸ The Supreme Court, in *Atlas Roofing Co. v. Occupational Safety & Health Review Commission*, unanimously rejected the argument that the law violated the Seventh Amendment because it authorized penalties to be collected from an employer without a jury trial:

At least in cases in which public rights are being litigated—*e.g.*, cases in which the government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact—the Seventh Amendment does not prohibit Congress from assigning the factfinding function and initial adjudication to an administrative forum with which the jury would be incompatible.¹⁹

On the other hand, if Congress assigns such cases to Article III courts, a jury may be required. In *Tull v. United States*,²⁰ the Court ruled that the Seventh Amendment requires a jury to determine whether an entity is liable for civil penalties under the Clean Water Act, which authorizes the Administrator of the Environmental Protection Agency to initiate a civil action in a federal district court to enforce the Act. In the Court's view, the penal nature of the Clean Water Act's civil penalty remedy distinguishes it from restitution-based remedies available in equity courts.²¹ Consequently, it is a type of remedy that only courts of law could impose.²² However, a jury trial is not required to assess the amount of the penalty. Because the Court viewed assessment of the amount of penalty as involving neither the "substance" nor a "fundamental element" of a common-law right to trial by jury, it held permissible the Act's assignment of that task to the trial judge.

Later, the Court relied on a broadened concept of "public rights" to define the limits of congressional power to assign causes of action to tribunals in which jury trials are unavailable. As a general matter, "public rights" involve "the relationship between the government and persons subject to its authority," whereas "private rights" relate to "the liability of one individual to another."²³ In *Granfinanciera, S.A. v. Nordberg*,²⁴ the Court

¹⁶ *Parsons v. Bedford*, 28 U.S. (3 Pet.) 433 (1830); *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354 (1959). *But see* *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16 (1963).

¹⁷ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937). *See also* *ICC v. Brimson*, 154 U.S. 447, 488 (1894); *Yakus v. United States*, 321 U.S. 414, 447 (1944).

¹⁸ *See* *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 445–46 (1977).

¹⁹ *Id.* at 450.

²⁰ 481 U.S. 412 (1987).

²¹ *Id.* at 422–25.

²² The statute specified only a maximum amount for the penalty; the Court derived its "punitive" characterization from indications in the legislative history that Congress desired consideration of the need for retribution and deterrence in addition to the need for restitution. *Id.* at 422–23.

²³ *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 51 n.8 (1989) (quoting *Crowell v. Benson*, 285 U.S. 22, 50, 51 (1932)). *Granfinanciera* qualified certain statements in *Atlas Roofing* and in the process refined its definition of "public rights". There are some "public rights" cases, the Court explained, in which "the Federal Government

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held that Congress “lacks the power to strip parties contesting matters of private right of their constitutional right to a trial by jury. The Seventh Amendment test, the Court indicated, is the same as the Article III test for whether Congress may assign adjudication of a claim to a non-Article III tribunal.”²⁵ Although finding room for “some debate,” the Court determined that a bankruptcy trustee’s right to recover for a fraudulent conveyance “is more accurately characterized as a private rather than a public right,” at least when the defendant had not submitted a claim against the bankruptcy estate.²⁶ The Court further distinguished public from private rights in *SEC v. Jarkesy*²⁷: if an action is akin to an action at common law—like the SEC securities action at issue in *Jarkesy*—then the action involves private rights and is subject to Article III jurisdiction.²⁸

is not a party in its sovereign capacity,” but which involve “statutory rights that are integral parts of a public regulatory scheme.” *Id.* at 55 n.10. The Court further noted that, in cases of this nature, Congress may “dispense with juries as factfinders through its choice of an adjudicative forum.” *Id.* However, Congress may not assign “initial factfinding in all cases involving controversies entirely between private parties to administrative tribunals or other tribunals not involving juries” even “if they are established as adjuncts to Article III courts.” *Id.* (emphasis added).

²⁴ *Id.* at 33, 51–52.

²⁵ The *Granfinanciera* Court stated: “[I]f a statutory cause of action . . . is not a ‘public right’ for Article III purposes, then Congress may not assign its adjudication to a specialized non-Article III court lacking ‘the essential attributes of the judicial power.’ If the action must be tried under the auspices of an Article III court, then the Seventh Amendment affords the parties the right to a jury trial whenever the cause of action is legal in nature. Conversely, if Congress may assign the adjudication of a statutory cause of action to a non-Article III tribunal, then the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.” *Id.* at 53–54 (citation omitted). See also *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1379 (2018) (“This Court’s precedents establish that, when Congress properly assigns a matter to adjudication in a non-Article III tribunal, ‘the Seventh Amendment poses no independent bar to the adjudication of that action by a nonjury factfinder.’” (quoting *Granfinanciera*, 492 U.S. at 53–54)).

²⁶ *Granfinanciera*, 492 U.S. at 55. The Court later held, however, that a creditor who submits a claim against the bankruptcy estate subjects himself to the bankruptcy court’s equitable power, and is not entitled to a jury trial when subsequently sued by the bankruptcy trustee to recover preferential monetary transfers. *Langenkamp v. Culp*, 498 U.S. 42 (1990).

²⁷ *SEC v. Jarkesy*, No. 22-859, slip op. at 27 (U.S. June 27, 2024). The Supreme Court affirmed a Fifth Circuit decision and remanded the case for further proceedings consistent with the Court’s opinion. *Id.*

²⁸ *Id.* at 14. The Court stated: “If a suit is in the nature of an action at common law, then the matter presumptively concerns private rights, and adjudication by an Article III court is mandatory.” *Id.* By contrast, the Court explained, public rights are at issue in those cases that “historically could have been determined exclusively by [the executive and legislative] branches.” *Id.* (quoting *Stern v. Marshall*, 564 U.S. 462, 493 (2011)).

EIGHTH AMENDMENT

CRUEL AND UNUSUAL PUNISHMENT

Amdt8.4 Punishment

Amdt8.4.6 Addiction, Alcoholism, and Homelessness under the Eighth Amendment

The Cruel and Unusual Punishments Clause typically applies to a punishment rendered as a sentence for a criminal conviction. The Supreme Court has recognized violations of the Clause when a punishment is “grossly out of proportion to the severity of the crime,”¹ which may include situations in which the government punishes an individual for their “status” rather than their overt actions.² For example, in *Robinson v. California*, the Court struck down a state law that criminalized narcotic addiction as violating the Cruel and Unusual Punishments Clause.³ Though the Court observed that the punishment imposed by the law—90 days’ imprisonment—was “not, in the abstract . . . either cruel or unusual,” the Court held that imposing such a punishment on an individual based on their status as one addicted to narcotics, rather than any overt act, would violate the Eighth Amendment.⁴

In *Powell v. Texas*, however, the Court held that a law criminalizing public drunkenness did not run afoul of the Court’s holding in *Robinson* when enforced against an individual with chronic alcoholism.⁵ Observing that the individual was convicted “not for being a chronic alcoholic, but for being in public while drunk on a particular occasion,” the Court did not find sufficient evidence in the record or “the current state of medical knowledge to conclude that individuals suffering from chronic alcoholism would be utterly unable” to avoid being publicly intoxicated.⁶

The Court further addressed the applicability of the Eighth Amendment in *City of Grants Pass v. Johnson*, where it held that city ordinances that impose fines, bans from public property, or prosecutions for criminal trespass on individuals who camp in public parks was not cruel and unusual punishment under the Eighth Amendment.⁷ The Court explained that the Eighth Amendment addresses the type of punishment that the government can impose on convicted criminals, not whether the government can criminalize certain activities.⁸ The Court then considered the nature of the ordinances’ punishments. The Court further held that, because they were not intended to inflict “terror, pain, or disgrace,” they were not cruel⁹ and, because “large numbers of cities and States across the country have long employed, and today employ, similar punishments for similar offenses,” they were not unusual.¹⁰ Examining whether the ordinances were

¹ *Gregg v. Georgia*, 428 U.S. 153, 174 (1976). See generally Amdt8.4.2 Evolving or Fixed Standard of Cruel and Unusual Punishment.

² *Robinson v. California*, 370 U.S. 660, 667 (1962).

³ *Id.*

⁴ *Id.*

⁵ 392 U.S. 514, 532 (1968) (plurality opinion). Justice White concurred in the result but only because the record did not show that the defendant was unable to stay out of public. *Id.* at 553–54 (White, J., concurring). Justice White and four dissenting Justices appeared willing to hold that if addiction as a status may not be punished, then neither can the yielding to the compulsion of that addiction. *Id.* at 548; *id.* at 554, 567 (Fortas, J., dissenting).

⁶ *Id.* at 532, 534–35 (plurality opinion).

⁷ *City of Grants Pass v. Johnson*, No. 23-175, slip op. at 35 (U.S. June 28, 2024).

⁸ *Id.* at 15.

⁹ *Id.* at 17.

¹⁰ *Id.*

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inconsistent with *Robinson*, the Court held that *Robinson* was inapplicable because the ordinances did not target a status.¹¹ Rather, they barred all people from public camping, including vacationers and protesters as well as the homeless.¹² As such, the ordinances criminalized conduct—camping on public property—not the status of homelessness.¹³ The Court noted that, in *Powell v. Texas*, it had declined to extend *Robinson* to activities that result from allegedly involuntary conduct¹⁴ and instead had distinguished being convicted for alcoholism (status) with being convicted for being drunk in public (conduct).¹⁵

¹¹ *Id.* at 20.

¹² *Id.* at 17-21.

¹³ *Id.* at 21.

¹⁴ *Id.* at 22-23 (citing *Powell*, 392 U.S. at 532).

¹⁵ *Id.* at 23.

TENTH AMENDMENT

RIGHTS RESERVED TO THE STATES AND THE PEOPLE

Amdt10.4 Modern Doctrine

Amdt10.4.2 Anti-Commandeering Doctrine

In *Garcia v. San Antonio Metropolitan Transit Authority*,¹ the Supreme Court adopted a narrow conception of states' reserved powers under the Tenth Amendment. Following *Garcia*, the Court adopted a "clear statement" rule requiring an unambiguous statement of congressional intent to displace state authority, a rule first articulated in *Gregory v. Ashcroft*.² After noting the serious constitutional issues that would be raised by interpreting the Age Discrimination in Employment Act to apply to appointed state judges, *Gregory* explained that, because *Garcia* "constrained" consideration of "the limits that the state-federal balance places on Congress's powers," a plain statement rule was all the more necessary.³ The Court stated: "[I]nasmuch as this Court in *Garcia* has left primarily to the political process the protection of the States against intrusive exercises of Congress's Commerce Clause powers, we must be absolutely certain that Congress intended such an exercise."⁴

The Court's 1992 decision in *New York v. United States*⁵ signaled a continuing retreat from the narrow conception of state power adopted in *Garcia* and the genesis of the Supreme Court's "anti-commandeering" doctrine. The *New York* holding that Congress may not "commandeer" state regulatory processes by ordering states to enact or administer a federal regulatory program limited congressional power previously recognized in dictum.⁶

Language in *New York* seems more reminiscent of *National League of Cities v. Usery*⁷ than of the Court's later *Garcia* decision. First, Justice Sandra Day O'Connor's opinion declared that it makes no difference whether federalism constraints derive from the Tenth Amendment, or instead from a lack of power delegated to Congress under Article I: "the Tenth Amendment . . . directs us to determine . . . whether an incident of state sovereignty is protected by a limitation on an Article I power."⁸ Second, the Court, without reference to *Garcia*, thoroughly repudiated *Garcia*'s "structural" approach requiring states to look primarily to the political processes for protection. In rejecting arguments that New York's sovereignty could not have been infringed because its

¹ 469 U.S. 528 (1985).

² 501 U.S. 452 (1991).

³ The Court left no doubt that it considered the constitutional issue to be serious: "[T]he authority of the people of the States to determine the qualifications of their most important government officials . . . is an authority that lies at 'the heart of representative government' [and] is a power reserved to the States under the Tenth Amendment and guaranteed them by [the Guarantee Clause]." *Id.* at 463. In the latter context, the Court's opinion by Justice Sandra Day O'Connor cited Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988) and Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987) (also cited by the Court); and Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985).

⁴ 501 U.S. at 464.

⁵ 505 U.S. 144 (1992).

⁶ See, e.g., *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 288 (1981); *FERC v. Mississippi*, 456 U.S. 742, 765 (1982); *South Carolina v. Baker*, 485 U.S. 505, 513–15 (1988).

⁷ 426 U.S. 833 (1976).

⁸ 505 U.S. at 157. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . ." *Id.* at 156 (quoted with approval in *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 22 (2007) (holding a national bank's state-chartered subsidiary real estate lending business is subject to federal, not state, law)).

representatives participated in developing the compromise legislation and consented to its enactment, the Court declared: “The Constitution does not protect the sovereignty of States for the benefit of the States or State governments, [but instead] for the protection of individuals.” Consequently, the Court reasoned, “State officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution.”⁹ The Court thus appeared to contemplate relaxation of *Garcia*’s obstacles to federalism-based challenges.

Extending the principle applied in *New York*, the Court in *Printz v. United States*¹⁰ held that Congress may not “circumvent” the prohibition on commandeering a state’s regulatory processes “by conscripting the State’s officers directly.”¹¹ *Printz* struck down interim provisions of the Brady Handgun Violence Protection Act that required state and local law enforcement officers to conduct background checks on prospective handgun purchasers. In *Printz*, the Court noted:

The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.¹²

In *Reno v. Condon*,¹³ the Court distinguished *New York* and *Printz* in upholding the Driver’s Privacy Protection Act of 1994 (DPPA), a federal law that restricted the disclosure and resale of personal information contained in the records of state motor vehicles departments. The Court returned to a principle articulated in *South Carolina v. Baker* that distinguished between laws that improperly seek to control the manner in which states regulate private parties, and those that merely regulate state activities directly.¹⁴

In *Condon*, the Court found that the DPPA did “not require the States in their sovereign capacities to regulate their own citizens,” but rather “regulate[d] the States as the owners of databases.”¹⁵ The Court saw no need to decide whether a federal law may regulate the states exclusively, because the DPPA was a law of general applicability that regulated private resellers of information as well as states.¹⁶

The Supreme Court’s anti-commandeering cases have recognized parallels—as well as distinctions—between commandeering state legislatures and requiring states to implement policies as a condition of federal funding.¹⁷ In both *New York* and *Printz*, the Court observed that Congress may attach conditions to federal funds disbursed under its

⁹ 505 U.S. at 181, 182.

¹⁰ 521 U.S. 898 (1997).

¹¹ *Id.* at 935.

¹² *Id.*

¹³ 528 U.S. 141 (2000).

¹⁴ 485 U.S. 505, 514–15 (1988).

¹⁵ *Condon*, 528 U.S. at 151.

¹⁶ *Id.*

¹⁷ See ArtI.S8.C1.2.1 Overview of Spending Clause.

Spending Clause power and thereby avoid anti-commandeering problems.¹⁸ The Court's decision in *National Federation of Independent Business v. Sebelius* (*NFIB*) explored the limits of this power, holding that a federal spending condition unconstitutionally "coerced" state legislatures to adopt a federal regulatory program.¹⁹

In *NFIB*, which involved constitutional challenges to the Patient Protection and Affordable Care Act (ACA),²⁰ several states challenged a provision that would have terminated a state's Medicaid funding if the state failed to expand Medicaid coverage as directed by the Act.²¹ The Court held that the ACA's Medicaid expansion was an unconstitutional exercise of Congress's spending power.²² Though his opinion analyzed the ACA's Medicaid expansion under the Spending Clause, Chief Justice John Roberts made repeated reference to the commandeering issues raised in *New York* and *Printz*.²³ While those two decisions both recognized the government's power to attach conditions to funds, Chief Justice Roberts averred that the distinction between permissible conditions and impermissible commandeering collapses "when the state has no choice" in whether to accept the conditions.²⁴ The states argued—and the Court agreed—that the Medicaid expansion's condition on noncompliance did not offer the states a true choice and was therefore akin to the types of coercion forbidden in *New York* and *Printz*.²⁵

NFIB was not the first Supreme Court case to scrutinize federal spending conditions,²⁶ but the case was the only instance in which the Supreme Court has invalidated an exercise of Congress's Spending Clause power. Several factors played a role in Chief Justice Roberts's analysis. First, as both the Chief Justice and the dissenters observed, states faced losing a substantial part of their budgets.²⁷ Second, the Chief Justice concluded that the ACA's Medicaid expansion represented "a shift in kind, not merely degree" that states could not have anticipated when they agreed to participate in Medicaid initially, despite Congress's express reservation of the "right to alter, amend, or repeal"²⁸ any aspect of Medicaid.²⁹

Though *NFIB* explored the limits of Congress's power under the Spending Clause, the decision may be relevant to the development of anti-commandeering doctrine because it identifies a potential limit on what *New York* and *Printz* recognized as a constitutional

¹⁸ *New York v. United States*, 505 U.S. 144, 167 (1992); *Printz v. United States*, 521 U.S. 898, 917 (1997).

¹⁹ 567 U.S. 519, 580 (2012) (plurality opinion of Roberts, C.J.).

²⁰ Pub. L. No. 111–148, 124 Stat. 119 (2010).

²¹ See 46 U.S.C. §§ 1396a (setting forth Medicaid requirements), 1396c (permitting the Secretary of the Department of Health and Human Services to withhold Medicaid payments).

²² *NFIB*, 567 U.S. at 580 (plurality opinion). Chief Justice Roberts's opinion with respect to the Medicaid expansion was joined by only three members of the Court, though four other Justices agreed that the ACA's Medicaid expansion was unconstitutionally coercive. See *id.* at 681 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

²³ *Id.* at 577 (plurality opinion of Roberts, C.J.).

²⁴ *Id.* at 578.

²⁵ *Id.* at 579–80.

²⁶ See, e.g., *South Dakota v. Dole*, 483 U.S. 203 (1987); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981).

²⁷ *NFIB*, 567 U.S. at 581–82 (plurality opinion of Roberts, C.J.); *id.* at 682 (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting).

²⁸ 42 U.S.C. § 1304.

²⁹ *NFIB*, 567 U.S. at 583 (plurality opinion of Roberts, C.J.).

alternative to commandeering.³⁰ Reframing an otherwise impermissible act of commandeering as a spending condition may be subject to challenge as unconstitutionally coercive, following the reasoning of Chief Justice Roberts and the four dissenting Justices.

The Supreme Court's most recent consideration of the anti-commandeering principle occurred in 2018 in *Murphy v. NCAA*.³¹ In *Murphy*, Justice Samuel Alito, writing on behalf of the Court, invalidated on anti-commandeering grounds a provision in the Professional and Amateur Sports Protection Act (PASPA) that prohibited states from authorizing sports gambling schemes.³² Noting the rule from *New York* and *Printz* that Congress lacks "the power to issue orders directly to the States,"³³ the Court concluded that PASPA's prohibition of state authorization of sports gambling violated the anti-commandeering rule by putting state legislatures under the "direct control of Congress."³⁴ In so concluding, Justice Alito rejected the argument that the anti-commandeering doctrine only applies to "affirmative" congressional commands, as opposed to when Congress prohibits certain state action.³⁵ Finding the distinction between affirmative requirements and prohibitions "empty," the Court held that both types of commands equally intrude on state sovereign interests.³⁶

In holding that Congress cannot command a state legislature to refrain from enacting a law, the *Murphy* Court reconciled its holding with two related doctrines.³⁷ First, the Court noted that while cases like *Garcia*, *Baker*, and *Condon* establish that the anti-commandeering doctrine "does not apply when Congress evenhandedly regulates activity in which both States and private actors engage,"³⁸ PASPA's anti-authorization provision was, in contrast, solely directed at the activities of state legislatures.³⁹ Second, the Court rejected the argument that PASPA constituted a "valid preemption provision" under the Supremacy Clause.⁴⁰ While acknowledging that the "language used by Congress and this Court" with respect to preemption is sometimes imprecise,⁴¹ Justice Alito viewed "every form of preemption" to be based on a federal law that regulates the conduct of private actors—either by directly regulating private entities or by conferring

³⁰ *New York v. United States*, 505 U.S. 144, 167 (1992); *Printz v. United States*, 521 U.S. 898, 917 (1997).

³¹ *Murphy v. NCAA*, No. 16-476, slip op. at 17–24 (U.S. May 14, 2018).

³² See Pub. L. No. 102-559, § 2(a), 106 Stat. 4227, 4228 (1992) (codified at 28 U.S.C. § 3702).

³³ See *Murphy*, No. 16-476, slip op. at 17–18. *Murphy* offered three justifications for the anti-commandeering rule: (1) to protect liberty by ensuring a "healthy balance of power" between the states and the federal government; (2) to promote political accountability by the United States avoiding the blurring of which government is to credit or blame for a particular policy; (3) to prevent Congress from shifting the costs of regulation to the states. *Id.* at 17–18.

³⁴ *Id.* at 18.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 17–18.

³⁸ *Id.* at 18.

³⁹ *Id.* at 18–19. The Court also distinguished two other cases, *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and *FERC v. Mississippi*, 456 U.S. 742 (1982), in which the Court rejected anti-commandeering challenges to federal statutes. See *Murphy*, No. 16-476, slip op. at 17–19.

⁴⁰ See *Murphy*, No. 16-476, slip op. *Murphy* identified two requirements for a preemption provision to be deemed valid: (1) the provision must represent an exercise of power conferred on Congress by the Constitution; (2) the provision must regulate private actors and not the states. *Id.*

⁴¹ *Id.* at 1480–81.

a federal right to be free from state regulation.⁴² In contrast, PASPA's anti-authorization provision did "not confer any federal rights on private actors interested in conducting sports gambling operations" or "impose any federal restrictions on private actors."⁴³ As a result, the *Murphy Court* viewed the challenged provision to be a direct command to the states in violation of the anti-commandeering rule.⁴⁴

On June 15, 2023, the Supreme Court issued a decision in *Haaland v. Brackeen*,⁴⁵ a case challenging the constitutionality of the Indian Child Welfare Act (ICWA). ICWA regulates state court child custody proceedings that involve Indian children by establishing a preference for placing Indian children with Indian families or institutions instead of unrelated non-Indians or non-Indian institutions.⁴⁶ The Court upheld ICWA as a valid exercise of Congress's broad power to legislate with respect to Indian tribes under the Indian Commerce Clause.⁴⁷ In reaching its decision, the Court rejected the argument that the challenged ICWA provisions "commandeered" state courts and officials to implement federal Indian policy in violation of the Tenth Amendment.⁴⁸ The Court concluded that ICWA's requirement that "any party" initiating an involuntary child custody proceeding demonstrate "active efforts" to avoid separating the Indian family did not implicate the anti-commandeering doctrine.⁴⁹ Noting that state agencies or private parties could initiate such proceedings and satisfy this requirement, the Court wrote that "[l]egislation that applies evenhandedly to state and private actors does not typically implicate the Tenth Amendment."⁵⁰ Moreover, ICWA did not commandeer state courts by mandating that they apply placement preferences in child custody proceedings because Congress can require state courts to enforce federal law.⁵¹

⁴² *Id.* at 1481.

⁴³ *Id.* (noting that if a private actor started a sports gambling operation, either with or without state authorization, PASPA's anti-authorization provision would not be violated).

⁴⁴ *Id.* The Court ultimately invalidated PASPA in its entirety, holding that other provisions of the law that regulated private conduct were inseverable from the anti-authorization provision and therefore could not exist independently from the unconstitutional provision. *See id.* at 1481–84.

⁴⁵ *Haaland v. Brackeen* No. 21-376 (U.S. June 15, 2023).

⁴⁶ *Id.* at 11–12 (citing 25 U.S.C. § 1915).

⁴⁷ *Id.* at 11–12.

⁴⁸ *Id.* at 18–29.

⁴⁹ *Id.* at 18–23.

⁵⁰ *Id.* at 20 (citations and internal quotation marks omitted).

⁵¹ *Id.* at 24. In addition, the Court held that ICWA provisions requiring state courts to maintain records of custody proceedings did not implicate the Tenth Amendment because such "adjudicative tasks" were ancillary to states courts' responsibility to enforce ICWA. *Id.* at 25–29.

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Amdt11.5 Modern Doctrine

Amdt11.5.1 General Scope of State Sovereign Immunity

In its 1890 decision, *Hans v. Louisiana*, the Supreme Court adopted Justice James Iredell's position in *Chisholm v. Georgia*, that the states, as sovereigns, were immune from suit by their citizens under long-standing principles grounded in the common law.¹ In *Hans v. Louisiana*,² a resident of Louisiana brought a suit against that state in federal court under federal question jurisdiction, alleging a violation of the Contract Clause in the state's repudiation of its obligation to pay interest on certain bonds. Admitting that the Amendment on its face prohibited only entertaining a suit against a state by citizens of another state, or citizens or subjects of a foreign state, the Court reasoned that the scope of the Eleventh Amendment was informed by the scope of Article III, Section 2, Clause 1, which provided federal courts jurisdiction over suits between a state and citizens of another state and foreign States, citizens or subjects. The court noted that the Eleventh Amendment was a result of the "shock of surprise throughout the country" at the *Chisholm* decision, which contravened long-established common law precedent that a sovereign cannot be sued absent its consent, and reflected the general consensus that the decision was wrong, and that federal jurisdiction did not extend to making defendants of unwilling states in lawsuits brought by individuals.³

In the *Hans* Court's view, the Eleventh Amendment reversed an erroneous decision and restored the proper interpretation of the Constitution. Delivering the Court's opinion, Justice Joseph Bradley stated: "The truth is, that the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States. The suability of a State without its consent was a thing unknown to the law."⁴ The Court reasoned that the Eleventh Amendment's silence on whether a citizen of a state could sue that state should not be construed as permitting such suits. Instead "the manner in which [*Chisholm*] was received by the country, the adoption of the Eleventh Amendment, the light of history and the reason of the thing,"⁵ led the Court unanimously to hold that states could not be sued by their own citizens on grounds arising under the Constitution and laws of the United States.

In line with *Hans*, the Court held, in *Ex parte New York (No. 1)*,⁶ that, absent its consent, a state was immune to suit in admiralty, the Eleventh Amendment's reference to "any suit in law or equity" notwithstanding. Writing for the Court, Justice Mahlon Pitney stated: "That a State may not be sued without its consent is a fundamental rule of jurisprudence . . . of which the Amendment is but an exemplification It is true the Amendment speaks only of suits in law or equity; but this is because the Amendment

¹ 134 U.S. 1 (1890).

² *Id.* at 11.

³ *Id.* at 13–14.

⁴ *Id.* at 15, 16.

⁵ 134 U.S. at 18. The Court acknowledged that Chief Justice John Marshall's opinion in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 382–83, 406–07, 410–12 (1821), was to the contrary, but observed that the language was unnecessary to the decision and thus dictum, "and though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion."

134 U.S. at 20.

⁶ 256 U.S. 490 (1921).

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was the outcome of a purpose to set aside the effect of the decision of this court in *Chisholm v. Georgia* from which it naturally came to pass that the language of the Amendment was particularly phrased so as to reverse the construction adopted in that case.”⁷ Just as *Hans v. Louisiana* had demonstrated the “impropriety of construing the Amendment” so as to permit federal question suits against a state, Justice Mahlon Pitney reasoned, “it seems to us equally clear that it cannot with propriety be construed to leave open a suit against a State in the admiralty jurisdiction by individuals, whether its own citizens or not.”⁸

The Court has continued to rely on *Hans*⁹ although support for it has not been universal.¹⁰ In 1996, the Court further solidified *Hans* in *Seminole Tribe of Florida v. Florida*,¹¹ holding that Congress lacks power under Article I to abrogate state immunity under the Eleventh Amendment. And, in 1999, the Court ruled in *Alden v. Maine*¹² that the broad principle of sovereign immunity reflected in the Eleventh Amendment bars suits against states in *state* courts as well as federal.

Having previously reserved the question of whether federal statutory rights could be enforced in state courts,¹³ the Court in *Alden v. Maine*¹⁴ held that states could also assert Eleventh Amendment “sovereign immunity” in their own courts. Recognizing that the application of the Eleventh Amendment, which limits only the federal courts, was a “misnomer”¹⁵ as applied to state courts, the Court nonetheless concluded that the principles of common law sovereign immunity applied absent “compelling evidence” that the states had surrendered such by ratifying the Constitution. Although this immunity is subject to the same limitations as apply in federal courts, the Court’s decision effectively limited applying significant portions of federal law to state governments.¹⁶

⁷ *Id.* at 497–98.

⁸ *Id.* at 498. See also *Florida Dep’t of State v. Treasure Salvors*, 458 U.S. 670 (1982); *Welch v. Texas Dep’t of Highways and Transp.*, 483 U.S. 468 (1987).

⁹ *E.g.*, *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 97–103 (1984) (opinion of the Court by Justice Lewis Powell); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 237–40, 243–44 n.3 (1985) (opinion of the Court by Justice Lewis Powell); *Welch v. Texas Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 472–74, 478–95 (1987) (plurality opinion of Justice Lewis Powell); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 29 (1989) (Justice Antonin Scalia concurring in part and dissenting in part); *Dellmuth v. Muth*, 491 U.S. 223, 227–32 (1989) (opinion of the Court by Justice Anthony Kennedy); *Hoffman v. Connecticut Dep’t of Income Maintenance*, 492 U.S. 96, 101 (1989) (plurality opinion of Justice Byron White); *id.* at 105 (concurring opinions of Justices Sandra Day O’Connor and Antonin Scalia); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990) (opinion of the Court by Justice Sandra Day O’Connor).

¹⁰ *E.g.*, *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985) (dissenting); *Welch v. Texas Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 496 (1987) (dissenting); *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989) (dissenting); *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 309 (1990) (concurring). Joining Justice William Brennan were Justices Thurgood Marshall, Harry Blackmun, and John Stevens. See also *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23 (1989) (Justice Stevens concurring).

¹¹ 517 U.S. 44 (1996).

¹² 527 U.S. 706 (1999).

¹³ *Employees of the Dep’t of Public Health and Welfare v. Department of Public Health and Welfare*, 411 U.S. 279, 287 (1973). 16. 527 U.S. 706 (1999).

¹⁴ 527 U.S. 706 (1999).

¹⁵ 527 U.S. at 713.

¹⁶ Note, however, that at least one subsequent decision has seemingly enhanced the applicability of federal law to the states themselves. In *PennEast Pipeline Co. v. New Jersey* (595 U.S. —), the Court held that a private company that was granted authority to exercise eminent domain by the federal government could exercise that authority to take possession of property interests owned by a state.

Both *Seminole Tribe* and *Alden* were 5-4 decisions with four dissenting Justices maintaining that *Hans* was wrongly decided.

This split continued with *Federal Maritime Commission v. South Carolina State Ports Authority*,¹⁷ which held that state sovereign immunity also applies to quasi-judicial proceedings in federal agencies. In this case, the operator of a cruise ship devoted to gambling had been denied entry to the Port of Charleston, and subsequently filed a complaint with the Federal Maritime Commission, alleging a violation of the Shipping Act of 1984.¹⁸ Justice Stephen Breyer, writing for the four dissenting Justices, emphasized the executive (as opposed to judicial) nature of such agency adjudications, noting that the ultimate enforcement of such proceedings in federal court was exercised by a federal agency (as is allowed under the doctrine of sovereign immunity). The majority, however, while admitting to a “relatively barren historical record,” presumed that when a proceeding was “unheard of” at the time of the founding of the Constitution, it could not subsequently be applied in derogation of a “State’s dignity” within our system of federalism.¹⁹

One question left unresolved by the Supreme Court is whether United States territories, such as Puerto Rico, possess sovereign immunity. In a case involving a lawsuit brought against a Puerto Rican government agency, the Supreme Court assumed without deciding that Puerto Rico possesses sovereign immunity.²⁰

Amdt11.6 Exceptions

Amdt11.6.2 Abrogation of State Sovereign Immunity

On May 11, 2023, the Supreme Court issued a decision in *Financial Oversight and Management Board for Puerto Rico v. Centro de Periodismo Investigativo, Inc.*, a case concerning whether the Puerto Rico Oversight, Management, and Economic Stability Act (PROMESA) abrogates the sovereign immunity of “an entity within the territorial government” of Puerto Rico created by the act.¹ The Court held that Congress did not make “unmistakably clear” in PROMESA’s language an intent to abrogate Puerto Rico’s sovereign immunity, as required by the Court’s precedents.² Accordingly, any sovereign immunity to which the entity might be entitled was not abrogated by PROMESA.

The Constitution grants Congress power to regulate state action by legislation. In some instances when Congress does so, it may subject states to suit by individuals to implement the legislation. The clearest example arises from the Civil War Amendments, which directly restrict state powers and expressly authorize Congress to enforce these restrictions through appropriate legislation.³ Thus, in *Fitzpatrick v. Bitzer*, the Court

¹⁷ 535 U.S. 743 (2002). Justice Breyer’s dissenting opinion describes a need for “continued dissent” from the majority’s sovereign immunity holdings. 535 U.S. at 788.

¹⁸ 46 U.S.C. §§ 40101 et seq.

¹⁹ 535 U.S. at 755, 760.

²⁰ *Fin. Oversight & Mgmt. Bd. v. Centro de Periodismo Investigativo, Inc.*, U.S. 339, 346 (2023).

¹ No. 22-96, slip op. (U.S. May 11, 2023).

² *Id.* at 8 (citing *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000)).

³ *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Hutto v. Finney*, 437 U.S. 678 (1978); *City of Rome v. United States*, 446 U.S. 156 (1980). More recent cases affirming Congress’s Section 5 powers include *Pennhurst State School*

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stated: “the Eleventh Amendment and the principle of state sovereignty which it embodies . . . are necessarily limited, by the enforcement provisions of § 5 of the Fourteenth Amendment.”⁴ The power to enforce the Civil War Amendments is substantive, however, not being limited to remedying judicially cognizable violations of the amendments, but extending as well to measures that in Congress’s judgment will promote compliance.⁵ The principal judicial brake on this power to abrogate state immunity in legislation enforcing the Civil War Amendments is the rule requiring that congressional intent to subject states to suit be clearly stated.⁶

In the 1989 case of *Pennsylvania v. Union Gas Co.*,⁷ the Court—temporarily at least—ended years of uncertainty by holding expressly that Congress acting pursuant to its Article I powers (as opposed to its Fourteenth Amendment powers) may abrogate the Eleventh Amendment immunity of the states, so long as it does so with sufficient clarity. Twenty-five years earlier the Court had stated that same principle,⁸ but only as an alternative holding, and a later case had set forth a more restrictive rule.⁹ The premises of *Union Gas* were that by consenting to ratification of the Constitution, with its Commerce Clause and other clauses empowering Congress and limiting the states, the states had implicitly authorized Congress to divest them of immunity, that the Eleventh Amendment was a restraint upon the courts and not similarly upon Congress, and that

& Hosp. v. Halderman, 465 U.S. 89, 99 (1984); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 (1985); and *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989).

⁴ *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976) (under the Fourteenth Amendment, Congress may “provide for private suits against States or state officials which are constitutionally impermissible in other contexts.”).

⁵ In *Maier v. Gagne*, 448 U.S. 122 (1980), the Court found that Congress could validly authorize imposition of attorneys’ fees on the state following settlement of a suit based on both constitutional and statutory grounds, even though settlement had prevented determination that there had been a constitutional violation. *Maine v. Thiboutot*, 448 U.S. 1 (1980), held that § 1983 suits could be premised on federal statutory as well as constitutional grounds. Other cases in which attorneys’ fees were awarded against states are *Hutto v. Finney*, 437 U.S. 678 (1978); and *New York Gaslight Club v. Carey*, 447 U.S. 54 (1980). See also *Frew v. Hawkins*, 540 U.S. 431 (2004) (upholding enforcement of consent decree).

⁶ Even prior to the tightening of the clear statement rule over the past several decades to require express legislative language (see note and accompanying text, *infra*), application of the rule curbed congressional enforcement. *Fitzpatrick v. Bitzer*, 427 U.S. 445 451–53 (1976); *Hutto v. Finney*, 437 U.S. 678, 693–98 (1978). Because of its rule of clear statement, the Court in *Quern v. Jordan*, 440 U.S. 332 (1979), held that in enacting 42 U.S.C. § 1983, Congress had not intended to include states within the term “person” for the purpose of subjecting them to suit. The question arose after *Monell v. N.Y. City Dep’t of Soc. Servs.*, 436 U.S. 658 (1978), reinterpreted “person” to include municipal corporations. Cf. *Alabama v. Pugh*, 438 U.S. 781 (1978). The Court has reserved the question of whether the Fourteenth Amendment itself, without congressional action, modifies the Eleventh Amendment to permit suits against states, *Milliken v. Bradley*, 433 U.S. 267, 290 n.23 (1977), but the result in *Milliken*, holding that the Governor could be enjoined to pay half the cost of providing compensatory education for certain schools, which would come from the state treasury, and in *Scheuer v. Rhodes*, 416 U.S. 232 (1974), permitting imposition of damages upon the governor, which would come from the state treasury, is suggestive. But see *Rabinovitch v. Nyquist*, 433 U.S. 901 (1977). The Court declined in *Ex parte Young*, 209 U.S. 123, 150 (1908), to view the Eleventh Amendment as modified by the Fourteenth.

⁷ 491 U.S. 1 (1989). The Justice William Brennan wrote the Court’s plurality opinion and was joined by the three other Justices who believed *Hans* was incorrectly decided. See *id.* at 23 (Justice Stevens concurring). Justice Byron White provided the fifth vote, *id.* at 45, 55–56 (Justice Byron White concurring), although he believed *Hans* was correctly decided and ought to be maintained although he did not believe Congress had acted with sufficient clarity in the statutes before the Court to abrogate immunity. Justice Antonin Scalia thought the statutes were express enough but that Congress simply lacked the power. *Id.* at 29. Chief Justice William Rehnquist and Justices Sandra Day O’Connor and Anthony Kennedy joined relevant portions of both opinions finding lack of power and lack of clarity.

⁸ *Parden v. Terminal Railway*, 377 U.S. 184, 190–92 (1964). See also *Employees of the Dep’t of Pub. Health and Welfare v. Department of Pub. Health and Welfare*, 411 U.S. 279, 283, 284, 285–86 (1973).

⁹ *Edelman v. Jordan*, 415 U.S. 651, 672 (1974).

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the exercises of Congress's powers under the Commerce Clause and other clauses would be incomplete without the ability to authorize damage actions against the states to enforce congressional enactments. The dissenters disputed each of these strands of the argument, and, while recognizing the Fourteenth Amendment abrogation power, took the position that no such power existed under Article I.

Pennsylvania v. Union Gas lasted less than seven years before the Court overruled it in *Seminole Tribe of Florida v. Florida*.¹⁰ Chief Justice William Rehnquist, writing for a 5-4 majority, concluded that *Union Gas* had deviated from a line of cases, tracing back to *Hans v. Louisiana*,¹¹ which viewed the Eleventh Amendment as implementing the “fundamental principle of sovereign immunity [that] limits the grant of judicial authority in Article III.”¹² Because “the Eleventh Amendment restricts the judicial power under Article III, . . . Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”¹³ Subsequent cases have upheld this interpretation.¹⁴

Section 5 of the Fourteenth Amendment, of course, is another matter. *Fitzpatrick v. Bitzer*,¹⁵ which held, in part, that the Fourteenth Amendment “operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment,” remains good law.¹⁶ This ruling led to a number of cases that examined whether a statute that might be applied against non-state actors under an Article I power could also, under section 5 of the Fourteenth Amendment, be applied against the states.¹⁷

In another line of cases, a different majority of the Court focused on language Congress used to overcome immunity rather than the authority underlying the action. Henceforth, the Court held in a 1985 decision, and even with respect to statutes that were enacted prior to promulgation of this judicial rule of construction, “Congress may

¹⁰ 517 U.S. 44 (1996) (invalidating a provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a state in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact).

¹¹ 134 U.S. 1 (1890).

¹² 517 U.S. at 64 (quoting *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 97–98 (1984)).

¹³ 517 U.S. at 72–73. Justice David Souter's dissent undertook a lengthy refutation of the majority's analysis, asserting that the Eleventh Amendment is best understood, in keeping with its express language, as barring only suits based on diversity of citizenship, and as having no application to federal question litigation. Moreover, Justice Souter contended, the state sovereign immunity that the Court mistakenly recognized in *Hans v. Louisiana* was a common law concept that “had no constitutional status and was subject to congressional abrogation.” 517 U.S. at 117. The Constitution made no provision for wholesale adoption of the common law, but, on the contrary, was premised on the view that common law rules would always be subject to legislative alteration. This “imperative of legislative control grew directly out of the Framers' revolutionary idea of popular sovereignty.” *Id.* at 160.

¹⁴ *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (the Trademark Remedy Clarification Act, an amendment to the Lanham Act, did not validly abrogate state immunity); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (amendment to patent laws abrogating state immunity from infringement suits is invalid); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000) (abrogation of state immunity in the Age Discrimination in Employment Act is invalid); *Allen v. Cooper*, 140 S. Ct. 994 (2020) (the Copyright Remedy Clarification Act of 1990 did not validly abrogate state sovereign immunity).

¹⁵ 427 U.S. 445 (1976).

¹⁶ *Seminole Tribe*, 517 U.S. at 65–66.

¹⁷ See Amdt14.S5.2 Who Congress. May Regulate.

ELEVENTH AMENDMENT—SUITS AGAINST STATES
Exceptions, Abrogation of State Sovereign Immunity

abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear *in the language of the statute itself*.”¹⁸

At one time, a plurality of the Court appeared to take the position that Congress had to refer specifically to state sovereign immunity and the Eleventh Amendment for its language to be unmistakably clear.¹⁹ Thus in 1985 the Court held in *Atascadero State Hospital v. Scanlon* that general language subjecting to suit in federal court by “any recipient of Federal assistance” under the Rehabilitation Act was insufficient to satisfy this test, not because of any question about whether states are “recipients” within the meaning of the provision but because “given their constitutional role, the states are not like any other class of recipients of federal aid.”²⁰ As a result of these rulings, Congress began to use words the Court had identified.²¹ Since then, however, the Court has accepted less precise language,²² and in at least one context, has eliminated the requirement of specific abrogation language altogether.²³

Even before the *Alden v. Maine* decision,²⁴ when the Court believed that Eleventh Amendment sovereign immunity did not apply to suits in state courts, the Court applied its rule of strict construction to require “unmistakable clarity” by Congress in order to subject states to suit.²⁵ Although the Court was willing to recognize exceptions to the clear statement rule when the issue involved subjection of states to suit in state courts, the Court also suggested the need for “symmetry” so that states’ liability or immunity would be the same in both state and federal courts.²⁶

¹⁸ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985) (emphasis added).

¹⁹ Justice Anthony Kennedy for the Court in *Dellmuth*, 491 U.S. at 231, expressly noted that the statute before the Court did not demonstrate abrogation with unmistakable clarity because, *inter alia*, it “makes no reference whatsoever to either the Eleventh Amendment or the States’ sovereign immunity.” Justice Antonin Scalia, one of four concurring Justices, expressed an “understanding” that the Court’s reasoning would allow for clearly expressed abrogation of immunity “without explicit reference to state sovereign immunity or the Eleventh Amendment.” *Id.* at 233.

²⁰ *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985). *See also* *Dellmuth v. Muth*, 491 U.S. 223 (1989).

²¹ In 1986, following *Atascadero*, Congress provided that states were not to be immune under the Eleventh Amendment from suits under several laws barring discrimination by recipients of federal financial assistance. Pub. L. No. 99-506, § 1003, 100 Stat. 1845 (1986), 42 U.S.C. § 2000d-7. Following *Dellmuth*, Congress amended the statute to insert the explicit language. Pub. L. No. 101-476, § 103, 104 Stat. 1106 (1990), 20 U.S.C. § 1403. *See also* the Copyright Remedy Clarification Act, Pub. L. 101-553, § 2, 104 Stat. 2749 (1990), 17 U.S.C. § 511 (making states and state officials liable in damages for copyright violations).

²² *Kimel v. Florida Board of Regents*, 528 U.S. 62, 74–78 (2000). In *Kimel*, statutory language authorized age discrimination suits “against any employer (including a public agency),” and a “public agency” was defined to include “the government of a State or political subdivision thereof.” The Court found this language to be sufficiently clear evidence of intent to abrogate state sovereign immunity. The relevant portion of the opinion was written by Justice Sandra Day O’Connor, and joined by Chief Justice William Rehnquist and Justices John Stevens, Antonin Scalia, David Souter, Ruth Bader Ginsburg, Stephen Breyer and John Stevens. *But see* *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002) (federal supplemental jurisdiction statute which tolls limitations period for state claims during pendency of federal case not applicable to claim dismissed on the basis of Eleventh Amendment immunity).

²³ *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006) (abrogation of state sovereign immunity under the Bankruptcy Clause was effectuated by the Constitution, so it need not additionally be done by statute); *id.* at 383 (Justice Clarence Thomas dissenting).

²⁴ 527 U.S. 706 (1999).

²⁵ *Will v. Michigan Dep’t of State Police*, 491 U.S. 58 (1989) (holding that states and state officials sued in their official capacity could not be made defendants in § 1983 actions in state courts).

²⁶ *Hilton v. South Carolina Pub. Rys. Comm’n*, 502 U.S. 197, 206 (1991) (interest in “symmetry” is outweighed by *stare decisis*, the FELA action being controlled by *Parden v. Terminal Ry.*).

THIRTEENTH AMENDMENT

ABOLITION OF SLAVERY

Amdt13.1 Overview of the Thirteenth Amendment

The Thirteenth Amendment prohibits slavery and involuntary servitude in all places subject to U.S. jurisdiction, except when imposed as punishment for a crime for which a person has been duly convicted.¹ Proposed by Congress and ratified by the states in the wake of the Civil War, the Thirteenth Amendment was the first of the three Reconstruction Amendments.² Together, these amendments aimed to safeguard the rights of newly emancipated persons and ensure that states accorded due process and equal protection of the laws to all persons.³ Unlike the other Reconstruction Amendments—the Fourteenth and Fifteenth Amendments and, indeed, the rest of the Constitution—the Thirteenth Amendment’s prohibitions apply directly to private individuals in addition to government actors.⁴

The states’ ratification of the Thirteenth Amendment abolishing slavery effectively negated two of the Constitution’s original provisions: (1) the so-called “Fugitive Slave Clause,” which granted an enslaver the right to seize and repossess an enslaved person in another state, regardless of that state’s laws;⁵ and (2) the Three-Fifths Clause, a compromise among the Founders that counted three-fifths of a state’s population of enslaved persons for the purposes of apportioning seats in the House of Representatives and levying certain types of taxes.⁶

Because the Thirteenth Amendment was self-executing, its prohibitions on slavery and involuntary servitude became effective upon ratification without the need for further government action.⁷ Nonetheless, Section 2 of the Thirteenth Amendment grants Congress the power to enforce the prohibitions in Section 1 by enacting “appropriate legislation.”⁸ The Supreme Court has long held that Congress may use its enforcement

¹ U.S. CONST. amend. XIII, § 1.

² The other two Reconstruction Amendments were the Fourteenth Amendment, which, among other things, requires states to accord due process and equal protection of the laws to all persons, and the Fifteenth Amendment, which prohibits the federal and state governments from denying or abridging the right to vote based on “race, color, or previous condition of servitude.” For more on the Fourteenth Amendment, see Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens through Amdt14.S5.4 Modern Doctrine on Enforcement Clause. For more on the Fifteenth Amendment, see Amdt15.1 Overview of Fifteenth Amendment, Right of Citizens to Vote.

³ *Supra* note 2. Congress proposed the Thirteenth Amendment in January 1865, shortly before the end of the Civil War. The states ratified the Amendment in December 1865, seven months after the war ended. See Intro6.1 Ratification of Amendments to the Constitution.

⁴ George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1370 (2008) (“The Thirteenth Amendment stands out in the Constitution as the only provision currently in effect that directly regulates private action. The Eighteenth Amendment, imposing Prohibition, applied directly to private individuals, but its repeal by the Twenty-First Amendment eliminated that instance of direct constitutional regulation of private conduct.”).

⁵ U.S. CONST. art. IV, § 2, cl. 3. See also ArtIV.S2.C3.1.1 Fugitive Slave Clause: Doctrine and Practice.

⁶ U.S. CONST. art. I, § 2, cl. 3. See also ArtI.S2.C3.1 Enumeration Clause. Subsequently, the Fourteenth Amendment explicitly repealed the Three-Fifths Clause. U.S. CONST. amend. XIV, § 2 (“Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed.”).

⁷ *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (“This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.”).

⁸ U.S. CONST. amend. XIII, § 2.

THIRTEENTH AMENDMENT—ABOLITION OF SLAVERY

Overview of the Thirteenth Amendment

power to remove or remedy burdens on individuals that constitute the “badges” or “incidents” of slavery.⁹

Questions about the scope of Congress’s Section 2 enforcement power have played a central role in the Supreme Court’s Thirteenth Amendment jurisprudence. After the Civil War, newly emancipated persons faced various forms of state-sanctioned and private discrimination. For example, some states enforced Black Codes that denied African-Americans equal rights under the law, including the rights to vote, hold property, and use public facilities.¹⁰ Some states codified the practice of peonage, enabling individuals to use the threat of force or legal action to compel African-Americans to perform services to satisfy a financial obligation.¹¹ In addition, some operators of public accommodations, such as hotels and restaurants, sought to prevent African-Americans from patronizing their businesses.¹² In response, beginning in 1866, Congress enacted civil rights legislation that sought to ensure that people of all races would have equal rights to make and enforce contracts and hold property, among other fundamental rights.¹³

Despite these legislative efforts, for more than a century after the states ratified the Thirteenth Amendment, the Supreme Court determined that Congress could not use its power to legislate against the “badges” and “incidents” of slavery to protect African-Americans from many forms of private racial discrimination or state-sanctioned segregation.¹⁴ However, the Court’s view of the scope of Congress’s enforcement power changed significantly with its 1968 decision in *Jones v. Alfred H. Mayer Co.*¹⁵ In that case, the Court adopted a more deferential approach toward Congress’s enforcement power, determining that Congress may play a significant role in determining the scope of that power through the enactment of legislation.¹⁶ Although the Court has since upheld Congress’s power to enforce the Thirteenth Amendment by enacting laws to combat some of the harms of private racial discrimination, the precise scope of Congress’s Thirteenth Amendment power remains unclear.¹⁷

The following essays examine the Thirteenth Amendment’s prohibitions on slavery and involuntary servitude beginning with an overview of the Amendment’s historical background. The essays then examine relevant Supreme Court decisions and historical practices related to the scope of the Amendment’s prohibitions and its exception for criminal punishment. The essays conclude by discussing the extent of Congress’s power to enforce the Thirteenth Amendment through the enactment of legislation

⁹ *The Civil Rights Cases*, 109 U.S. at 20.

¹⁰ See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426–37 (1968); *Bell v. Maryland*, 378 U.S. 226, 288, 303 (1964) (Goldberg, J., concurring).

¹¹ See *Peonage Cases*, 123 F. 671, 673–74 (M.D. Ala. 1903).

¹² See, e.g., *The Civil Rights Cases*, 109 U.S. at 8–10, 23.

¹³ See, e.g., Act of April 9, 1866, ch. 31, 14 Stat. 27. See also 42 U.S.C. §§ 1981–1982.

¹⁴ See Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment. See also *Plessy v. Ferguson*, 163 U.S. 537, 542–43 (1896) (upholding the constitutionality of a Louisiana law mandating racial segregation in railway cars), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

¹⁵ 392 U.S. 409 (1968).

¹⁶ *Id.* at 440.

¹⁷ See Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment.

Amdt13.2 Slavery and Civil War

During the Federal Convention of 1787, the Constitution’s Framers vigorously debated the role that slavery would play in the newly created United States.¹ Conflicts over slavery, which had been practiced in the British colonies of North America for over a century often pitted delegates from southern states that relied heavily on enslaved persons’ labor against northern states whose inhabitants increasingly opposed the practice on moral grounds.² Despite fervent disagreement over the issue of slavery at the Convention, the Constitution’s original text did not specifically refer to slavery. For example, the so-called “Fugitive Slave Clause” did not employ the term “slave” but instead granted the owner of a “person held to service or labor” the right to seize and repossess him in another state, regardless of that state’s laws.³ Moreover, the Three-Fifths Clause, a cornerstone of the Great Compromise⁴ among the Founders, counted three-fifths of “all other Persons”—a term that included enslaved persons—for the purposes of apportioning seats in the House of Representatives and levying certain types of taxes.⁵

In 1808, two decades after the Constitution’s ratification, Congress prohibited importing enslaved persons from other countries.⁶ Although northern states had already abolished (or begun to abolish) slavery within their jurisdictions,⁷ the domestic trade in enslaved persons continued to flourish in the South.

In the decades leading up to the Civil War, political tensions simmered as abolitionists and proponents of slavery argued over whether new U.S. territories would be admitted to the union as “slave” or “free” states.⁸ Initially, Congress resolved some of these disagreements. For example, in the Missouri Compromise of 1820, Congress admitted

¹ See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 364–65 (Max Farrand ed., 1911) (Madison’s notes, Aug. 21, 1787) (recording a debate over banning the importation of enslaved persons); *id.* at 369–74 (Madison’s notes, Aug. 22, 1787).

² See *id.*

³ U.S. CONST. art. IV, § 2, cl. 3. See also ArtIV.S2.C3.1 Fugitive Slave Clause.

⁴ The delegates to the Federal Convention devised the Great Compromise to address the states’ fear of an imbalance of power in Congress by providing for a bicameral legislature with proportional representation based on a state’s population for one chamber and equal state representation in the other. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 524 (Max Farrand ed., 1911). See also MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 104–07 (1913).

⁵ U.S. CONST. art. I, § 2, cl. 3. In addition, Article V, while not mentioning slavery specifically, prohibited amendments prior to 1808 that would have affected the Constitution’s limitations on Congress’s power to (1) restrict the trade in enslaved persons, or (2) levy certain taxes on land or enslaved persons. *Id.* art. V. See also *id.* art. I, § 9, cls. 1, 4.

⁶ Act of March 2, 1807, ch. 22, 2 Stat. 426.

⁷ See George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1373 & n.23 (2008).

⁸ The 1787 ordinance that the Confederation Congress enacted to govern the newly acquired Northwest Territory prohibited slavery and involuntary servitude, except as punishment for a crime. *An ordinance for the government of the territory of the United States, North-west of the river Ohio*, LIBR. OF CONG., <https://www.loc.gov/resource/bdsdcc.22501/?st=gallery>. The Northwest Ordinance, however, allowed for the “reclaiming” of enslaved persons that escaped into the territory. See *id.* The Ordinance established the Ohio River as the boundary between newly admitted, northern territories that forbade slavery and southern territories that permitted slavery. *Id.*

THIRTEENTH AMENDMENT—ABOLITION OF SLAVERY

Slavery and Civil War

Maine as a “free” state and Missouri as a “slave” state.⁹ In addition, Congress sought to achieve additional understandings on the issue of slavery in the five Acts that made up the Compromise of 1850.¹⁰ Despite these early efforts, compromises on the issue of slavery began to unravel during the 1850s. The Kansas-Nebraska Act of 1854 repealed the Missouri Compromise, allowing each territory’s population to decide whether to permit slavery.¹¹ This led to an outbreak of violence between abolitionists and proponents of slavery in Kansas.¹² The Supreme Court’s 1857 decision in *Dred Scott v. Sandford* exacerbated tensions by declaring the Missouri Compromise to have been an unconstitutional deprivation of enslavers’ property.¹³ Disagreements over slavery and President Abraham Lincoln’s election to the presidency were the primary causes of the Civil War, which erupted when the Confederate army fired on Fort Sumter on April 12, 1861.¹⁴

After almost two years of war, President Lincoln issued the “Emancipation Proclamation” by exercising his executive war powers.¹⁵ The Proclamation declared that, as of January 1, 1863, “all persons held as slaves within any State or designated part of a State, the people whereof shall then be in rebellion against the United States, shall be then, thenceforward, and forever free.”¹⁶ The Proclamation did not apply to enslaved that resided in “loyal” states that had not seceded from the Union.¹⁷ Nor did it apply to enslaved persons in portions of southern states under Union control.¹⁸ However, it applied to enslaved persons in most of the rest of the core Confederate states’ territory.¹⁹

⁹ *Missouri Compromise: Primary Documents in American History*, LIBR. OF CONG., <https://guides.loc.gov/missouri-compromise>. The compromise also limited the geographic expansion of slavery westward into newly acquired territories. *Id.*

¹⁰ *Compromise of 1850: Primary Documents in American History*, LIBR. OF CONG., <https://guides.loc.gov/compromise-1850>. The compromise strengthened federal judicial officials’ obligations to capture and return fugitive enslaved persons; abolished the trade in enslaved persons in Washington, D.C.; admitted California as a “free” state; and allowed New Mexico and Utah to decide whether to join the United States as “free” states or “slave” states. *Id.*

¹¹ *Kansas-Nebraska Act: Primary Documents in American History*, LIBR. OF CONG., <https://guides.loc.gov/kansas-nebraska-act>.

¹² *Id.*

¹³ 60 U.S. (19 How.) 393, 451–52 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

¹⁴ *Battle of Fort Sumter, April 1861*, NAT’L PARK SERV., <https://www.nps.gov/articles/battle-of-fort-sumter-april-1861.htm>.

¹⁵ *The Emancipation Proclamation*, NAT’L ARCHIVES, <https://www.archives.gov/exhibits/featured-documents/emancipation-proclamation>. On September 22, 1862, President Lincoln issued the preliminary Emancipation Proclamation, which announced his intention to issue the Emancipation Proclamation on January 1, 1863. See *Preliminary Emancipation Proclamation*, NAT’L ARCHIVES, https://www.archives.gov/exhibits/american originals_iv/sections/preliminary_emancipation_proclamation.html. Although President Lincoln issued the Proclamation in 1863, some enslaved persons in the South did not attain freedom until much later. For example, enslaved persons in Texas attained freedom when Major General Gordon Granger and Union troops arrived in Galveston, Texas on June 19, 1865. *Juneteenth*, LIB. OF CONG., <https://www.loc.gov/loc/lcib/9908/juneteenth.html>.

¹⁶ See sources cited *supra* note 15. In 1861 and 1862, Congress enacted legislation known as the “Confiscation Acts” that freed enslaved persons that came within Union lines and had been under Confederate masters, but this legislation was ineffective. President Lincoln was initially reluctant to enforce these laws strictly because of concerns that it would cause border states to secede from the Union. See CONG. GLOBE, 38th Cong., 1st Sess. 1313 (1864); Paul Finkelman, *Lincoln, Emancipation, and the Limits of Constitutional Change*, 2008 SUP. CT. REV. 349, 367–70 (2008). Congress abolished slavery in the District of Columbia in 1862 via the District of Columbia Compensated Emancipation Act. Act of Apr. 16, 1862, ch. 54, 12 Stat. 376. Congress abolished slavery in the territories in the Abolition of Slavery Act (Territories), ch. 111, 12 Stat. 432 (1862).

¹⁷ Sources cited *supra* notes 15–16.

¹⁸ *Id.*

¹⁹ *Id.*

THIRTEENTH AMENDMENT—ABOLITION OF SLAVERY
Prohibition on Slavery and Involuntary Servitude, Prohibition Clause

As the nation approached the end of the Civil War, questions arose about the legal authority for the Emancipation Proclamation; Congress's power to ban slavery by enacting legislation; and the future status of slaves and freedmen throughout the United States.²⁰ These questions played a prominent role in debates over Congress's consideration of the joint resolution that would become the Thirteenth Amendment.²¹

Amdt13.4 Ratification of Thirteenth Amendment

Congress submitted the Thirteenth Amendment to the states for their consideration only a few months before the end of the Civil War.¹ On April 14, 1865, President Abraham Lincoln, one of the Amendment's foremost proponents, was assassinated.² Vice President Andrew Johnson succeeded to the presidency and successfully pressured several southern states to ratify the Thirteenth Amendment as a condition of rejoining the Union.³ Secretary of State William Seward proclaimed the states' ratification of the Thirteenth Amendment on December 18, 1865.⁴

Although the Thirteenth Amendment abolished slavery, state governments and private individuals continued to discriminate against African-Americans and deny them equal rights under the law.⁵ Concerns that the Thirteenth Amendment did not sufficiently protect African-Americans from various forms of discrimination led the Reconstruction-era Congress to enact civil rights legislation and propose the language that became the Fourteenth and Fifteenth Amendments to the Constitution.⁶

Amdt13.S1 Prohibition on Slavery and Involuntary Servitude

Amdt13.S1.1 Prohibition Clause

Section 1 of the Thirteenth Amendment prohibits slavery and involuntary servitude in all places subject to U.S. jurisdiction.¹ Since the states ratified the Amendment in 1865, the Supreme Court has decided cases interpreting the Prohibition Clause and applying

²⁰ See CONG. GLOBE, 38th Cong., 1st Sess. 1313–14 (1864).

²¹ See, e.g., *id.*

¹ *A Resolution Submitting to the Legislatures of the Several States a Proposition to Amend the Constitution of the United States*, <https://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=013/llsl013.db&recNum=596>.

² Rebecca E. Zietlow, *James Ashley, the Great Strategist of the Thirteenth Amendment*, 15 GEO. J. L. & PUB. POL'Y 265, 301 (2017).

³ Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 503–04 (1989).

⁴ Proclamation No. 52, 13 Stat. 774, 775 (1865) (proclamation by Secretary of State William H. Seward of December 18, 1865). The Amendment attained the threshold for ratification and entry into force on December 6, 1865. Although slavery had already been abolished in most U.S. jurisdictions by the time of ratification, the Thirteenth Amendment freed some enslaved persons in Delaware and Kentucky. Eric Foner, *Abraham Lincoln, the Thirteenth Amendment, and the Problem of Freedom*, 15 GEO. J.L. & PUB. POL'Y 59, 62 (2017).

⁵ See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426–37 (1968); *Bell v. Maryland*, 378 U.S. 226, 288, 303 (1964) (Goldberg, J., concurring); *The Civil Rights Cases*, 109 U.S. 3, 8–10, 23 (1883); *Peonage Cases*, 123 F. 671, 673–74 (M.D. Ala. 1903).

⁶ See, e.g., Act of April 9, 1866, ch. 31, 14 Stat. 27. The Fourteenth Amendment was enacted, in part, because of concerns about the civil rights of African-Americans after the Civil War. See *Bell*, 378 U.S. at 293 (Goldberg, J., concurring) (“A review of the relevant congressional debates reveals that the concept of civil rights which lay at the heart both of the contemporary legislative proposals and of the Fourteenth Amendment encompassed the right to equal treatment in public places—a right explicitly recognized to be a ‘civil’ rather than a ‘social’ right.”). See also Amdt14 Equal Protection and Other Rights; Amdt15 Rights of Citizens to Vote.

¹ U.S. CONST. amend. XIII, § 1. The Thirteenth Amendment prohibits the enslavement of all races of people. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 72 (1872).

it to various forms of government or private action. In particular, the Court has examined: (1) whether particular burdens imposed on individuals constitute prohibited “badges” or “incidents” of slavery;² and (2) the meaning of “involuntary servitude.”³

Amdt13.S2 Enforcement

Amdt13.S2.1 Overview of the Enforcement Clause of the Thirteenth Amendment

Because the Thirteenth Amendment is self-executing, its prohibitions on slavery and involuntary servitude became effective upon ratification without the need for further government action.¹ Nonetheless, Section 2 of the Amendment grants Congress the power to enforce the Amendment’s prohibitions by enacting “appropriate legislation.”² Congress may use its enforcement power to address specific circumstances and provide remedies for violations of the Thirteenth Amendment’s prohibitions.³ Because the Thirteenth Amendment’s Prohibitions Clause extends to private conduct as well as government action, the Supreme Court has long held that Congress may enforce the Amendment through legislation that directly regulates private individuals’ activities.⁴

After the Civil War, newly emancipated persons faced various forms of state-sanctioned and private discrimination. For example, some states enforced Black Codes that denied African-Americans equal rights under the law, including the rights to vote, hold property, and use public facilities.⁵ Some states codified the practice of peonage, enabling individuals to use the threat of force or legal action to compel African-Americans to perform services to satisfy a financial obligation.⁶ In addition, some operators of public accommodations, such as hotels and restaurants, sought to prevent African-Americans from patronizing their businesses.⁷ In response, beginning in 1866, Congress enacted civil rights legislation that sought to ensure that people of all races would have equal rights to make and enforce contracts and hold property, among other fundamental rights.⁸ In various cases, individuals challenged the constitutionality of these laws, arguing that Congress’s Thirteenth Amendment enforcement power did not authorize it to enact such laws.

² See, e.g., *The Civil Rights Cases*, 109 U.S. 3, 20–22 (1883). In a pair of cases decided shortly after ratification of the Thirteenth Amendment, the Supreme Court concluded that, although the Amendment freed slaves from bondage, it did not annul contracts that private parties had entered into for the sale of slaves before ratification. *Boyce v. Tabb*, 85 U.S. (18 Wall.) 546, 548 (1873); *Osborn v. Nicholson*, 80 U.S. (13 Wall.) 654, 662–63 (1872).

³ See, e.g., *Clyatt v. United States*, 197 U.S. 207, 215 (1905).

¹ *The Civil Rights Cases*, 109 U.S. 3, 20 (1883) (“This amendment, as well as the Fourteenth, is undoubtedly self-executing without any ancillary legislation, so far as its terms are applicable to any existing state of circumstances.”).

² U.S. CONST. amend. XIII, § 2.

³ *The Civil Rights Cases*, 109 U.S. at 20. The Fourteenth and Fifteenth Amendments contain similar enforcement language. For more information on Congress’s power to enforce the Fourteenth Amendment, see Amdt14.S5.2 Who Congress May Regulate. For more information on Congress’s power to enforce the Fifteenth Amendment, see Amdt15.S2 Enforcement.

⁴ *Clyatt v. United States*, 197 U.S. 207, 217 (1905) (citing *The Civil Rights Cases*, 109 U.S. at 20, 23).

⁵ See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 426–37 (1968); *Bell v. Maryland*, 378 U.S. 226, 288, 303 (1964) (Goldberg, J., concurring).

⁶ See *Peonage Cases*, 123 F. 671, 673–74 (M.D. Ala. 1903).

⁷ See, e.g., *The Civil Rights Cases*, 109 U.S. at 8–10, 23.

⁸ See, e.g., Act of April 9, 1866, ch. 31, 14 Stat. 27. See also 42 U.S.C. §§ 1981–1982.

THIRTEENTH AMENDMENT—ABOLITION OF SLAVERY
Enforcement, Overview of the Enforcement Clause of the Thirteenth Amendment

For more than a century after the states ratified the Thirteenth Amendment, the Supreme Court determined that Congress's power to legislate against the "badges" and "incidents" of slavery did not authorize it to enact legislation that broadly sought to protect African-Americans from private racial discrimination.⁹ However, the Court's views on Congress's enforcement power changed significantly with its 1968 decision in *Jones v. Alfred H. Mayer Co.*¹⁰ In that case, the Court adopted a more deferential approach toward Congress's enforcement power, determining that Congress may play a significant role in determining the scope of its power through the enactment of legislation.¹¹ Although the Court has since upheld Congress's power to enforce the Thirteenth Amendment by enacting laws to combat some forms of private racial discrimination, Congress's power to combat harms beyond racial discrimination is less clear.¹²

⁹ See Amdt13.S2.2 Early Doctrine on Enforcement Clause of Thirteenth Amendment.

¹⁰ 392 U.S. 409 (1968).

¹¹ *Id.* at 440.

¹² See Amdt13.S2.3 Scope of Enforcement Clause of Thirteenth Amendment.

FOURTEENTH AMENDMENT

EQUAL PROTECTION AND OTHER RIGHTS

Amdt14.S1 Rights

Amdt14.S1.5 Procedural Due Process

Amdt14.S1.5.4 Civil Cases

Amdt14.S1.5.4.4 Opportunity for Meaningful Hearing

As a general matter, procedural due process requires an opportunity for a meaningful hearing to review a deprivation of a protected interest.¹ The Supreme Court has held that “some form of hearing is required before an individual is finally deprived of a property [or liberty] interest.”² This right is a “basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment.”³ Thus, the notice of hearing and the opportunity to be heard must be granted at a meaningful time and in a meaningful manner.⁴ However, the type of hearing required, and when the hearing must occur, depend on the specific circumstances at issue.

The Court has held that it is a violation of due process for a state to enforce a judgment against a party to a proceeding without having given him an opportunity to be heard sometime before final judgment is entered.⁵ However, due process does not necessarily require affording a party the opportunity to present every available defense before entry of judgment. A person may be remitted to other actions initiated by him,⁶ or an appeal may suffice. Accordingly, in one case the Court held that a company objecting to the entry of a judgment against it without notice and an opportunity to be heard on the issue of liability was not denied due process where the state provided the opportunity for a hearing on appeal from the judgment.⁷ Nor could the company show a denial of due process based on the fact that it lost the opportunity for a hearing by inadvertently pursuing the wrong procedure in the state courts.⁸ On the other hand, where a state appellate court reversed a trial court and entered a final judgment for the defendant, the Supreme Court held that the plaintiff was denied due process because he did not have an opportunity to introduce evidence in rebuttal to testimony that the trial court deemed immaterial but the appellate court considered material.⁹

In interpreting the analogous Due Process clause of the Fifth Amendment, the Court has held that due process does not require a trial-type hearing in every conceivable case of governmental impairment of private interest. For instance, the Court held that the

¹ *E.g.*, *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

² *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). Parties whose rights are to be affected are entitled to be heard. *Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1863).

³ *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972). *See Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 170–71 (1951) (Frankfurter, J., concurring).

⁴ *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

⁵ *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 476 (1918); *Baker v. Baker, Eccles & Co.*, 242 U.S. 394, 403 (1917); *Louisville & Nashville R.R. v. Schmidt*, 177 U.S. 230, 236 (1900).

⁶ *Lindsey v. Normet*, 405 U.S. 56, 65–69 (1972). However, if a person would suffer too severe an injury “between the doing and the undoing,” he may avoid the alternative means. *Stanley v. Illinois*, 405 U.S. 645, 647 (1972).

⁷ *Am. Surety Co. v. Baldwin*, 287 U.S. 156 (1932).

⁸ *Id. Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429–30, 432–33 (1982).

⁹ *Saunders v. Shaw*, 244 U.S. 317 (1917).

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summary exclusion on security grounds of a concessionaire's cook at the Naval Gun Factory, without hearing or advice as to the basis for the exclusion, did not violate due process.¹⁰ In *Hannah v. Larche*, the Court upheld rules of procedure adopted by the Civil Rights Commission, under which state electoral officials and others accused of discrimination were not apprised of the identity of their accusers or accorded a right to confront and cross-examine witnesses or accusers testifying at such hearings.¹¹ In upholding the procedures, the Court opined that the Commission acts solely as an investigative and fact-finding agency and makes no adjudications. It further noted that additional procedural protections have not been granted by grand juries, congressional committees, or administrative agencies conducting purely fact-finding investigations that do not determine private rights.

With respect to actions taken by administrative agencies, the Court has held that the demands of due process do not require a hearing at the initial stage, or at any particular point in the proceeding, so long as a hearing is held before a final order becomes effective.¹² In *Bowles v. Willingham*, the Court sustained orders fixing maximum rents

¹⁰ *Cafeteria & Rest. Workers v. McElroy*, 367 U.S. 886 (1961). In so holding, the Court considered the historical power of a commanding officer summarily to exclude civilians from the area of his command and applicable Navy regulations that confirm that authority, together with a stipulation in the contract between the restaurant concessionaire and the Naval Gun Factory forbidding employment on the premises of any person not meeting security requirements.

Manifesting a disposition to adjudicate on non-constitutional grounds employee dismissals under the Federal Loyalty Program, in *Peters v. Hobby*, 349 U.S. 331 (1955), the Court invalidated, as in excess of delegated authority, a Loyalty Review Board's finding of reasonable doubt as to the petitioner's loyalty that reopened his case on its own initiative after it had twice cleared him.

In *Cole v. Young*, 351 U.S. 536 (1956), also decided on the basis of statutory interpretation, the Court intimated that grave due process issues would be raised by applying to federal employees, not occupying sensitive positions, a measure which authorized, in the interest of national security, summary suspensions and unreviewable dismissals of allegedly disloyal employees by agency heads. In *Service v. Dulles*, 354 U.S. 363 (1957), and *Vitarelli v. Seaton*, 359 U.S. 535 (1959), the Court nullified dismissals for security reasons by invoking an established administrative law rule that an administrator must comply with procedures outlined in applicable agency regulations, notwithstanding that such regulations conform to more rigorous substantive and procedural standards than Congress required or that the agency action is discretionary. In both of the last cited decisions, the Court set aside dismissals of employees as security risks because the employing agency failed to conform the dismissal to its established security regulations. See *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

Again, avoiding constitutional issues, in *Greene v. McElroy*, 360 U.S. 474 (1959), the Court invalidated the security clearance procedure the Defense Department required from defense contractors as being unauthorized either by law or presidential order. However, the Court suggested that it would condemn, on grounds of denial of due process, any enactment or Executive Order that sanctioned a comparable department security clearance program, under which a defense contractor's employee could have his security clearance revoked without a hearing at which he had the right to confront and cross-examine witnesses. Justices Felix Frankfurter, John Marshall Harlan, and Charles Whittaker concurred without passing on the validity of such procedure, if authorized. Justice Tom Clark dissented. See also the dissenting opinions of Justices William O. Douglas and Hugo Black in *Beard v. Stahr*, 370 U.S. 41, 43 (1962), and in *Williams v. Zuckert*, 371 U.S. 531, 533 (1963).

¹¹ 363 U.S. 420, 493, 499 (1960). Congress subsequently amended the law to require that any person who is defamed, degraded, or incriminated by evidence or testimony presented to the Commission be afforded the opportunity to appear and be heard in executive session, with a reasonable number of additional witnesses requested by him, before the Commission can make public such evidence or testimony. Further, any such person, before the evidence or testimony is released, must be afforded an opportunity to appear publicly to state his side and to file verified statements with the Commission which it must release with any report or other document containing defaming, degrading, or incriminating evidence or testimony. Pub. L. 91-521, § 4, 84 Stat. 1357 (1970) (codified as amended at 42 U.S.C. § 1975a(e)). Cf. *Jenkins v. McKeithen*, 395 U.S. 411 (1969).

¹² *Opp. Cotton Mills v. Administrator*, 312 U.S. 126, 152, 153 (1941).

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issued without a hearing at any stage, saying that “where Congress has provided for judicial review after the regulations or orders have been made effective it has done all that due process under the war emergency requires.”¹³ But in another case where the National Labor Relations Board undertook to void an agreement between an employer and a union after consideration of charges brought against the employer by an independent complaining union, the Court held that the union that formed the agreement was entitled to notice and an opportunity to participate in the proceedings.¹⁴ Although a taxpayer must be afforded a fair opportunity for a hearing in connection with the assessment of taxes,¹⁵ collection of taxes through summary administrative proceedings is lawful if the taxpayer is later afforded a hearing.¹⁶

When the Constitution requires a hearing, it requires a fair one, held before a tribunal that meets currently prevailing standards of impartiality.¹⁷ A party must be given an opportunity not only to present evidence, but also to know the claims of the opposing party and to respond to them.¹⁸ In administrative proceedings, a variance between the initial charges and the agency’s ultimate findings will not invalidate the proceedings where the record shows that there was no misunderstanding as to the basis of the complaint.¹⁹ The admission of evidence that would be inadmissible in judicial proceedings does not vitiate the order of an administrative agency.²⁰ An administrative hearing may consider hearsay evidence, and hearsay may constitute by itself substantial evidence in support of an agency determination, provided that there are assurances of the underlying reliability and probative value of the evidence and the claimant before the agency had the opportunity to subpoena the witnesses and cross-examine them.²¹ However, a provision that an administrative body shall not be controlled by rules of evidence does not justify the issuance of orders without a foundation in evidence having rational probative force. Although the Court has recognized that in some circumstances

¹³ 321 U.S. 503, 521 (1944).

¹⁴ *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938).

¹⁵ *Cent. of Ga. Ry. v. Wright*, 207 U.S. 127 (1907); *Lipke v. Lederer*, 259 U.S. 557 (1922).

¹⁶ *Phillips v. Commissioner*, 283 U.S. 589 (1931). *Cf.* *Springer v. United States*, 102 U.S. 586, 593 (1881); *Passavant v. United States*, 148 U.S. 214 (1893). The collection of taxes is, however, very nearly a wholly unique area. *See* *Perez v. Ledesma*, 401 U.S. 82, 127 n.17 (1971) (Brennan, J., concurring in part and dissenting in part). On the limitations on private prejudgment collection, *see* *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

¹⁷ *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50 (1950). *See also* Amdt14.S1.5.4.5 Impartial Decision Maker.

¹⁸ *Morgan v. United States*, 304 U.S. 1, 18–19 (1938). The Court has applied this principle with differing results to administrative hearings and subsequent review in selective service cases. *Compare* *Gonzales v. United States*, 348 U.S. 407 (1955) (conscientious objector contesting his classification before appeals board must be furnished copy of recommendation submitted by Department of Justice; only by being appraised of the arguments and conclusions upon which recommendations were based would he be enabled to present his case effectively), *with* *United States v. Nugent*, 346 U.S. 1 (1953) (in auxiliary hearing that culminated in a Justice Department report and recommendation, it is sufficient that registrant be provided with resume of adverse evidence in FBI report because the “imperative needs of mobilization and national vigilance” mandate a minimum of “litigious interruption”), *and* *Gonzales v. United States*, 364 U.S. 59 (1960) (finding no due process violation when petitioner at departmental proceedings was not permitted to rebut statements attributed to him by his local board, because the statements were in his file and he had opportunity to rebut both before hearing officer and appeal board; likewise finding no violation where petitioner at trial was denied access to hearing officer’s notes and report, because he failed to show any need and did have Department recommendations).

¹⁹ *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 349–50 (1938).

²⁰ *W. Chem. Co. v. United States*, 271 U.S. 268 (1926). *See also* *United States v. Abilene & So. Ry.*, 265 U.S. 274, 288 (1924).

²¹ *Richardson v. Perales*, 402 U.S. 389 (1971).

a “fair hearing” implies a right to oral argument,²² it has refused to lay down a general rule that would cover all cases.²³

Amdt14.S1.7 Due Process Limits on State Action

Amdt14.S1.7.1 Personal Jurisdiction

Amdt14.S1.7.1.3 Modern Doctrine on Personal Jurisdiction

Although *Pennoyer*’s physical presence test informed the Supreme Court’s jurisprudence related to jurisdiction for several decades, a significant expansion of the U.S. economy in the mid-twentieth century altered that focus. As commerce and travel among the states and between the states and foreign countries increased,¹ corporations expanded the geographical scope of their activities.² A more interconnected, global economy meant that a corporation’s activities had greater potential to cause harm in distant jurisdictions, but also meant that businesses could more easily defend lawsuits arising from that harm in distant fora.³ Faced with these new realities, the Court reconsidered the nature of the due process limitations on the jurisdiction of state courts over non-resident individuals and corporations that conducted activities in the states.⁴ In the 1945 case

²² *Londoner v. Denver*, 210 U.S. 373 (1908).

²³ *FCC v. WJR*, 337 U.S. 265, 274–77 (1949). *See also* *Inland Empire Council v. Millis*, 325 U.S. 697, 710 (1945). *See* Administrative Procedure Act, 60 Stat. 237 (1946) (codified as amended at 5 U.S.C. §§ 1001–1011). *Cf.* *Link v. Wabash R.R.*, 370 U.S. 626, 637, 646 (1962), in which the majority rejected Justice Black’s dissenting thesis that the dismissal with prejudice of a damage suit without notice to the client and grounded upon the dilatory tactics of his attorney, and the latter’s failure to appear at a pre-trial conference, amounted to a taking of property without due process of law.

¹ *See* Hanson, 357 U.S. at 250–51 (“As technological progress has increased the flow of commerce between States, the need for jurisdiction over nonresidents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome.”); *McGee v. Int’l Life Ins. Co.*, 355 U.S. 220, 222–23 (1957) (noting a “clearly discernible” trend “toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents that was “attributable to the fundamental transformation of our national economy over the years”).

² *See supra* note 1.

³ *See supra* note 1.

⁴ *See supra* note 1. The Supreme Court has not drawn a bright line between its jurisprudence addressing persons and its cases addressing corporations. However, some commentators have argued that the Court’s recent opinions have been more solicitous toward corporate defendants. *See, e.g.*, Judy M. Cornett & Michael H. Hoffheimer, *Good-bye Significant Contacts: General Personal Jurisdiction After Daimler AG v. Bauman*, 76 OHIO ST. L.J. 101, 107 (2015) (“[T]he Court has moved too far, too fast towards limiting the traditional powers of states to require nonresident corporations to answer lawsuits in their courts.”); Thomas C. Arthur & Richard D. Freer, *Be Careful What You Wish For: Goodyear, Daimler, and the Evisceration of General Jurisdiction*, 64 EMORY L.J. ONLINE 2001, 2002 (2014) (“[T]he Court’s decisions in these two cases leave a large gap in the appropriate scope of state adjudicatory jurisdiction, putting some plaintiffs at risk of being unable to bring a defendant to justice in an American court.”). On the other hand, other commentators have defended the recent change in the Court’s decisions, asserting that it will bring more clarity and cohesion to the doctrine of personal jurisdiction and reduce unfairness to defendants. *E.g.*, William Grayson Lambert, *The Necessary Narrowing of General Personal Jurisdiction*, 100 MARQ. L. REV. 375, 378 (2016) (“Contrary to the weight of this body of scholarship on the ‘at home’ rule of *Goodyear* and *Daimler AG*, I argue that this new rule is a welcome change to general personal jurisdiction for two reasons. First, the ‘at home’ rule is clear. It provides an easy-to-apply rule that will minimize resources expended litigating an issue other than the merits of a case. Second, the ‘at home’ rule is more logically coherent because it promotes internal consistency in personal jurisdiction decisions. No matter which justification of personal jurisdiction one adopts from among the myriad justifications that the Supreme Court has offered, the ‘at home’ rule fits neatly within that framework.”); Case Comment, *Personal Jurisdiction—General Jurisdiction—Daimler AG v. Bauman*, 128 HARV. L. REV. 311, 316 (2014) (“Closer examination of *Daimler*, however, reveals that Justice Ginsburg is not operating from formalist or ideological conceptions of when jurisdiction ought to be exercised. Rather, she has adopted a different philosophical framework, drawn from the pioneering work of von Mehren and Trautman, that focuses

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International Shoe Co. v. Washington, the Court explained its rejection of a strict adherence to the physical presence test, holding that a state could authorize its courts to subject an out-of-state entity to in personam jurisdiction, consistent with due process, and thus require it to defend a lawsuit, if that entity had “certain minimum contacts” with the forum state “such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.”⁵ The Court rested its holding in part on the notion that an entity conducting activities in a state benefits from the protections of state law, and thus should have to respond to legal complaints arising out of its actions in the forum even if it is not “physically present” in the state.⁶

Thus, the Supreme Court’s opinions in *International Shoe* and subsequent cases have established a more flexible two-part test for determining when a court’s exercise of personal jurisdiction over a nonresident defendant sued by a plaintiff comports with due process: (1) the defendant has established minimum contacts with the forum state that demonstrate an intent to avail itself of the benefits and protections of state law; and (2) it is reasonable to require the defendant to defend the lawsuit in the forum.⁷

Nevertheless, as noted, the Court has confirmed that several traditional bases for exercising judicial power over a nonresident defendant continue to enjoy a presumption of constitutionality without requiring an independent inquiry into the contacts among the defendant, the forum, and the litigation. Specifically, the traditional bases for jurisdiction include if: (1) the defendant is domiciled in the forum state (e.g., a defendant who is a natural person intends to establish a permanent home in the forum or a corporation intends to establish a permanent headquarters);⁸ (2) the defendant has

fundamentally on fairness to both parties. Starting with her opinions in *Goodyear* and *Nicastro*, Justice Ginsburg has consistently applied this framework.”).

⁵ *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation and internal quotation marks omitted). The Court deemed a corporation’s “presence” in the forum state to result from those activities of the corporation or its agents in the state “which courts will deem to be sufficient to satisfy the demands of due process.” *Id.* at 317. The Court wrote that the concept of constitutional due process did “not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or relations. *Id.* at 319.

⁶ *Id.* (“[T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations; and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.”).

⁷ *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980) (“[A] state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist ‘minimum contacts’ between the defendant and the forum State.”) (citing *Int’l Shoe Co.*, 326 U.S. at 316); *id.* at 292 ([T]he defendant’s contacts with the forum State must be such that maintenance of the suit ‘does not offend traditional notions of fair play and substantial justice.’) (quoting *Int’l Shoe Co.*, 326 U.S. at 316). *See also* *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985) (“So long as a commercial actor’s efforts are ‘purposefully directed’ toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there.”).

⁸ *Milliken v. Meyer*, 311 U.S. 457, 462–63 (1940) (“Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state’s jurisdiction for purposes of a personal judgment by means of appropriate substituted service The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties.”); *Blackmer v. United States*, 284 U.S. 421, 438 (1932) (holding that the United States retains in personam jurisdiction over its citizens living abroad) (citation omitted).

consented to jurisdiction;⁹ or (3) a defendant who is a natural person is served with process while he is physically present—even temporarily—within the forum.¹⁰ The Court has also indicated that a state court may adjudicate the personal status of a plaintiff in relation to the defendant (e.g., marital status) without considering whether personal jurisdiction over the defendant is constitutionally valid.¹¹

On June 27, 2023, the Supreme Court issued a decision in *Mallory v. Norfolk Southern Railway Co.*,¹² holding that Pennsylvania had not violated the Fourteenth Amendment's Due Process Clause by requiring an out-of-state railroad company to consent to general personal jurisdiction and defend against a negligence lawsuit that did not arise out of the company's activities in the Commonwealth in order to conduct business in the state.¹³ Relying on its 1917 precedent in *Pennsylvania Fire Ins. Co. of Philadelphia v. Gold Issue Mining & Milling Co.*,¹⁴ the Court upheld the relevant provisions of Pennsylvania's corporate registration law, noting that they imposed the same "benefits and burdens" on domestic corporations.¹⁵

Amdt14.S1.7.2 State Taxation

Amdt14.S1.7.2.4 Intangible Personalty

To determine whether a state may tax intangible personal property, the Court has applied the fiction *mobilia sequuntur personam* (movable property follows the person) and has also recognized that such property may acquire, for tax purposes, a permanent business or commercial situs. The Court, however, has never clearly disposed of the issue whether multiple personal property taxation of intangibles is consistent with due process. In the case of corporate stock, however, the Court has obliquely acknowledged that the owner thereof may be taxed at his own domicile, at the commercial situs of the

⁹ "Consent" may be express or implied. *See, e.g.,* Nat'l Equip. Rental v. Szukhent, 375 U.S. 311, 318 (1964) (holding that defendant lessee's contractual appointment of an agent to receive service of process on the lessee's behalf amounted to consent to the personal jurisdiction of the courts of New York when the agent was served with process and notified the lessee); *Hess v. Pawloski*, 274 U.S. 352, 355–56 (1927) (upholding service of process on a nonresident defendant under a state law providing that a person who drove a vehicle on a public highway in the state implicitly consented to the appointment of a state official as agent for service of process for lawsuits arising outside of accidents attending such operation). *See also* *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594–95 (1991) (holding that plaintiffs' notice and acceptance of a forum-selection clause in a contract for passage on a cruise ship constituted consent to the exercise of personal jurisdiction by Florida courts over the plaintiffs in a personal injury action); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12 (1972) (determining that a forum-selection clause in a contract that selected a foreign court for the resolution of disputes between the parties could not deprive a U.S. court of jurisdiction, but that the U.S. court should nonetheless enforce the clause by dismissing the case unless the clause was unreasonable, unfair, or unjust).

¹⁰ *Burnham v. Superior Court*, 495 U.S. 604, 619 (1990) (plurality opinion) ("[J]urisdiction based on physical presence alone constitutes due process because it is one of the continuing traditions of our legal system that define the due process standard of 'traditional notions of fair play and substantial justice.'"). Providing the fifth and deciding vote in *Burnham*, Justice White, in an opinion concurring in the judgment, argued that a particular basis for jurisdiction could not be constitutionally valid merely because of its historical pedigree, and that fairness to the defendant must also be considered. *Id.* at 629 (White, J., concurring).

¹¹ *Pennoy v. Neff*, 95 U.S. 714, 734 (1877) ("[W]e do not mean to assert, by any thing we have said, that a State may not authorize proceedings to determine the *status* of one of its citizens towards a non-resident, which would be binding within the State, though made without service of process or personal notice to the non-resident."), *overruled in part by*, *Shaffer v. Heitner*, 433 U.S. 186 (1977).

¹² No. 21-1168 (U.S. June 27, 2023)

¹³ *Id.* at 2, 11.

¹⁴ *Id.* at 4 (citing 243 U.S. 93, 95 (1917)).

¹⁵ *Id.* at 11.

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issuing corporation, and at the latter's domicile. Constitutional lawyers speculated whether the Court would sustain a tax by all three jurisdictions, or by only two of them. If the latter, the question would be which two—the state of the commercial situs and of the issuing corporation's domicile, or the state of the owner's domicile and that of the commercial situs.¹

Thus far, the Court has sustained the following personal property taxes on intangibles: (1) a debt held by a resident against a nonresident, evidenced by a bond of the debtor and secured by a mortgage on real estate in the state of the debtor's residence;² (2) a mortgage owned and kept outside the state by a nonresident but on land within the state;³ (3) investments, in the form of loans to a resident, made by a resident agent of a nonresident creditor;⁴ (4) deposits of a resident in a bank in another state, where he carries on a business and from which these deposits are derived, but belonging absolutely to him and not used in the business;⁵ (5) membership owned by a nonresident in a domestic exchange, known as a chamber of commerce;⁶ (6) membership by a resident in a stock exchange located in another state;⁷ (7) stock held by a resident in a foreign corporation that does no business and has no property within the taxing state;⁸ (8) stock in a foreign corporation owned by another foreign corporation transacting its business within the taxing state;⁹ (9) shares owned by nonresident shareholders in a domestic corporation, the tax being assessed on the basis of corporate assets and payable by the corporation either out of its general fund or by collection from the shareholder;¹⁰ (10) dividends of a corporation distributed ratably among stockholders regardless of their residence outside the state;¹¹ (11) the transfer within the taxing state by one nonresi-

¹ Howard, *State Jurisdiction to Tax Intangibles: A Twelve Year Cycle*, 8 MO. L. REV. 155, 160–62 (1943); Rawlins, *State Jurisdiction to Tax Intangibles: Some Modern Aspects*, 18 TEX. L. REV. 196, 314–15 (1940).

² Kirtland v. Hotchkiss, 100 U.S. 491, 498 (1879).

³ Savings Soc'y v. Multnomah Cnty., 169 U.S. 421 (1898).

⁴ Bristol v. Washington Cnty., 177 U.S. 133, 141 (1900).

⁵ These deposits were allowed to be subjected to a personal property tax in the city of his residence, regardless of whether or not they are subject to tax in the state where the business is carried on. Fidelity & Columbia Tr. Co. v. Louisville, 245 U.S. 54 (1917). The tax is imposed for the general advantage of living within the jurisdiction (benefit-protection theory), and may be measured by reference to the riches of the person taxed.

⁶ Rogers v. Hennepin County, 240 U.S. 184 (1916).

⁷ Citizens Nat'l Bank v. Durr, 257 U.S. 99, 109 (1921). "Double taxation" the Court observed "by one and the same State is not" prohibited "by the Fourteenth Amendment; much less is taxation by two States upon identical or closely related property interest falling within the jurisdiction of both, forbidden."

⁸ Hawley v. Malden, 232 U.S. 1, 12 (1914). The Court attached no importance to the fact that the shares were already taxed by the State in which the issuing corporation was domiciled and might also be taxed by the State in which the stock owner was domiciled, or at any rate did not find it necessary to pass upon the validity of the latter two taxes. The present levy was deemed to be tenable on the basis of the benefit-protection theory, namely, "the economic advantages realized through the protection at the place . . . [of business situs] of the ownership of rights in intangibles. . . ." The Court also added that "undoubtedly the State in which a corporation is organized may . . . [tax] all of its shares whether by residents or nonresidents."

⁹ First Bank Corp. v. Minnesota, 301 U.S. 234, 241 (1937). The shares represent an aliquot portion of the whole corporate assets, and the property right so represented arises where the corporation has its home, and is therefore within the taxing jurisdiction of the state, notwithstanding that ownership of the stock may also be a taxable subject in another state.

¹⁰ Schuylkill Tr. Co. v. Pennsylvania, 302 U.S. 506 (1938).

¹¹ The Court found that all stockholders were the ultimate beneficiaries of the corporation's activities within the taxing State, were protected by the latter, and were thus subject to the State's jurisdiction. Int'l Harvester Co. v. Dep't of Tax'n, 322 U.S. 435 (1944). This tax, though collected by the corporation, is on the transfer to a stockholder of his share of corporate dividends within the taxing State and is deducted from said dividend payments. Wis. Gas Co. v. United States, 322 U.S. 526 (1944).

dent to another of stock certificates issued by a foreign corporation;¹² and (12) promissory notes executed by a domestic corporation, although payable to banks in other states.¹³

The following personal property taxes on intangibles have been invalidated: (1) debts evidenced by notes in safekeeping within the taxing state, but made and payable and secured by property in a second state and owned by a resident of a third state;¹⁴ (2) a tax, measured by income, levied on trust certificates held by a resident, representing interests in various parcels of land (some inside the state and some outside), the holder of the certificates, though without a voice in the management of the property, being entitled to a share in the net income and, upon sale of the property, to the proceeds of the sale.¹⁵

The Court also invalidated a property tax sought to be collected from a life beneficiary on the corpus of a trust composed of property located in another state and as to which the beneficiary had neither control nor possession, apart from the receipt of income therefrom.¹⁶ However, a personal property tax may be collected on one-half of the value of the corpus of a trust from a resident who is one of the two trustees thereof, notwithstanding that the trust was created by the will of a resident of another state in respect of intangible property located in the latter state, at least where it does not appear that the trustee is exposed to the danger of other ad valorem taxes in another state.¹⁷ The first case, *Brooke v. Norfolk*,¹⁸ is distinguishable by virtue of the fact that the property tax therein voided was levied upon a resident beneficiary rather than upon a resident trustee in control of nonresident intangibles. Also different is *Safe Deposit & Trust Co. v. Virginia*,¹⁹ where a property tax was unsuccessfully demanded of a nonresident trustee with respect to nonresident intangibles under its control. Likewise, the more recent case of *North Carolina Department of Revenue v. Kimberly Rice Kaestner 1992 Family Trust*, which saw the Court invalidating a state tax imposed on trust income of an in-state beneficiary, appears to be limited to its facts, where the beneficiaries (1) had not received any trust income, (2) had no right to demand that income, and (3) were uncertain to ever receive that income.²⁰

A state in which a foreign corporation has acquired a commercial domicile and in which it maintains its general business offices may tax the corporation's bank deposits and accounts receivable even though the deposits are outside the state and the accounts receivable arise from manufacturing activities in another state. Similarly, a non-domiciliary state in which a foreign corporation did business can tax the "corporate

¹² *New York ex rel. Hatch v. Reardon*, 204 U.S. 152 (1907).

¹³ *Graniteville Mfg. Co. v. Query*, 283 U.S. 376 (1931). These taxes, however, were deemed to have been laid, not on the property, but upon an event, the transfer in one instance, and execution in the latter which took place in the taxing state.

¹⁴ *Buck v. Beach*, 206 U.S. 392 (1907).

¹⁵ *Senior v. Braden*, 295 U.S. 422 (1935).

¹⁶ *Brooke v. City of Norfolk*, 277 U.S. 27 (1928).

¹⁷ *Greenough v. Tax Assessors*, 331 U.S. 486, 496–97 (1947).

¹⁸ 277 U.S. 27 (1928).

¹⁹ 280 U.S. 83 (1929).

²⁰ See *N.C. Dept. of Revenue v. Kimberly Rice Kaestner 1992 Family Tr.*, 139 S. Ct. 2213, 2221 (2019).

excess” arising from property employed and business done in the taxing state.²¹ On the other hand, when the foreign corporation transacts only interstate commerce within a state, any excise tax on such excess is void, irrespective of the amount of the tax.²²

Also a domiciliary state that imposes no franchise tax on a stock fire insurance corporation may assess a tax on the full amount of paid-in capital stock and surplus, less deductions for liabilities, notwithstanding that such domestic corporation concentrates its executive, accounting, and other business offices in New York, and maintains in the domiciliary state only a required registered office at which local claims are handled. Despite “the vicissitudes which the so-called ‘jurisdiction-to-tax’ doctrine has encountered,” the presumption persists that intangible property is taxable by the state of origin.²³

A property tax on the capital stock of a domestic company, however, the appraisal of which includes the value of coal mined in the taxing state but located in another state awaiting sale, deprives the corporation of its property without due process of law.²⁴ Also void for the same reason is a state tax on the franchise of a domestic ferry company that includes in the valuation of the tax the worth of a franchise granted to the company by another state.²⁵

Amdt14.S1.8 Equal Protection

Amdt14.S1.8.4 Facially Non-Neutral Laws Benefiting Racial Minorities

Amdt14.S1.8.4.2 Modern Doctrine on Appropriate Scrutiny

A clear distinction was then drawn between federal and state power to apply racial classifications. In *City of Richmond v. J.A. Croson Co.*,¹ the Court invalidated a minority set-aside requirement that holders of construction contracts with the City subcontract at least 30% of the dollar amount to minority business enterprises. Applying strict scrutiny, the Court found Richmond’s program to be deficient because it was not tied to evidence of past discrimination in the City’s construction industry. By contrast, the

²¹ *Adams Express Co. v. Ohio*, 165 U.S. 194 (1897).

²² *Alpha Cement Co. v. Massachusetts*, 268 U.S. 203 (1925). A domiciliary state, however, may tax the excess of market value of outstanding capital stock over the value of real and personal property and certain indebtedness of a domestic corporation even though this “corporate excess” arose from property located and business done in another state and was there taxable. Moreover, this result follows whether the tax is considered as one on property or on the franchise. *Wheeling Steel Corp. v. Fox*, 298 U.S. 193 (1936). *See also* *Memphis Gas Co. v. Beeler*, 315 U.S. 649, 652 (1942).

²³ *Newark Fire Ins. Co. v. State Board*, 307 U.S. 313, 324 (1939). Although the eight Justices affirming this tax were not in agreement as to the reasons to be assigned in justification of this result, the holding appears to be in line with the dictum uttered by Chief Justice John Harlan Stone in *Curry v. McCannless*, 307 U.S. 357, 368 (1939), to the effect that the taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles.

²⁴ *Delaware, Lackawanna & W. R.R. v. Pennsylvania*, 198 U.S. 341 (1905).

²⁵ *Louisville & Jeffersonville Ferry Co. v. Kentucky*, 188 U.S. 385 (1903).

¹ 488 U.S. 469 (1989). *Croson* was decided by a 6-3 vote. The portions of Justice Sandra Day O’Connor’s opinion adopted as the opinion of the Court were joined by Chief Justice William Rehnquist and by Justices Byron White, John Paul Stevens, and Anthony Kennedy. The latter two Justices joined only part of Justice Sandra Day O’Connor’s opinion; each added a separate concurring opinion. Justice Antonin Scalia concurred separately; Justices Thurgood Marshall, William Brennan, and Harry Blackmun dissented.

Court in *Metro Broadcasting, Inc. v. FCC*² applied a more lenient standard of review in upholding two racial preference policies used by the FCC in the award of radio and television broadcast licenses. The FCC policies, the Court explained, are “benign, race-conscious measures” that are “substantially related” to the achievement of an “important” governmental objective of broadcast diversity.³

In *Croson*, the Court ruled that the City had failed to establish a “compelling” interest in the racial quota system because it failed to identify past discrimination in its construction industry. Mere recitation of a “benign” or remedial purpose will not suffice, the Court concluded, nor will reliance on the disparity between the number of contracts awarded to minority firms and the minority population of the city. “[W]here special qualifications are necessary, the relevant statistical pool for purposes of demonstrating exclusion must be the number of minorities qualified to undertake the particular task.”⁴ The Court also said that because the ordinance defined “minority group members” to include “citizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts,” this expansive definition “impugn[ed] the city’s claim of remedial motivation,” there having been “no evidence” of any past discrimination against non-Black racial minorities in the Richmond construction industry.⁵ It followed that Richmond’s set-aside program also was not “narrowly tailored” to remedy the effects of past discrimination in the city: an individualized waiver procedure made the quota approach unnecessary, and a minority entrepreneur “from anywhere in the country” could obtain an absolute racial preference.⁶

At issue in *Metro Broadcasting* were two minority preference policies of the FCC, one recognizing an “enhancement” for minority ownership and participation in management when the FCC considers competing license applications, and the other authorizing a “distress sale” transfer of a broadcast license to a minority enterprise. These racial preferences—unlike the set-asides at issue in *Fullilove*—originated as administrative policies rather than statutory mandates. Because Congress later endorsed these policies, however, the Court was able to conclude that they bore “the imprimatur of longstanding congressional support and direction.”⁷

Metro Broadcasting was noteworthy for several other reasons as well. The Court rejected the dissent’s argument—seemingly accepted by a *Croson* majority—that Congress’s more extensive authority to adopt racial classifications must trace to Section 5 of the Fourteenth Amendment, and instead ruled that Congress also may rely on race-conscious measures in exercise of its commerce and spending powers.⁸ This meant that

² 497 U.S. 547 (1990). This was a 5-4 decision, Justice William Brennan’s opinion of the Court being joined by Justices Byron White, Thurgood Marshall, Harry Blackmun, and John Paul Stevens. Justice Sandra Day O’Connor wrote a dissenting opinion joined by the Chief Justice and by Justices Antonin Scalia and Anthony Kennedy, and Justice Anthony Kennedy added a separate dissenting opinion joined by Justice Antonin Scalia.

³ *Id.* at 564–65.

⁴ 488 U.S. at 501–02.

⁵ *Id.* at 506.

⁶ *Id.* at 508.

⁷ 497 U.S. at 600. Justice Sandra Day O’Connor’s dissenting opinion contended that the case “does not present ‘a considered decision of the Congress and the President.’” *Id.* at 607 (quoting *Fullilove*, 448 U.S. at 473).

⁸ 497 U.S. at 563 & n.11. For the dissenting views of Justice Sandra Day O’Connor, see *id.* at 606–07. See also *Croson*, 488 U.S. at 504 (opinion of Court).

the governmental interest furthered by a race-conscious policy need not be remedial, but could be a less focused interest such as broadcast diversity. Secondly, as noted above, the Court eschewed strict scrutiny analysis: the governmental interest need only be “important” rather than “compelling,” and the means adopted need only be “substantially related” rather than “narrowly tailored” to furthering the interest.

The distinction between federal and state power to apply racial classifications, however, proved ephemeral. The Court ruled in *Adarand Constructors, Inc. v. Peña*⁹ that racial classifications imposed by federal law must be analyzed by the same strict scrutiny standard that is applied to evaluate state and local classifications based on race. The Court overruled *Metro Broadcasting* and, to the extent that it applied a review standard less stringent than strict scrutiny, *Fullilove v. Klutznick*. Strict scrutiny is to be applied regardless of the race of those burdened or benefited by the particular classification; there is no intermediate standard applicable to “benign” racial classifications. The underlying principle, the Court explained, is that the Fifth and Fourteenth Amendments protect persons, not groups. It follows, therefore, that classifications based on the group characteristic of race “should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection . . . has not been infringed.”¹⁰

By applying strict scrutiny, the Court was in essence affirming Justice Lewis Powell’s individual opinion in *Bakke*, which posited a strict scrutiny analysis of affirmative action. There remained the question, however, whether Justice Lewis Powell’s suggestion that creating a diverse student body in an educational setting was a compelling governmental interest that would survive strict scrutiny analysis. It engendered some surprise, then, that the Court essentially reaffirmed Justice Lewis Powell’s line of reasoning in the cases of *Grutter v. Bollinger*¹¹ and *Gratz v. Bollinger*.¹²

In *Grutter*, the Court considered the admissions policy of the University of Michigan Law School, which requires admissions officials to evaluate each applicant based on all the information available in their file (for example, grade point average, Law School Admissions Test score, personal statement, recommendations) and on “soft” variables (for example, strength of recommendations, quality of undergraduate institution, difficulty of undergraduate courses). The policy also considered “racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against, like African-Americans, Hispanics and Native Americans Although, the policy did not limit the seeking of diversity to ethnic and racial classifications, it did seek a “critical mass” of minorities so that those students would not feel isolated.”¹³

⁹ 515 U.S. 200 (1995). This was a 5-4 decision. Justice Sandra Day O’Connor’s opinion for Court was joined by Chief Justice William Rehnquist, and by Justices Anthony Kennedy, Clarence Thomas, and—to the extent not inconsistent with his own concurring opinion—Antonin Scalia. Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer dissented.

¹⁰ 515 U.S. at 227 (emphasis original).

¹¹ 539 U.S. 306 (2003).

¹² 539 U.S. 244 (2003).

¹³ 539 U.S. at 316.

The *Grutter* Court found that student diversity provided significant benefits, not just to the students who might have otherwise not been admitted, but also to the student body as a whole. These benefits include “cross-racial understanding,” the breakdown of racial stereotypes, the improvement of classroom discussion, and the preparation of students to enter a diverse workforce. Further, the Court emphasized the role of education in developing national leaders. Thus, the Court found that such efforts were important to “cultivate a set of leaders with legitimacy in the eyes of the citizenry.”¹⁴ As the university did not rely on quotas, but rather relied on “flexible assessments” of a student’s record, the Court found that the university’s policy was narrowly tailored to achieve the substantial governmental interest of achieving a diverse student body.¹⁵

The law school’s admission policy in *Grutter*, however, can be contrasted with the university’s undergraduate admission policy. In *Gratz*, the Court evaluated the undergraduate program’s “selection index,” which assigned applicants up to 150 points based on a variety of factors similar to those considered by the law school. Applicants with scores over 100 were generally admitted, while those with scores of less than 100 fell into categories that could result in either admittance, postponement, or rejection. Of particular interest to the Court was that an applicant would be entitled to twenty points based solely upon his or her membership in an underrepresented racial or ethnic minority group. The policy also included the “flagging” of certain applications for special review, and underrepresented minorities were among those whose applications were flagged.¹⁶

The Court in *Gratz* struck down this admissions policy, relying again on Justice Lewis Powell’s decision in *Bakke*. Although Justice Lewis Powell had thought it permissible that “race or ethnic background . . . be deemed a ‘plus’ in a particular applicant’s file,”¹⁷ the system he envisioned involved individualized consideration of all elements of an application to ascertain how the applicant would contribute to the diversity of the student body. According to the majority opinion in *Gratz*, the undergraduate policy did not provide for such individualized consideration. Instead, by automatically distributing twenty points to every applicant from an “underrepresented minority” group, the policy effectively admitted every qualified minority applicant. Although it acknowledged that the volume of applications could make individualized assessments an “administrative challenge,” the Court found that the policy was not narrowly tailored to achieve respondents’ asserted compelling interest in diversity.¹⁸

¹⁴ *Id.* at 335.

¹⁵ *Id.*, at 315. While an educational institution will receive deference in its judgment as to whether diversity is essential to its educational mission, the courts must closely scrutinize the means by which this goal is achieved. Thus, the institution will receive no deference regarding the question of the necessity of the means chosen and will bear the burden of demonstrating that “each applicant is evaluated as an individual and not in a way that an applicant’s race or ethnicity is the defining feature of his or her application.” *Fisher v. Univ. of Tex. at Austin* (Fisher I), 570 U.S. 297, 298 (2013) (citation omitted). In its 2013 decision in *Fisher*, the Court did not rule on the substance of the challenged affirmative action program and instead remanded the case so that the reviewing appellate court could apply the correct standard of review. However, the Court issued a subsequent decision in *Fisher* addressing the Texas program directly. See *Fisher v. Univ. of Tex. at Austin* (Fisher II), 136 S. Ct. 2198 (2016).

¹⁶ 539 U.S. at 272–73.

¹⁷ 438 U.S. 265, 317 (1978).

¹⁸ *Id.* at 284–85.

The Court subsequently revisited the question of affirmative action in undergraduate education in its 2016 decision in *Fisher v. University of Texas at Austin*, upholding the University of Texas at Austin’s (UT’s) use of “scores” based, in part, on race in filling approximately 25% of the slots in its incoming class that were not required by statute to be awarded to Texas high school students who finished in the top 10% of their graduating class (Top Ten Percent Plan or TTPP).¹⁹ The Court itself suggested that the “sui generis” nature of the UT program,²⁰ coupled with the “fact that this case has been litigated on a somewhat artificial basis” because the record lacked information about the impact of Texas’s TTPP,²¹ may limit the decision’s value for “prospective guidance.”²² Nonetheless, certain language in the Court’s decision, along with its application of the three “controlling factors” set forth in the Court’s 2013 decision in *Fisher*,²³ seem likely to have some influence, as they represent the Court’s most recent jurisprudence on whether and when institutions of higher education may take race into consideration in their admission decisions. Specifically, the 2016 *Fisher* decision began and ended with broad language recognizing constraints on the implementation of affirmative action programs in undergraduate education, including language that highlights the university’s “continuing obligation to satisfy the burden of strict scrutiny in light of changing circumstances”²⁴ and emphasized that “[t]he Court’s affirmance of the University’s admissions policy today does not necessarily mean the University may rely on that same policy without refinement.”²⁵ Nonetheless, while citing these constraints, the 2016 *Fisher* decision held that the challenged UT program did not run afoul of the Fourteenth Amendment. In particular, the Court concluded that the state’s compelling interest in the case was not in enrolling a certain number of minority students, but in obtaining the educational benefits that flow from student body diversity, noting that the state cannot be faulted for not specifying a particular level of minority enrollment.²⁶ The Court further concurred with UT’s view that the alleged “critical mass” of minority students achieved under the 10% plan was not dispositive, as the university had found that it was insufficient,²⁷ and that UT had found other means of promoting student-body diversity

¹⁹ *Fisher II*, 136 S. Ct. at 2206.

²⁰ *Id.* at 2208.

²¹ *Id.* at 2209.

²² *Id.*

²³ *Fisher I*, 570 U.S. 297, 298 (2013). The first of these principles is that strict scrutiny requires the university to demonstrate with clarity that its “purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is necessary . . . to the accomplishment of its purpose.” *Id.* at 309. The second principle is that the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper. *Id.* at 310. The third is that no deference is owed in determining whether the use of race is narrowly tailored; rather, the university bears burden of proving a non-racial approach would not promote its interests “about as well” and “at tolerable administrative expense.” *Id.* at 312.

²⁴ *Fisher II*, 136 S. Ct. at 2209–10.

²⁵ *Id.*

²⁶ *Id.* at 2210–11. On the other hand, the Court emphasized that the university cannot claim educational benefits in “diversity writ large.” *Id.* at 2211. “A university’s goals cannot be elusory or amorphous—they must be sufficiently measurable to permit judicial scrutiny of the policies adopted to reach them.” *Id.* The Court also noted that the asserted goals of UT’s affirmative action program “mirror” those approved in earlier cases (for example, ending stereotypes and promoting cross-racial understanding). *Id.* at 2211.

²⁷ *Id.* at 2211–13. The Court further emphasized that the fact that race allegedly plays a minor role in UT admissions, given that approximately seventy-five percent of the incoming class is admitted under the ten percent plan, shows that the challenged use of race in determining the composition of the rest of the incoming class is narrowly tailored, not that it is unconstitutional. *Id.* at 2212.

were unworkable.²⁸ In so concluding, the Court held that the university had met its burden in surviving strict scrutiny by providing sworn affidavits from UT officials and internal assessments based on months of studies, retreats, interviews, and reviews of data that amounted, in the view of the Court, to a “reasoned, principled explanation” of the university’s interests and its efforts to achieve those interests in a manner that was no broader than necessary.²⁹ The Court refused to question the motives of university administrators and did not further scrutinize the underlying evidence relied on by the respondents, which may indicate that there are some limits to the degree in which the Court will evaluate a race-conscious admissions policy once the university has provided sufficient support for its approach.³⁰

While institutions of higher education were striving to increase racial diversity in their student populations, state and local governments were engaged in a similar effort with respect to elementary and secondary schools. Whether this goal could be constitutionally achieved after *Grutter* and *Gratz*, however, remained unclear, especially as the type of individualized admission considerations found in higher education are less likely to have useful analogies in the context of public school assignments. Thus, for instance, in *Parents Involved in Community Schools v. Seattle School District No. 1*,³¹ the Court rejected plans in both Seattle, Washington and Jefferson County, Kentucky, that, in order reduce what the Court found to be “de facto” racial imbalance in the schools, used “racial tiebreakers” to determine school assignments.³² As in *Bakke*, numerous opinions by a fractured Court led to an uncertain resolution of the issue.

In an opinion by Chief Justice John Roberts, a majority of the Court in *Parents Involved in Community Schools* agreed that the plans before the Court did not include the kind of individualized considerations that had been at issue in the university admissions process in *Grutter*, but rather focused primarily on racial considerations.³³ Although a majority of the Court found the plans unconstitutional, only four Justices (including the Chief Justice) concluded that alleviating “de facto” racial imbalance in elementary and secondary schools could never be a compelling governmental interest. Justice Anthony Kennedy, while finding that the school plans at issue were unconstitutional because they were not narrowly tailored,³⁴ suggested in separate concurrence that relieving racial isolation could be a compelling governmental interest. The Justice even envi-

²⁸ *Id.* at 2212–14.

²⁹ *Id.* at 2211 (“Petitioner’s contention that the University’s goal was insufficiently concrete is rebutted by the record”).

³⁰ *Id.* at 2211–12.

³¹ 551 U.S. 701 (2007). Another case involving racial diversity in public schools, *Meredith v. Jefferson Cnty. Bd. of Educ.*, was argued separately before the Court on the same day, but the two cases were subsequently consolidated and both were addressed in the cited opinion.

³² In Seattle, students could choose among ten high schools in the school district, but, if an oversubscribed school was not within ten percentage points of the district’s overall White/non-White racial balance, the district would assign students whose race would serve to bring the school closer to the desired racial balance. 127 S. Ct. at 2747. In *Jefferson County*, assignments and transfers were limited when such action would cause a school’s Black enrollment to fall below fifteen percent or exceed fifty percent. *Id.* at 2749.

³³ 127 S. Ct. at 2753–54. The Court also noted that, in *Grutter*, the Court had relied upon “considerations unique to institutions of higher education.” *Id.* at 2574 (finding that, as stated in *Grutter*, 539 U.S. at 329, because of the “expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition”).

³⁴ In his analysis of whether the plans were narrowly tailored to the governmental interest in question, Justice Anthony Kennedy focused on a lack of clarity in the administration and application of Kentucky’s plan and the

sioned the use of plans based on individual racial classifications “as a last resort” if other means failed.³⁵ As Justice Anthony Kennedy’s concurrence appears to represent a narrower basis for the judgment of the Court than does Justice John Roberts’ opinion, it appears to represent, for the moment, the controlling opinion for the lower courts.³⁶

On June 29, 2023, the Supreme Court issued a decision in two cases involving Fourteenth Amendment Equal Protection Clause challenges to university admissions policies, *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*³⁷ and *Students for Fair Admissions, Inc. v. University of North Carolina*.³⁸ The challenged university admissions programs sought to promote student body diversity through the use of race-conscious preferences.³⁹ The Court ruled that, because Harvard’s and the University of North Carolina’s admissions policies “lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points, those admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause.”⁴⁰ However, the Court suggested that institutions of higher education may consider during the admissions process “an applicant’s discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise,” provided that the discussion is tied to the student’s character or “unique ability to contribute to the university.”⁴¹

Amdt14.S1.8.5 Facially Neutral Laws Implicating Suspect Classifications

Applying the Equal Protection Clause of the Fourteenth Amendment, the Court ordinarily upholds classifications in law or government policy so long as they are supported by a rational basis. However, the Court will apply strict scrutiny to an express racial classification and will often invalidate it; similarly, it will more closely scrutinize an express classification based on sex, alienage, or whether a person was born out of

use of the “crude racial categories” of “white” and “non-white” (which failed to distinguish among racial minorities) in the Seattle plan. 127 S. Ct. at 2790–91.

³⁵ 127 S. Ct. at 2760–61. Some other means suggested by Justice Anthony Kennedy (which by implication could be constitutionally used to address racial imbalance in schools) included strategic site selection for new schools, the redrawing of attendance zones, the allocation of resources for special programs, the targeted recruiting of students and faculty, and the tracking of enrollments, performance, and other statistics by race.

³⁶ *Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds’”).

³⁷ No. 20-1199 (U.S. June 29, 2023). This case involved a challenge to Harvard’s admissions program under Title VI of the Civil Rights Act of 1964, which provides that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id.* at 6 n.2 (quoting 42 U.S.C. § 2000d). The Court noted that “discrimination that violates the Equal Protection Clause the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.” *Id.* (quoting *Gratz v. Bollinger*, 539 U.S. 244, 276 n.23 (2003)). Accordingly, the Court evaluate[d] Harvard’s admissions program under the standards of the Equal Protection Clause itself. *Id.*

³⁸ No. 21-707 (U.S. June 29, 2023).

³⁹ *Id.* at 23.

⁴⁰ *Id.* at 39–40.

⁴¹ *Id.*

FOURTEENTH AMENDMENT—EQUAL PROTECTION AND OTHER RIGHTS

Rights, Equal Protection

wedlock.¹ In reviewing a neutral classification that is an obvious pretext for racial discrimination or for discrimination on some other forbidden basis, the Court will apply heightened scrutiny and, often, invalidate the provision containing the classification.² But a neutral law that has a disproportionately adverse *effect* upon a racial group or upon another group entitled to heightened protection under the Equal Protection Clause presents a much more difficult case.

In *Washington v. Davis*, the Court held that someone claiming harm from the disparate or disproportionate racial impact of a race-neutral law or policy must prove the government's intent to discriminate.³ A classification having a differential impact, absent a showing of discriminatory purpose, is subject to review under only the lenient rationality standard.⁴ Before *Davis*, lower courts had relied on a prior Supreme Court decision suggesting the racially disparate effects of government conduct alone could support a constitutional claim.⁵ Further, the Court had upheld similar claims under certain civil rights statutes without requiring plaintiffs to prove a discriminatory purpose.⁶ Accordingly, the lower federal courts developed a constitutional “disproportionate impact” framework within which government conduct lacking a substantial justification violated equal protection when it resulted in adverse, disparate impacts on racial minorities.⁷

¹ These levels of scrutiny are discussed in other essays. For assessments of racial classifications, see Amdt14.S1.8.1.1 Overview of *Race*-Based Classifications. For gender, see Amdt14.S1.8.8.3 General Approach to Gender Classifications. For alienage and for nonmarital birth, see Amdt14.S1.8.7.3 Out of Wedlock Births.

² See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Guinn v. United States*, 238 U.S. 347 (1915); *Lane v. Wilson*, 307 U.S. 268 (1939); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960). A law may be unconstitutional even if it does not facially discriminate on the basis of race, if it “uses the racial nature of an issue to define the governmental decisionmaking structure, and thus imposes substantial and unique burdens on racial minorities.” *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982).

³ *Mayor of Washington, D.C., et al. v. Davis*, 426 U.S. 229, 242 (1976) (“[A] law, neutral on its face and serving ends otherwise within the power of government to pursue, is [not] invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.”). *Davis* was decided under the Fifth Amendment’s Due Process Clause, which the Court has interpreted to incorporate equal protection principles. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁴ See *Davis*, 426 U.S. at 247–48; *Rogers v. Lodge*, 458 U.S. 613, 617 n.5 (1982). The Court has applied the same standard to a claim of selective prosecution allegedly penalizing exercise of First Amendment rights. *Wayte v. United States*, 470 U.S. 598 (1985) (holding no discriminatory purpose shown); see also *Bazemore v. Friday*, 478 U.S. 385 (1986) (holding existence of de facto, single-race, state-sponsored 4-H Clubs is permissible, given membership was voluntary and open to all regardless of race).

⁵ The principal case was *Palmer v. Thompson*, 403 U.S. 217 (1971), in which a five-to-four majority refused to order a city to reopen its swimming pools closed allegedly to avoid desegregation orders. See also *Wright v. Council of the City of Emporia*, 407 U.S. 451 (1972). The *Davis* Court read *Palmer* to hold that there was no discrimination, because the pools were closed to black and white residents alike, and that the city’s avowed reasons—to avoid violence and economic loss—“were not open to impeachment by evidence that the councilmen were actually motivated by racial consideration.” *Davis*, 426 U.S. at 242–43.

⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (same); see also *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519 (2015). But see *Gen. Bldg. Contractors Ass’n v. Pennsylvania*, 458 U.S. 375 (1982) (holding discriminatory intent required for claims under 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866). The *Davis* Court affirmed *Griggs*’s reading of Title VII but declined to import the statutory standard for discrimination into the Constitutional standard. 426 U.S. at 238–39, 246–48 (1976). But see *Gen. Bldg. Contractors Ass’n*, 458 U.S. (holding that, unlike Title VII, under 42 U.S.C. § 1981, derived from the Civil Rights Act of 1866, proof of discriminatory intent is required).

⁷ See *Davis*, 426 U.S. at 244 n.12 (listing and disapproving cases). Cases that the Court did not cite include those in which the Fifth Circuit wrestled with the distinction between de facto and de jure school segregation. In *Cisneros v. Corpus Christi Independent School District*, the circuit court held that motive and purpose were irrelevant and that the “de facto and de jure nomenclature” were “meaningless.” 467 F.2d 142, 148–50 (5th Cir. 1972) (en banc). After the Supreme Court reiterated the distinction between de facto and de jure school segregation in *Keyes v. Denver Sch. Dist.*, 413 U.S. 189 (1973), the Fifth Circuit adopted the position that a

Davis rejected the approach of these cases, but the Court noted that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another. It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.”⁸

The Court has since clarified how courts might identify a discriminatory intent behind a facially neutral law. Looking to a challenged local zoning decision that had a greater adverse impact on black and low-income residents than on others, the Court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* explained in some detail how a court could inquire into a defendant’s motivation.⁹ First, a plaintiff is not required to prove that discrimination was the only motive; establishing “a discriminatory purpose” among other, permissible purposes shifts the burden to the defendant to show that it would have made the same decision without the impermissible motive.¹⁰ Second, determining whether discrimination was a motivating factor “demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”¹¹ A disparate impact provides a starting point, and “[s]ometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face,” but the Court anticipated such cases would be “rare.”¹² In the absence of a stark pattern, a court should look to such factors as the “historical background of the decision,” especially if there is a series of official discriminatory actions.¹³ “The specific sequence of events” may shed light on purpose, as would “departures from the normal procedural sequence” or from the usual substantive considerations.¹⁴ A court may evaluate decisionmakers’ statements, and “[i]n some extraordinary instances the members [of the decisionmaking body] might be called to the stand at trial to testify concerning the purpose of the official action, although even then such testimony frequently will be barred by privilege.”¹⁵ Usually, a court will look to all the circumstances to ascertain intent.

decisionmaker must be presumed to have intended the probable, natural, or foreseeable consequences of his decision and therefore that a school board decision that results in segregation is intentional in the constitutional sense, regardless of its motivation. *United States v. Tex. Educ. Agency*, 532 F.2d 380 (5th Cir. 1976), *vacated by Austin Indep. Sch. Dist. v. United States*, 429 U.S. 990 (1976), *cert. denied* 443 U.S. 915 (1979); *see also United States v. Tex. Educ. Agency*, 600 F.2d 518 (5th Cir. 1979). The Court substantially constrained this form of analysis, however, in *Mass. Pers. Adm’r v. Feeney*, 442 U.S. 256, 278–80 (1979), it acknowledged that the foreseeability of racially disparate impacts remained evidence of proof of intent in *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 464–65 (1979).

⁸ *Davis*, 426 U.S. at 242.

⁹ 429 U.S. 252 (1977), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended in 52 USCS § 10301), *as recognized in Chapman v. Nicholson*, 579 F. Supp. 1504, 1514 (N.D. Ala. 1984).

¹⁰ *Id.* at 265–66, 270 n.21; *see also Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 284–87 (1977), *superseded by statute*, Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 30, *as recognized in Rivera v. United States*, 924 F.2d 948, 954 n.7 (indicating that once plaintiff shows defendant acted from impermissible motive in not rehiring him, burden shifts to defendant to show result would have been same in the absence of that motive; constitutional violation not established merely by showing of wrongful motive).

¹¹ *Arlington Heights*, 429 U.S. at 266.

¹² *Id.*

¹³ *Id.* at 267.

¹⁴ *Id.*

¹⁵ *Id.* at 267–68.

The Court has held that a law that directly and foreseeably perpetuates the effects of past discrimination can be facially neutral, and that these effects may not alone establish the requisite discriminatory intent. In *Massachusetts Personnel Administrator v. Feeney*, the Court considered a state law requiring that veteran job applicants who passed a civil service examination be ranked ahead of all non-veterans, even those with higher test scores.¹⁶ The lower court observed that as a result of the armed forces' historical exclusion of women, the preference excluded virtually all women from state civil service positions. The lower court held that this result was easily predictable, and so might be intentional.¹⁷ Reversing, the Supreme Court found the veteran preference law neither overtly nor covertly gender-based. According to the Court, too many men were non-veterans to permit such a conclusion and some women were veterans.¹⁸ That the preference implicitly incorporated past official discrimination against women, the Court held, did not undermine the state's legitimate public purpose of rewarding veterans for their service.¹⁹ Nor did the foreseeability of the preference's consequences establish the requisite showing of intent. The Court stated: "Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."²⁰ Applying this reasoning in other cases, the Court has held that the repeal of antidiscrimination measures alone does not violate equal protection.²¹

Since *Arlington Heights* and *Feeney*, the Court has taken various approaches to determining intent from showings of disparate racial impacts and other circumstantial evidence. For example, in *City of Mobile v. Bolden*, the Court considered the constitutionality of the use of a multi-member electoral district in Alabama that diluted the voting strength of Black voters.²² Rather than consider the totality of circumstances, the plurality evaluated separately such factors as election of minority candidates, discrimination by elected leaders, and a local history or official racial discrimination, holding

¹⁶ 442 U.S. 256, 259–61 (1979). This case clearly established the application of *Davis* and *Arlington Heights* to all nonracial classifications attacked under the Equal Protection Clause.

¹⁷ *Id.* at 260–61 (citing *Feeney v. Com. of Mass.*, 451 F. Supp. 143, 149–150 (D. Mass. 1978), *rev'd Mass. Pers. Adm'r*, 442 U.S.).

¹⁸ *Id.* at 275.

¹⁹ *Id.* at 265, 275.

²⁰ *Id.* at 279. But compare *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 461 (1979), and *Dayton Bd. of Educ. v. Brinkman*, 443 U.S. 526, 538 (1979), which found discriminatory intent established by a showing of past discrimination coupled with foreseeable impact in the school segregation area. See also *Hunter v. Underwood*, 471 U.S. 222, 231–32 (1985) (holding the circumstances of enactment made it clear that state constitutional amendment requiring disenfranchisement for crimes involving moral turpitude had been adopted for purpose of racial discrimination, even though it was realized that some poor white people would also be disenfranchised thereby).

²¹ *Brinkman*, 443 U.S. at 414 (holding repudiation of an earlier desegregation resolution did not violate the Fourteenth Amendment); *Hunter v. Erickson*, 393 U.S. 385, 390 n.5 (1969) (approving "mere repeal" of existing antidiscrimination measures); *Crawford v. Bd. of Educ. of City of Los Angeles*, 458 U.S. 527, 538–39 (1982) (upholding ban on state court busing orders except as a remedy for unconstitutional segregation); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 485–86 (1982) (holding ban on busing for desegregation unconstitutional); see also Amdt14.S1.8.1.7 Political Process Doctrine.

²² 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (codified as amended in 52 USCS § 10301), as recognized in *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2332 (2021). The plurality also concluded that a discriminatory purpose is needed to establish a violation of the Fifteenth Amendment or a violation of the Equal Protection Clause's protections against restrictions of a "fundamental" right, not just its protection against racial classifications. *Bolden*, 446 U.S. at 62–63, 66, 75.

that none proved a constitutional violation.²³ The Court in *Rogers v. Lodge*, in contrast, considered similar factors in a totality-of-the-circumstances analysis and upheld a lower court ruling that a multi-member electoral district in Georgia was being maintained for a racially discriminatory purpose.²⁴ The *Lodge* Court did not require direct proof of intent, stating: “[A]n invidious purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.”²⁵ The Court also emphasized that “laws and practices which, though neutral on their face, serve to maintain the status quo” that had been created by intentional discrimination, were “relevant to drawing an inference of purposeful discrimination.”²⁶ The fact that no black person had ever been elected in the majority-black county, the Court concluded, was “important evidence of purposeful exclusion.”²⁷ Together with a showing of past discrimination, of systemic exclusion of black citizens from the political process, of educational segregation and discrimination, and of elected officials’ unresponsiveness to the needs of the black community, this evidence indicated the presence of discriminatory motivation. The Court also looked to the “depressed socio-economic status” of the black population as being both a result of past discrimination and a barrier to black citizens’ access to voting power.²⁸ The Court determined that the question of discriminatory intent was one of fact, not law, and therefore reviewed and affirmed the district court’s finding of discriminatory intent under the deferential “clearly erroneous” standard.²⁹

Context matters in cases examining racially disparate impacts. In a grand jury selection case, the Court, in *Castenada v. Partida*, (in a five–four decision) seemingly departed from *Davis* and *Arlington Heights*’s refusal to find constitutional violations based on disparate impacts alone.³⁰ Noting that disproportionate impacts did not themselves prove an equal protection claim, the Court nonetheless held that a plaintiff who showed a significant racial discrepancy between the proportion of the county’s population with Spanish surnames and the proportion of recently selected jurors with Spanish surnames established a *prima facie* case of discrimination, shifting the burden to the defendant to show that racially neutral criteria were used.³¹ Several factors probably account for the seeming difference in the Court’s rulings. First, the Court has long recognized that discrimination in jury selection can be inferred more easily from disproportionate

²³ *Id.* at 65–74 (plurality op.). After *Mobile*, Congress passed the Voting Rights Act Amendments of 1982, proscribing election practices “which result[] in a denial or abridgment of the right . . . to vote on account of race or color,” and spelling out a “totality of circumstances” test. *See id.*; S. Rep. No. 417, 97th Congress, 2d Sess. 27–28 (1982).

²⁴ 458 U.S. 613, 622–27 (1982). The *Lodge* Court affirmed that determining discriminatory intent required an analysis of “such circumstantial and direct evidence” as was available. *Id.* at 618 (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)).

²⁵ *Id.* (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)).

²⁶ *Id.* at 625.

²⁷ *Id.* at 623–24.

²⁸ *Id.* at 624–27. The Court also noted the existence of other factors showing the tendency of the system to minimize the voting strength of black citizens, including the large size of the jurisdiction, which made it difficult for Black people to vote or campaign; the maintenance of majority vote and single-seat requirements, which allowed the majority to consistently overrule the minority and “prevent[ed] a cohesive political group from concentrating on a single candidate”; and the absence of residency requirements, allowing all candidates to come from White neighborhoods. *Id.* at 627.

²⁹ *Id.* at 623, 627.

³⁰ *Castaneda v. Partida*, 430 U.S. 482 (1977).

³¹ *Id.* at 486–95.

outcomes than can other forms of discrimination.³² As the Court pointed out in another jury case, “it taxes our credulity to say that mere chance resulted in” marked underrepresentation, and “[t]he result bespeaks discrimination.”³³ Second, the jury selection processes are often “highly subjective” and thus easily manipulated for discriminatory purposes, unlike the processes in *Davis* and *Arlington Heights*, which were regularized and open to inspection.³⁴ Thus, in jury cases disparate impacts may suffice to shift the burden to defendants to show a lack of discriminatory intent while in other contexts, at least where the challenged state procedures are open and facially objective, it is the plaintiffs who must show animus.

In a more recent case, *Department of Homeland Security v. Regents of the University of California*, a four-Justice plurality rejected an equal protection challenge premised on disparate impact.³⁵ Like the jury selection cases, in this case the particular context, here immigration, likely played a role. Litigants challenged the Department of Homeland Security’s decision to rescind the Deferred Action for Childhood Arrivals (DACA) program.³⁶ The DACA program offered “immigration relief” in the form of “favorable treatment” for certain people who arrived in the United States as children.³⁷ The plaintiffs argued that the rescission decision violated equal protection guarantees because it was motivated by impermissible animus, “evidenced by (1) the disparate impact of the rescission on Latinos from Mexico, who represent 78% of DACA recipients; (2) the unusual history behind the rescission,” which included shifting positions about whether to continue the program; “and (3) pre- and post-election statements by President Trump” that were critical of Latinos.³⁸ In considering the first factor, the plurality found that this disparate impact was “expected” based on the fact that “Latinos make up a large share of the unauthorized alien population.”³⁹ On the second factor, the plurality said the Administration’s “decision to reevaluate DACA . . . was a natural response” to new concerns about the program’s legality.⁴⁰ And finally, the plurality concluded that the President’s statements, “remote in time and made in unrelated contexts,” were not probative of other executive officials’ decision to rescind the program.⁴¹

³² *Id.* at 493–94. The Court so stated in *Washington v. Davis*, 426 U.S. 229, 241 (1976), and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 n.13 (1977).

³³ *Hernandez v. Texas*, 347 U.S. 475, 482 (1954); *see also* *Batson v. Kentucky*, 476 U.S. 79, 95 (1986) (“[T]he Court has declined to attribute to chance the absence of black citizens on a particular jury array where the selection mechanism is subject to abuse.”). Most of the Court’s jurisprudence adjudicates intentional discrimination through individual peremptory challenges, rather than an inference of discrimination due to underrepresentation. *See* Amdt14.S1.8.1.8 Peremptory Challenges.

³⁴ *Castaneda*, 430 U.S. at 494, 497–99. In *McCleskey v. Kemp*, 481 U.S. 279, 352–53 (1987), the Court stated that a challenge of racial discrimination in jury selection should include a showing that “the allegedly discriminatory procedure is susceptible to abuse or is not racially neutral.”

³⁵ 140 S. Ct. 1891 (2020) (plurality op.).

³⁶ *Id.* at 1915. A majority of the Court held that the Department’s decision to rescind DACA was “arbitrary and capricious” under the Administrative Procedure Act and remanded the case so the Department could “consider the problem anew.” *Id.* at 1914, 1916 (majority op.). Four Justices who dissented from this aspect of the Court’s decision concurred in the judgment rejecting the equal protection claim. *Id.* at 1919 (Thomas, J., concurring in the judgment in part and dissenting in part); *id.* at 1935–36 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

³⁷ *Id.* at 1901 (majority op.).

³⁸ *Id.* at 1915 (plurality op.).

³⁹ *Id.* at 1915–16.

⁴⁰ *Id.* at 1916.

⁴¹ *Id.*

Amdt14.S3 Disqualification from Holding Office

Amdt14.S3.1 Overview of the Insurrection Clause (Disqualification Clause)

Ratified in the Civil War’s aftermath, Section 3 of the Fourteenth Amendment, which is sometimes referred to as the Insurrection Clause or Disqualification Clause, disqualifies any person from being a Senator, Representative, or elector of the President or Vice-President, or from holding any federal or state military or civil office, if that person has: (1) sworn to support the Constitution as a Member of Congress, officer of the United States, member of a State legislature, or state executive or judicial officer; and (2) subsequently engaged in insurrection or rebellion against the Constitution or given aid or comfort to its enemies.¹ Section 3 further provides that Congress may remove the bar from an otherwise disqualified person by a two-thirds vote in each House.

Section 3 has rarely been applied.² In 1872, Congress removed the disqualification bar from all persons except Senators and Representatives of the Thirty-sixth and Thirty-seventh Congresses, officers in the judicial, military and naval service of the United States, heads of departments, and foreign ministers of the United States.³ And in 1898, Congress enacted broader legislation removing the remaining Section 3 disability incurred during the Civil War.⁴ On March 4, 2024, in its only decision specifically interpreting Section 3, the Supreme Court held unanimously in *Trump v. Anderson* that states cannot enforce Section 3 against federal officeholders or candidates.⁵ In so ruling, the Supreme Court reversed the decision of the Colorado Supreme Court that had held former President Donald J. Trump to be ineligible for the office of President under Section 3 on the grounds that he had engaged in insurrection and, therefore, could not be listed on the Colorado presidential primary ballot.⁶

¹ U.S. CONST. amend. XIV, § 3.

² Cf. Enforcement Act of 1870, ch. 114, §§14–15, 16 Stat. 140, 143 (providing for federal enforcement of the Insurrection Clause). Passage of the Amnesty Act of 1872 halted subsequent federal enforcement of the Clause against those who participated in the Civil War on behalf of the Confederate States of America. See *infra* note 3.

³ Ch. 193, 17 Stat. 142.

⁴ Act of June 6, 1898, ch. 389, 30 Stat. 432 (“the disability imposed by section 3 . . . incurred heretofore, is hereby removed.”). During the Reconstruction Era, a lower court held Congress first had to adopt legislation providing for removal from office in order to give effect to Section 3 and, absent such legislation, persons in office before the Fourteenth Amendment’s promulgation continued to exercise their functions lawfully. *Griffin’s Case*, 11 F. Cas. 7 (C.C.D.Va. 1869) (No. 5815). Furthermore, persons who had participated in the Civil War but had been pardoned by the President before the Fourteenth Amendment’s adoption were not precluded by Section from holding a U.S. office. 18 Op. Att’y Gen. 149 (1885).

⁵ *Trump v. Anderson* No. 23-719, slip op. at 6 (U.S. Mar. 4, 2024) (“States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the President”). For further discussion on *Trump v. Anderson*, see Amdt14.S3.2 *Trump v. Anderson* and Enforcement of the Insurrection Clause (Disqualification Clause).

⁶ *Anderson v. Griswold*, 2023 CO 63 at 221 (“We conclude that the foregoing evidence, the great bulk of which was undisputed at trial, established that President Trump engaged in insurrection.”) *Id.* at 257 (“[B]ecause President Trump is disqualified from holding the office of President under Section Three, it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot.”).

Amdt14.S3.2 *Trump v. Anderson* and Enforcement of the Insurrection Clause (Disqualification Clause)

Reversing the Colorado Supreme Court’s decision in *Anderson v. Griswold*,¹ the United States Supreme Court held, per curiam, in *Trump v. Anderson*, that states cannot determine a candidate’s eligibility for federal office under Section 3 of the Fourteenth Amendment.² In *Anderson v. Griswold*, the Colorado Supreme Court had held former President Donald J. Trump to be “disqualified from holding the office of President under Section Three”³ of the Fourteenth Amendment on the grounds that he had “engaged in insurrection.”⁴ As a consequence, the Colorado Supreme Court held that the Colorado Secretary of State could not include President Trump’s name on Colorado’s 2024 presidential primary ballot.⁵

In reaching its decision in *Trump v. Anderson*, the U.S. Supreme Court observed that Congress “enjoys power to enforce the Amendment through legislation pursuant to Section 5” of the Fourteenth Amendment,⁶ and reasoned that Section 5 grants Congress alone the authority to provide for the enforcement of Section 3 against federal officeholders and candidates.⁷ The Court noted, however, that states retain concurrent authority to enforce Section 3 with respect to state offices.⁸

Amdt14.S4. Public Debt

Amdt14.S4.2 Adoption of the Public Debt Clause

December 1865 saw the opening of the first session of the 39th Congress, the first since the Civil War’s end.¹ In mid-December, the House and Senate resolved to establish a Joint Committee on Reconstruction (Joint Committee) to probe the condition of the former Confederate states.² Among other topics, the Joint Committee investigated public sentiment in the southern states concerning public debts. It learned that voters in those states, who at the time lacked representation in Congress, would back repudi-

¹ *Anderson v. Griswold*, 2023 CO 63

² *Trump v. Anderson* No. 23-719, slip op. at 6 (U.S. Mar. 4, 2024) (“States have no power under the Constitution to enforce Section 3 with respect to federal offices, especially the President.”).

³ *Anderson v. Griswold*, 2023 CO 63

⁴ *Id.* at 221 (“We conclude that the foregoing evidence, the great bulk of which was undisputed at trial, established that President Trump engaged in insurrection.”).

⁵ *Id.* at 257 (“[B]ecause President Trump is disqualified from holding the office of President under Section Three, it would be a wrongful act under the Election Code for the Secretary to list President Trump as a candidate on the presidential primary ballot.”). After the Supreme Court agreed to review the case, the Colorado Secretary of State, however, announced that President Trump’s name would appear on the primary ballot. *Secretary of State Jena Griswold Certifies 2024 Colorado Primary Election Ballot*, State of Colo. News Release (Jan. 5, 2024).

⁶ *Trump v. Anderson* No. 23-719, slip op. at 7 (U.S. Mar. 4, 2024).

⁷ *Id.* (“The terms of the [Fourteenth] Amendment speak only to enforcement by Congress, which enjoys power to enforce the Amendment through legislation pursuant to Section 5.”). See U.S. CONST. amend XIV, § 5 (The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.).

⁸ *Trump v. Anderson* No. 23-719, slip op. at 6 (U.S. Mar. 4, 2024) (“We conclude that States may disqualify persons holding or attempting to hold state office.”) (emphasis retained).

¹ Earlier, in March 1865, the 39th Congress briefly sat in special session. See, e.g., CONG. GLOBE, 39th Cong., Special Sess. 1424 (Mar. 4, 1865) (opening of week-long special session).

² CONG. GLOBE, 39th Cong., 1st Sess. 38 (Dec. 13, 1865) (reflecting the House’s concurrence in the Senate amendment to the resolution establishing the Joint Committee on Reconstruction).

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ating—that is, refusing to pay—debts incurred by the federal government if permitted to resume seating congressional delegations.³ Some witnesses supported having the federal government assume debts of the Confederate States of America or of its constituent states.⁴ There was even “an expectation that compensation will be made for slaves emancipated and property destroyed during the war.”⁵ These public sentiments concerned some in Congress,⁶ because southern states would likely see the ranks of their eventual congressional delegations in the House of Representatives increase due to changes in the apportionment processes that were then contemplated.⁷

The Joint Committee therefore recommended an amendment to the Constitution that, among other things, would have prohibited the United States or any state from paying either debts incurred in aid of war against the United States or claims seeking compensation for the loss of involuntary labor.⁸ During its Senate consideration, Sen. Benjamin Wade proposed broadening this proposal to also put debt incurred on the Union’s part “under the guardianship of the Constitution of the United States, so that a Congress cannot repudiate it.”⁹ The text continued to evolve throughout its congressional consideration, with members offering legislative language bearing different descriptions of the types of federal debts and obligations the constitutional amendment would protect and the measure of protection afforded.¹⁰ Eventually, the 39th Congress proposed a Fourteenth Amendment that, in relevant part, directs that the validity of the public debt of the United States shall not be questioned and declares illegal and void debts or obligations incurred to aid insurrection against the United States or claims for compensation for the emancipation of slaves.¹¹

³ JOINT COMM. ON RECONSTRUCTION, 39TH CONG., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION xvii (1866) [hereinafter JOINT COMMITTEE REPORT] (stating that “almost all” “witnesses examined as to the willingness of the people of the south” to contribute to payment of the national debt believed that “the people of the rebellious states would, if they should see a prospect of success, repudiate the national debt”).

⁴ JOINT COMM. ON RECONSTRUCTION, 39TH CONG., REPORT OF THE JOINT COMMITTEE ON RECONSTRUCTION, PT. IV: FLORIDA, LOUISIANA, AND TEXAS 140 (1866) (testimony of newspaper correspondent that in certain southern states “a majority of the politicians and others seemed to be in favor of paying” the state debt but that support was more muted among other classes of southerners he encountered).

⁵ See JOINT COMMITTEE REPORT, *supra* note 3, at xvii.

⁶ These concerns were not, however, shared universally. Compare CONG. GLOBE, 39th Cong., 1st Sess. 2398 (May 5, 1866) (statement of Rep. Phelps) (arguing that it was “wholly imaginary” that southerners, who would have to pay “their share of Federal taxes” to service existing federal debt, would support assuming rebel debts), with *id.* at 2405 (statement of Rep. Ingersoll) (responding that there would be support in the South for federal assumption of rebel debts, as these were promises to disabled Confederate soldiers, widows, orphans, and other southerners who had “sacrificed their treasure and their blood” to support the rebel war cause).

⁷ The 39th Congress was then considering amending the Constitution to fully count formerly enslaved persons and their descendants in the apportionment of seats in the House of Representatives, in place of the original Constitution’s counting of such persons as three-fifths of a person. See Amdt14.S2.1.1 Apportionment Clause.

⁸ See H.R. 543, 39th Cong. (1866); S. 292, 39th Cong. (1866); see also BENJAMIN B. KENDRICK, THE JOURNAL OF THE JOINT COMMITTEE OF FIFTEEN ON RECONSTRUCTION 114 (1914) (Joint Committee minutes of vote to simultaneously report proposed constitutional amendment to the House and Senate).

⁹ CONG. GLOBE, 39th Cong., 1st Sess. 2769 (May 23, 1866). In relevant part, Senator Wade’s proposal would have declared the “public debt of the United States” “inviolable.” *Id.* at 2768.

¹⁰ Compare, e.g., *id.* (extending constitutional protection to the “public debt of the United States,” which would “includ[e]” debts or obligations incurred to suppress insurrection or in war in defense of the Union), with CONG. GLOBE, 39th Cong. 1st Sess. 2869 (May 29, 1866) (amendment offered by Senator Jacob Howard declaring that the “obligations of the United States incurred in suppressing insurrection, or in defense of the Union, or for payment of bounties or pensions incident thereto, shall remain inviolate,” leading to Senator Wade’s withdrawal of his earlier amendment).

¹¹ U.S. CONST. amend. XIV, § 4.

Amdt14.S4.3 Interpretation of the Public Debt Clause

Though the Fourteenth Amendment won ratification in 1868, justices of the Supreme Court have only once construed the Public Debt Clause in a plurality opinion, and never in a majority opinion.¹ In the 1935 decision *Perry v. United States*,² a Liberty Bond holder challenged a 1933 joint resolution that affected how the federal government would pay the bond.³ The bond carried a “gold clause” entitling its holder to payment in gold coin, or its equivalent, at the standard of value the coin carried in 1918 when the bond issued.⁴ In place of this payment, the joint resolution directed payment of the bond’s \$10,000 face amount, dollar for dollar, in whatever coin or currency was legal tender at the time of payment.⁵ Then, in 1934, President Franklin Roosevelt exercised separate statutory authority to devalue the gold dollar.⁶ Thus, payment under the joint resolution would be worth much less than what was promised in 1918.⁷

In his opinion, Chief Justice Hughes first described the obligation that the federal government undertook when it issued the bond with a gold clause. By stipulating payment in gold coin “of the present standard of value,” the United States had assured those who lent it funds that they would not suffer loss through depreciation.⁸ The Chief Justice then considered the joint resolution in light of this obligation, asking whether Congress could use its constitutional power to regulate the value of money to invalidate the terms of existing obligations issued under its separate power to borrow money on the credit of the United States.⁹ If Congress had the power under the Coinage Clause to modify contract terms, then it would “inevitably follow[]” that Congress could repudiate

¹ In a concurrence to *Perry v. United States*, 294 U.S. 330 (1935), then-Justice Harlan F. Stone expressly declined to join the portions of Chief Justice Charles Evans Hughes’ opinion that held the joint resolution exceeded Congress’s authority. *See id.* at 359–61 (Stone, J., concurring). Four other justices dissented, relying on a dissent written by Justice James McReynolds in a companion case, *Norman v. Baltimore & O.R. Co.*, 294 U.S. 240 (1935), which did not address the Public Debt Clause. *See Perry*, 294 U.S. at 361 (noting Justices McReynolds, Van Devanter, Sutherland, and Butler’s dissent); *see also Norman*, 294 U.S. at 426 (McReynolds, J., dissenting) (“Valid contracts to repay money borrowed cannot be destroyed by exercising power under the [Constitution’s] coinage provision.”). Given Justice Stone’s separate writing, scholars have characterized portions of Chief Justice Hughes’ opinion as representing the views of less than a majority of the Court. *See, e.g.,* Gerard Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1269 (2012) (stating that Chief Justice Hughes’ opinion reflected only a “plurality” view insofar as it declared the joint resolution unconstitutional); Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1190–91 (2012) (arguing that *Perry*’s discussion of the Public Debt Clause, “though appearing in the controlling opinion of the case, was not endorsed by a majority of the Justices of the Court” and adding that the discussion is “arguably dicta” that the Court has not “definitively endorsed” in a “legally binding fashion” (footnote omitted)); Henry M. Hart, Jr., *The Gold Clause in United States Bonds*, 48 HARV. L. REV. 1057, 1099 n.1 (1935) (describing Justice Stone’s separate writing as a special concurrence).

² 294 U.S. 330 (1935).

³ Pub. Res. No. 73-10, 48 Stat. 112, 113 (1933).

⁴ *Perry*, 294 U.S. at 348–49.

⁵ 48 Stat. at 113.

⁶ Proclamation No. 2072, reprinted in 3 PUB. PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 67-69 (1938).

⁷ *Perry* argued that devaluation resulted in an approximately 41 percent reduction in the value of the gold dollar from its 1918 worth, and thus a corresponding decrease in the value of his bond if the gold clause was not honored. *See Perry*, 294 U.S. at 355.

⁸ *Id.* at 348–49.

⁹ *Id.* at 350; *see also* U.S. CONST. art. I, § 8, cl. 2 (“The Congress shall have Power” to “borrow Money on the credit of the United States.”); *id.* at art. I, § 8, cl. 3 (“The Congress shall have Power” to “coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures.”).

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its obligation to repay any sums.¹⁰ Refusing to construe the Constitution to grant Congress such power,¹¹ Chief Justice Hughes stated that when the United States “with constitutional authority, makes contracts,” “it has rights and incurs responsibilities similar to those of individuals who are parties” to contracts, except that the federal government may be sued only with its consent.¹² The Chief Justice refused to read the Constitution as conferring on Congress the power to borrow money on the credit of the United States while simultaneously allowing Congress the power to “alter or destroy” commitments made in the course of such borrowing.¹³

Chief Justice Hughes then discussed the Public Debt Clause, providing the only interpretation of the Clause that has appeared in a controlling opinion of the Court:

The Fourteenth Amendment, in its fourth section, explicitly declares: “The validity of the public debt of the United States, authorized by law, . . . shall not be questioned.” While this provision was undoubtedly inspired by the desire to put beyond question the obligations of the government issued during the Civil War, its language indicates a broader connotation. We regard it as confirmatory of a fundamental principle which applies as well to the government bonds in question, and to others duly authorized by the Congress, as to those issued before the amendment was adopted. Nor can we perceive any reason for not considering the expression “the validity of the public debt” as embracing whatever concerns the integrity of the public obligations.¹⁴

Chief Justice Hughes thus concluded that the joint resolution exceeded Congress’s authority.¹⁵

The Court nonetheless denied Perry relief.¹⁶ Perry’s suit demanded either the gold coin promised in 1918 or its equivalent in currency.¹⁷ To obtain either form of relief, the Court explained that Perry had to demonstrate actual damages resulting from the government’s refusal to perform under the gold clause.¹⁸ Damages “could not be assessed without regard to the internal economy of the country at the time the alleged breach occurred.”¹⁹

¹⁰ *Perry*, 294 U.S. at 350.

¹¹ *Id.*

¹² *Id.* at 352 (citing *United States v. Bank of Metropolis*, 40 U.S. 377, 392 (1841)).

¹³ *Id.*

¹⁴ *Id.* at 354 (ellipsis in original).

¹⁵ *Id.* (“We conclude that the Joint Resolution of June 5, 1933, in so far as it attempted to override the obligation created by the bond in suit, went beyond the congressional power.”).

¹⁶ *See id.* at 358. Unlike the portions of Chief Justice Hughes’ opinion that concluded the joint resolution exceeded Congress’s legislative powers, it appears that the opinion’s discussion of Perry’s inability to prove damages resulting from the joint resolution represents the views of a majority of the Court. *See, e.g., id.* at 359 (Stone, J., concurring) (stating “I cannot escape the conclusion, announced for the Court, that in the situation now presented, the government, through the exercise of its sovereign power to regulate the value of money, has rendered itself immune from liability for its action”).

¹⁷ *Id.* at 347.

¹⁸ *Id.* at 354–55.

¹⁹ *Id.* at 357.

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Judged by this standard, Perry failed to support either of his requests for relief with a valid damages theory. When Perry sought payment in May 1934, because of congressional action beyond the challenged joint resolution a “free domestic market for gold was nonexistent.”²⁰ Moreover, Perry calculated the currency equivalent as equal to roughly \$16,9000—more than the \$10,000 face amount of the bond, given devaluation in 1934.²¹ The Court concluded that payment of this amount of currency “would appear to constitute, not a recoupment of loss in any proper sense, but an unjustified enrichment.”²²

Since 1935, no majority opinion has endorsed, repudiated, or otherwise examined the view, articulated in *Perry’s* plurality opinion, that the Public Debt Clause protects the public debt of the United States, no matter when issued, against “whatever” might “concern[]” its “integrity.”²³

²⁰ *Id.* 355, 357 (noting that “gold coin had been withdrawn from circulation” prior to devaluation in 1934 and that “Congress had authorized the prohibition of the exportation of gold coin and the placing of restrictions upon transactions in foreign exchange”).

²¹ *Id.*

²² *Id.*; see also *id.* at 355 (“[T]he change in the weight of the gold dollar did not necessarily cause loss to the plaintiff of the amount claimed.”).

²³ *Id.* at 354.

SIXTEENTH AMENDMENT

INCOME TAX

Amdt16.4 Corporate Earnings

In *Helvering v. National Grocery Company*, the Court rejected the contention that a tax on undistributed corporate profits is essentially a penalty or a direct tax on capital subject to apportionment.¹ Because the exaction was permissible as a tax, its penal objective, which was “to force corporations to distribute earnings in order to create a basis for taxation against the stockholders,” did not impair its validity.² The Court rejected the contention that the tax was a direct tax on a state of mind because liability was assessed upon a mere purpose to evade imposition of surtaxes against stockholders. The Court held that, while “the existence of the defined purpose was a condition precedent to the imposition of the tax liability,” that “[did] not prevent it from being a true income tax within the meaning of the Sixteenth Amendment.”³ Subsequently, in *Helvering v. Northwest Steel Mills*,⁴ the Court addressed the constitutionality of the undistributed profits tax, observing:

It is true that the surtax is imposed upon annual income only if it is not distributed, but this does not serve to make it anything other than a true tax on income within the meaning of the Sixteenth Amendment. Nor is it true . . . that because there might be an impairment of the capital stock, the tax on the current annual profit would be the equivalent of a tax upon capital. Whether there was an impairment of the capital stock or not, the tax . . . was imposed on profits earned during a definite period—a tax year—and therefore on profits constituting income within the meaning of the Sixteenth Amendment.⁵

Similarly, the Court has held Congress’s power to tax the income of an unincorporated joint stock association to be unaffected by the fact that, under state law, the association is not a legal entity and cannot hold title to property, or by the fact that the shareholders are liable for its debts as partners.⁶ Congress may also attribute an American-controlled foreign corporations realized and undistributed income to its American shareholders and tax each shareholder’s portion of that income.⁷

Whether subsidies paid to corporations in money or in the form of grants of land or other physical property constitute taxable income has also concerned the Court. In *Edwards v. Cuba Railroad*,⁸ the Court ruled that subsidies of lands, equipment, and money paid by Cuba to construct a railroad were not taxable income but should be viewed as having

¹ *Helvering v. National Grocery Co.*, 304 U.S. 282 (1938).

² *Id.* at 288.

³ *Id.* at 288–89. In *Helvering v. Mitchell*, 303 U.S. 391 (1938), the defendant contended that the collection of 50% of any deficiency in addition to the deficiency alleged to have resulted from a fraudulent intent to evade the income tax amounted to the imposition of a criminal penalty. The Court, however, described the additional sum as a civil and not a criminal sanction, and one which could be constitutionally employed to safeguard the Government against loss of revenue. In contrast, the exaction upheld in *Helvering v. National Grocery Co.*, though conceded to possess the attributes of a civil sanction, was held to be sustainable as a tax.

⁴ 311 U.S. 46 (1940). See also *Crane-Johnson Co. v. Helvering*, 311 U.S. 54 (1940).

⁵ 311 U.S. at 53.

⁶ *Burk-Waggoner Ass’n v. Hopkins*, 269 U.S. 110 (1925).

⁷ *Moore v. United States*, No. 22-800, slip op at 7 (U.S. June 20, 2024).

⁸ 268 U.S. 628 (1925).

SIXTEENTH AMENDMENT—INCOME TAX
Corporate Earnings

been received by the railroad as a reimbursement for capital expenditures in completing such project.

On the other hand, sums the Federal Government paid to fulfill its guarantee of minimum operating revenue to railroads during the six months following relinquishment of their control by that government were found to be taxable income. Such payments were distinguished from those excluded from computation of income in the preceding case in that the former were neither bonuses, nor gifts, nor subsidies, “that is, contributions to capital.”⁹ Other corporate receipts deemed to be taxable as income include: (1) “insiders profits” realized by a director and stockholder of a corporation from transaction in its stock, which, as required by the Securities and Exchange Act,¹⁰ are paid over to the corporation;¹¹ (2) money received as exemplary damages for fraud or as the punitive two-thirds portion of a treble damage antitrust recovery;¹² and (3) compensation awarded for the fair rental value of trucking facilities operated by the taxpayer under control and possession of the government during World War II, for in the last instance the government never acquired title to the property and had not damaged it beyond ordinary wear.¹³

⁹ *Texas & Pacific Ry. v. United States*, 286 U.S. 285, 289 (1932); *Continental Tie & L. Co. v. United States*, 286 U.S. 290 (1932).

¹⁰ 15 U.S.C. § 78p.

¹¹ *General American Investors Co. v. Commissioner*, 348 U.S. 434 (1955).

¹² *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955).

¹³ *Commissioner v. Gillette Motor Co.*, 364 U.S. 130 (1960).

EIGHTEENTH AMENDMENT

PROHIBITION OF LIQUOR

Amdt18.1 Overview of the Eighteenth Amendment, Prohibition of Liquor

Prior to its repeal, the Eighteenth Amendment prohibited the manufacture, sale, or transportation of “intoxicating liquors” for “beverage purposes” within the United States.¹ To enforce Prohibition,² Congress enacted the National Prohibition Act or “Volstead Act.”³ The Eighteenth Amendment and Volstead Act were controversial in part because they empowered the federal government to police activities that implicated individual social habits and morality—a role traditionally led by state and local governments.⁴ Difficult to enforce and widely disobeyed, Prohibition lasted almost 14 years before the Twenty-First Amendment repealed it.⁵

The Eighteenth Amendment was the product of nationwide temperance movements that first emerged in the decades after the Founding and steadily grew in influence during the Progressive Era.⁶ From the Colonial Era to the early 1800s, most Americans viewed moderate alcohol consumption as a normal aspect of life.⁷ Early Americans, including many of the Founders, drank, purchased, or manufactured large quantities of alcoholic

¹ U.S. CONST. amend. XVIII, § 1. The Amendment also forbade the importation of beverage liquor into the United States or its exportation therefrom. *Id.* This group of essays often refers to the Eighteenth Amendment’s nationwide ban on the liquor trade as “Prohibition.”

² The Eighteenth Amendment granted Congress and the state legislatures “concurrent powers” to enforce Prohibition by enacting “appropriate legislation.” U.S. CONST. amend. XVIII, § 2. The Supreme Court held that the Eighteenth Amendment gave the federal government broad power to enforce Prohibition, even with respect to activities conducted within a single state, such as the manufacturing and sale of alcoholic beverages. *See Nat’l Prohibition Cases*, 253 U.S. 350, 387 (1920). The Court also confirmed the states’ power to augment the federal government’s enforcement efforts with potentially stricter requirements by targeting aspects of the liquor trade that fell within state jurisdiction. *E.g.*, *Vigliotti v. Pennsylvania*, 258 U.S. 403, 407–09 (1922). For more information, see Amdt18.8 Federal and State Enforcement Powers.

³ The National Prohibition Act was popularly known as the Volstead Act because Representative Andrew John Volstead of Minnesota, chairman of the House Judiciary Committee, sponsored and promoted the Act. The Volstead Act forbid, among other activities, the production, sale, transportation, or possession of beverages that contained 0.5% or greater alcohol by volume—a stringent definition of “intoxicating liquors” that encompassed beer and light wines in addition to distilled alcoholic beverages, such as whiskey or gin. However, the Act allowed the licensed production, use, and sale of alcohol for certain industrial, medicinal, religious, and scientific purposes, subject to state or local restrictions. Moreover, the Act did not specifically prohibit drinking or purchasing alcoholic beverages, and it allowed persons to possess beverages that had been legally acquired. *See* Amdt18.5 The Volstead Act.

⁴ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, H.R. DOC. NO. 71-722, at 20 (1931) (“The Eighteenth Amendment represents the first effort in our history to exten[d] directly by Constitutional provision the police control of the federal government to the personal habits and conduct of the individual.”); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 2–4, 6–7 & n.8, 11–12 (2006) (noting that the Eighteenth Amendment “caused a major crisis in the theory and practice of American federalism, as the national government, which lacked the courts or police necessary for implementing the [Amendment], sought to conscript state judicial and law enforcement resources.”).

⁵ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, In the decades leading up to the Eighteenth Amendment’s proposal and ratification, *supra* note 4, at 54; 56 CONG. REC. 436–37 (1917). Prohibition took effect on January 17, 1920. The Twenty-First Amendment repealed the Eighteenth Amendment on December 5, 1933. *See* U.S. CONST. amend. XXI, § 1.

⁶ *See* Amdt18.2.2 Temperance Movements of the Nineteenth and Twentieth Centuries. The Progressive Era, which lasted from the 1890s to the 1920s, was a period of increased political activism and social reform in the United States. *See Progressive Era to New Era, 1900–1929: Overview*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/overview/> (last visited June 13, 2023).

⁷ *See* Amdt18.2.1 Alcoholic Beverages in Colonial America.

EIGHTEENTH AMENDMENT—PROHIBITION OF LIQUOR

Overview of the Eighteenth Amendment, Prohibition of Liquor

beverages.⁸ However, as Americans' consumption of hard liquor increased significantly from the 1790s to the 1830s, Protestant Christians, concerned about alcoholism's effects on society, formed some of the first temperance groups.⁹

In the decades leading up to the Civil War, temperance groups adopted an increasingly stringent attitude toward alcohol consumption and successfully pressured some states to enact laws prohibiting the liquor trade.¹⁰ However, as the nation became embroiled in disagreements over the issue of slavery, Americans' interest in the temperance movement waned, and many state legislatures repealed or weakened their prohibition laws.¹¹

After the Civil War, the temperance movement again surged in popularity as the nation grappled with rapid industrialization and urbanization.¹² The organization most responsible for the Eighteenth Amendment's proposal and ratification was the Anti-Saloon League.¹³ Founded in 1893, the League engaged strategically with Protestant churches and both of the major political parties, publishing political pamphlets and giving speeches in support of Prohibition.¹⁴ One of the League's most prominent leaders, Wayne B. Wheeler, directed the organization's lobbying and fundraising efforts, which targeted politicians at all levels of government throughout the United States.¹⁵

By 1917, the widespread proliferation of state prohibition laws and Congress's enactment of wartime restrictions on the production and sale of alcoholic beverages had laid the foundation for nationwide Prohibition.¹⁶ With the Anti-Saloon League's political influence at its peak, a wave of "dry" candidates swept into Congress in 1916.¹⁷ On December 18, 1917, Congress proposed the Eighteenth Amendment.¹⁸ Although Congress imposed a seven-year deadline on the Amendment's ratification, the requisite three-fourths of the states approved it in little more than a year.¹⁹ On January 29, 1919, Acting Secretary of State Frank L. Polk certified that the Amendment had been ratified on January 16.²⁰ By its terms, the Amendment did not become effective until January 17, 1920, which was one year after the states ratified it.²¹

The Eighteenth Amendment was the product of nationwide temperance movements that first emerged in the decades after the Founding and steadily grew in influence during the Progressive Era.²² From the Colonial Era to the early 1800s, most Americans viewed

⁸ *See id.*

⁹ *See* Amdt18.2.2 Temperance Movements of the Nineteenth and Twentieth Centuries.

¹⁰ *See id.*

¹¹ *See id.*

¹² *See* Amdt18.2.3 Post-Civil War Temperance Organizations.

¹³ *See id.*

¹⁴ *See id.*

¹⁵ *See id.*

¹⁶ *See* Amdt18.4 Proposal and Ratification of the Eighteenth Amendment.

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

²² *See* Amdt18.2.2 Temperance Movements of the Nineteenth and Twentieth Centuries. The Progressive Era, which lasted from the 1890s to the 1920s, was a period of increased political activism and social reform in the

EIGHTEENTH AMENDMENT—PROHIBITION OF LIQUOR

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moderate alcohol consumption as a normal aspect of life.²³ Early Americans, including many of the Founders, drank, purchased, or manufactured large quantities of alcoholic beverages.²⁴ However, as Americans' consumption of hard liquor increased significantly from the 1790s to the 1830s, Protestant Christians, concerned about alcoholism's effects on society, formed some of the first temperance groups.²⁵

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United States. *See Progressive Era to New Era, 1900–1929: Overview*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/overview/> (last visited June 13, 2023).

²³ *See* Amdt18.2.1 Alcoholic Beverages in Colonial America.

²⁴ *See id.*

²⁵ *See* Amdt18.2.2 Temperance Movements of the Nineteenth and Twentieth Centuries.

²⁶ *See id.*

²⁷ *See id.*

²⁸ *See* Amdt18.2.3 Post-Civil War Temperance Organizations.

²⁹ *See id.*

³⁰ *See id.*

³¹ *See id.*

³² *See* Amdt18.4 Proposal and Ratification of the Eighteenth Amendment.

³³ *See id.*

³⁴ *See id.*

³⁵ *See id.*

³⁶ *See id.*

³⁷ *See id.*

EIGHTEENTH AMENDMENT—PROHIBITION OF LIQUOR

Historical Background, Alcoholic Beverages in Colonial America

The Eighteenth Amendment and nationwide Prohibition quickly fell out of favor with the American public because of ineffective enforcement, harsh enforcement techniques, crime related to the illegal liquor traffic, a need for tax revenue during the Great Depression, and widespread defiance of the law.³⁸ The Twenty-First Amendment repealed Prohibition but recognized that the states could regulate or prohibit alcoholic beverages within their jurisdictions for nonprotectionist purposes, such as health or safety.³⁹ In addition, the federal government continued to tax or regulate activities involving alcoholic beverages, including aspects of beverage production, wholesale distribution, importation, labeling, and advertising.⁴⁰

Amdt18.2 Historical Background

Amdt18.2.1 Alcoholic Beverages in Colonial America

Early colonial Americans drank, imported, and manufactured large quantities of alcoholic beverages.¹ Shortly after arriving in the New World, the settlers of Great Britain's American colonies brewed beer and cider, believing these beverages to be safer to drink than water.² By the mid-eighteenth century, commercial distilleries in New England were producing large quantities of rum.³ At taverns and other establishments that served alcoholic drinks, Americans gathered to socialize, debate politics, and organize protests against British rule.⁴ After the Revolutionary War, for patriotic and practical reasons, many eighteenth-century Americans preferred to drink whiskey distilled from corn and grain, particularly on the Frontier.⁵

³⁸ See Amdt18.9 Repeal of the Eighteenth Amendment.

³⁹ U.S. CONST. amend. XXI, § 2; Tenn. Wine & Spirits Retailers Ass'n v. Thomas, No. 18-96, slip op. at 31–32 (U.S. June 26, 2019) (“[Section 2] allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests.”).

⁴⁰ See Amdt18.9 Repeal of the Eighteenth Amendment.

¹ ERIC BURNS, *THE SPIRITS OF AMERICA: A SOCIAL HISTORY OF ALCOHOL* 8 (2004); MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* 9 (1982) (“Simply stated, most settlers drank often and abundantly.”). Drinking was an important part of Americans' social, occupational, and political life. See Ed Crews, *Rattle-Skull, Stonewall, Bogus, Blackstrap, Bombo, Mimbo, Whistle Belly, Syllabub, Sling, Toddy, and Flip: Drinking in Colonial America*, COLONIAL WILLIAMSBURG (2007), <https://research.colonialwilliamsburg.org/Foundation/journal/Holiday07/drink.cfm> (last visited June 13, 2023) (“Alcohol lubricated such social events as christenings, weddings, funerals, trials, and election-day gatherings, where aspiring candidates tempted voters with free drinks. Craftsmen drank at work, as did hired hands in the fields, shoppers in stores, sailors at sea, and soldiers in camp.”).

² BURNS, *supra* note 1, at 33–34; LENDER & MARTIN, *supra* note 1, at 2 (discussing how the pilgrims and other settlers “brought generous supplies of liquor with them” when they settled America).

³ BURNS, *supra* note 1, at 39–40; LENDER & MARTIN, *supra* note 1, at 30–31. Distillation is “the process of boiling a liquid to separate the components . . . Distillation of fermented solutions such as beer, wine or mead results in a product with a higher alcohol content. Distilled alcohol can be stored longer than beers and wines, so producing distilled beverages became a good way for farmers to use excess grain to produce a marketable product.” *Indomitable Spirits: Prohibition in the United States: Distilleries*, DIGITAL PUB. LIBR. OF AM., <https://dp.la/exhibitions/spirits/early-alcohol-consumption/distilleries> (last visited June 13, 2023).

⁴ Taverns served as the location for the planning of key events leading up to the Revolutionary War. See BURNS, *supra* note 1, at 7–8 (noting that the New York merchants organized Stamp Act boycotts at Burns's Tavern on Broadway and that Bostonians “organize[d] their tea party at the Green Dragon Tavern”); LENDER & MARTIN, *supra* note 1, at 13 (stating that taverns “offered not only food and drink but also lodgings and a forum for public gatherings”).

⁵ See *Rum*, MT. VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/rum/> (last visited June 13, 2023). After the Revolutionary War, government policies restricted imports of rum's key ingredient, molasses. Meanwhile, Americans increasingly settled the lands west of the Appalachian Mountains

EIGHTEENTH AMENDMENT—PROHIBITION OF LIQUOR

Historical Background, Alcoholic Beverages in Colonial America

Like other early Americans, several Founders drank, bought, sold, or produced alcoholic beverages. For example, Thomas Jefferson, an avid wine connoisseur, once wrote that the “light and high flavored wines” were a “necessary of life” for him.⁶ At Jefferson’s Monticello plantation, Peter Hemings, an enslaved person who worked as a cook and tailor, brewed an ale for family and guests.⁷ During the Revolutionary War, George Washington, who served as Commander-in-chief of the Continental Army, wrote that “there should always be a sufficient quantity of spirits, with the army to furnish moderate supplies to the troops.”⁸ After fulfilling his duties as the nation’s first President and retiring to his Mount Vernon estate, Washington operated one of the largest and most profitable distilleries in the nation, which once produced 11,000 gallons of whiskey in a single year.⁹

Although moderate alcohol consumption played a prominent role in many Americans’ lives during the Founding Era,¹⁰ some of the nation’s earliest leaders opposed the excessive consumption of distilled alcoholic beverages (e.g., whiskey or rum).¹¹ For example, George Washington, in a 1788 letter to a French diplomat, wrote that an increase in Americans’ consumption of French wines and brandies would “be more innocent to the health and morals of the people, than the thousands of Hogsheads of poisonous Rum which are annually consumed in the United States.”¹² Alexander Ham-

where corn and grain were abundant. See LENDER & MARTIN, *supra* note 1, at 30–33, 54; DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 54 (2010) (describing how a farmer could choose to “transport a wagonload of grain across the Alleghenies, or he could reduce the wagonload to a few convenient, compact, rot-resistant, and highly profitable jugs of whiskey.”).

⁶ Letter from Thomas Jefferson to Thomas Appleton (Jan. 14, 1816), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-09-02-0222> (last visited June 13, 2023). Although Jefferson experimented with growing grapes at his Monticello plantation, it does not appear that he ever produced a Monticello wine. Peter J. Hatch, *The Vineyards*, MONTICELLO, <https://www.monticello.org/house-gardens/farms-gardens/fruit-gardens/the-vineyards/> (last visited June 13, 2023).

⁷ *Beer*, MONTICELLO, <https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/beer/> (last visited June 13, 2023). Peter Hemings was “the ninth child of Elizabeth Hemings, matriarch of the Hemings family at Monticello, and her fifth child by her enslaver at the time, John Wayles—Thomas Jefferson’s father in-law.” *Peter Hemings*, MONTICELLO, <https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/peter-hemings/> (last visited June 13, 2023).

⁸ Letter from George Washington to William Buchanan (Aug. 20, 1777), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-11-02-0011> (last visited June 13, 2023).

⁹ Letter from George Washington to William Buchanan (Aug. 20, 1777), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/03-11-02-0011> (last visited June 13, 2023).

¹⁰ LENDER & MARTIN, *supra* note 1, at 52–53. Colonial- and Founding-era laws permitted authorities to punish drunkenness; however, “community values” often sufficed to prevent alcohol abuse. *Id.* at 16–18. “[V]arious local laws such as those regulating the establishment of closing times, limitation on the volume of liquor served, and fines for the excessive drinker and/or the server were not uncommon.” *Indomitable Spirits: Prohibition in the United States: Saloons*, DIGITAL PUB. LIBR. OF AM., <https://dp.la/exhibitions/spirits/early-alcohol-consumption/saloons> (last visited June 13, 2023); Clark Byse, *Alcoholic Beverage Control Before Repeal*, 7 LAW & CONTEMP. PROBS. 544, 544–47, 552 (1940) (surveying the history of early American legislation regulating the retail sale of alcoholic beverages, including licensing, regulatory, and taxation provisions that applied to taverns).

¹¹ The Second Continental Congress passed a resolution in February 1777 urging the state legislatures “immediately to pass laws the most effectual for putting an immediate stop to the pernicious practice of distilling grain, by which the most extensive evils are likely to be derived, if not quickly prevented.” 7 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 165 (Feb. 27, 1777) (Worthington Chauncey Ford, ed., 1907). However, the Congress’s journal does not explain the resolution’s motivation.

¹² Letter from George Washington to Eléonor-François-Elie, Comte de Moustier (Dec. 15, 1788), NAT’L ARCHIVES, <https://founders.archives.gov/documents/Washington/05-01-02-0136> (last visited June 13, 2023). Thomas Jefferson once wrote to an acquaintance that he wished “to see [beer] become common instead of the whiskey which kills one third of our citizens and ruins their families.” Letter from Thomas Jefferson to Charles

EIGHTEENTH AMENDMENT—PROHIBITION OF LIQUOR

Historical Background, Temperance Movements of the Nineteenth and Twentieth Centuries

ilton, while serving as the nation's first Treasury Secretary, wrote in a 1790 report to Congress that the "consumption of ardent spirits . . . no doubt very much on account of their cheapness, is carried to an extreme, which is truly to be regretted, as well in regard to the health and the morals, as to the economy of the community."¹³ Acting on Hamilton's recommendation, Congress enacted a tax on whiskey distillation, which led farmers in western Pennsylvania to rebel unsuccessfully against the federal government.¹⁴

Another Founder, the physician Benjamin Rush, warned the American public about alcoholism's dangers. A politician and social reformer who signed the Declaration of Independence, Rush wrote a pamphlet, first published in 1784, titled *An Inquiry Into the Effects of Ardent Spirits Upon the Human Body and Mind*.¹⁵ In his pamphlet, Rush identified some of alcoholism's symptoms and suggested potential remedies.¹⁶ One of Rush's remedies, which helped to inspire the early nineteenth-century temperance movement, was the cultivation of a "practical belief in the doctrines of the Christian religion."¹⁷ Rush aimed to reduce the consumption of distilled alcoholic beverages (e.g., whiskey or rum) but did not oppose moderate consumption of less potent alcohol beverages (e.g., beer or wine).¹⁸ Rush challenged the popular belief that drinking benefited society, warning of alcohol addiction's negative effects on individuals' health and the "future welfare of the republic."¹⁹

Amdt18.2.2 Temperance Movements of the Nineteenth and Twentieth Centuries

From the 1790s to the early 1830s, Americans drank increasingly large amounts of whiskey and other distilled alcoholic beverages.¹ Heavy consumption of hard liquor offended many social reformers, including Protestant churchgoers, who viewed drunkenness as a source of crime, family strife, illness, immorality, poverty, and workplace injuries.² Concerned about alcoholism's effects on society, small groups of farmers and Protestant Christians formed some of the first temperance societies in the early nine-

Yancey (Jan. 6, 1816), NAT'L ARCHIVES, <https://founders.archives.gov/documents/Jefferson/03-09-02-0209> (last visited June 13, 2023).

¹³ . *Report Relative to a Provision for the Support of Public Credit, [9 January 1790]*, NAT'L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0001#ARHN-01-06-02-0076-0002-fn-0127> (last visited June 13, 2023).

¹⁴ BURNS, *supra* note 1, at 43–45. President Washington sent 15,000 militiamen to Pennsylvania, who successfully put down the Whiskey Rebellion without significant opposition. *Id.*

¹⁵ BENJAMIN RUSH, *AN INQUIRY INTO THE EFFECTS OF ARDENT SPIRITS UPON THE HUMAN BODY AND MIND WITH AN ACCOUNT OF THE MEANS OF PREVENTING AND OF THE REMEDIES FOR CURING THEM* (8th ed. 1819).

¹⁶ *Id.* at 5–15, 29–36.

¹⁷ *Id.* at 32.

¹⁸ *See id.* at 5.

¹⁹ *Id.* at 27–29; LENDER & MARTIN, *supra* note 1, at 39–40 ("The future welfare of the republic, Rush believed, depended heavily upon how vigorously succeeding generations would grapple with his message.").

¹ MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* 46 (1982).

² *Id.* at 44. *See also* 1 PERMANENT TEMPERANCE DOCUMENTS OF THE AMERICAN TEMPERANCE SOCIETY 3–11 (1835), <https://archive.org/details/permanenttemper00socigoo/page/n17/mode/1up?view=theater> (last visited June 13, 2023) (outlining negative individual and social consequences of excessive alcohol consumption); LYMAN BEECHER, *SIX SERMONS ON THE NATURE, OCCASIONS, SIGNS, EVILS, AND REMEDY OF INTEMPERANCE* 5–23 (1828), <https://archive.org/details/66350990R.nlm.nih.gov/page/n10/mode/1up> (last visited June 13, 2023) (describing intemperance as "evil").

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teenth century.³ These societies urged Americans to abstain from drinking distilled alcoholic beverages but did not initially call for “teetotalism”—that is, total abstinence from all alcoholic beverages.⁴

Temperance societies adopted a stricter approach toward alcohol consumption in the 1830s, urging Americans to abstain entirely from drinking.⁵ For instance, the American Temperance Society, which Christian clergy founded in 1826, initially called for Americans to refrain from drinking “ardent spirits.”⁶ However, by the late 1830s, the society advocated for total abstinence from all alcoholic beverages.⁷ The society communicated this abstinence message through its writings and lectures, gaining more than a million members nationwide.⁸ Partly as a result of the temperance movement, Americans’ drinking declined during the mid-1830s.⁹

In addition to advocating for abstinence, some pre-Civil War temperance leaders called for Congress or the state legislatures to prohibit the liquor trade.¹⁰ For example, Lyman Beecher, a Presbyterian minister who co-founded the American Temperance Society, advocated for a ban on the manufacture and sale of liquor to foster individual morality and social order.¹¹ Answering calls for reform, at least fourteen states adopted prohibition laws in some form by 1855.¹² However, as the nation became embroiled in disagreements over the issue of slavery, Americans’ interest in the temperance movement waned, and many state legislatures repealed or weakened their prohibition laws.¹³

³ LENDER & MARTIN, *supra* note 1, at 64–67. As early as the late eighteenth century, some Protestant religious groups, including the Methodists and Quakers, advocated for Americans to abstain from drinking distilled alcohol alcoholic beverages. *Id.* at 64.

⁴ *Id.* at 68, 70. In 1831, President Andrew Jackson and former Presidents James Madison and John Quincy Adams signed a statement encouraging all U.S. citizens—and, in particular, young men—to stop drinking hard liquor “to promote the health, the virtue, and the happiness of the community.” *James Madison: Temperance Statement, July 1831*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/99-02-02-2380> (last visited June 13, 2023).

⁵ LENDER & MARTIN, *supra* note 1, at 69.

⁶ 1 PERMANENT TEMPERANCE DOCUMENTS OF THE AMERICAN TEMPERANCE SOCIETY, *supra* note 2, at 11–12. The group was originally called the “American Society for the Promotion of Temperance.” *Id.* at 12. *See also* LENDER & MARTIN, *supra* note 1, at 68–71.

⁷ 2 PERMANENT TEMPERANCE DOCUMENTS OF THE AMERICAN TEMPERANCE SOCIETY 24 (1856) https://www.google.com/books/edition/Permanent_Temperance_Documents_of_the_Am/jbdJAQAAMAAJ?hl=en&gbpv=1 (last visited June 16, 2023) (discussing the national temperance movement’s shift toward advocating for total abstinence in the 1830s); LENDER & MARTIN, *supra* note 1, at 68–71. In 1833, a bipartisan group of Members of Congress formed the Congressional Temperance Society, which met in the hall of the House of Representatives. *See* 1 PERMANENT TEMPERANCE DOCUMENTS OF THE AMERICAN TEMPERANCE SOCIETY, *supra* note 2, at 257.

⁸ *See* sources cited *supra* note 7.

⁹ LENDER & MARTIN, *supra* note 1, at 71–72.

¹⁰ *E.g.*, BEECHER, *supra* note 2, at 73 (“The commerce therefore, in ardent spirits, which produces no good, and produces a certain and an immense amount of evil, must be regarded as an unlawful commerce, and ought, upon every principle of humanity, and patriotism, and conscience, and religion, to be abandoned and proscribed.”). Beecher also acknowledged that prohibition laws would likely be ineffective unless “public sentiment” turned against the liquor trade. *Id.* at 62–63; LENDER & MARTIN, *supra* note 1, at 79.

¹¹ BEECHER, *supra* note 2, at 73.

¹² Clark Byse, *Alcoholic Beverage Control Before Repeal*, 7 LAW & CONTEMP. PROBS. 544, 560 (1940). Beginning in the 1820s, a few states enacted the “local option,” which allowed local governments to prohibit the sale of liquor. *Id.* at 558. As one commentator noted, the term “prohibition” was “really a misnomer, for most laws [at the time] did not completely prohibit the manufacture or sale of intoxicating beverages” but allowed certain businesses to sell alcoholic beverages for “medicinal purposes” and allowed individuals to import or produce beer or wine for personal use. *Id.* at 560 n.120.

¹³ *See* 55 CONG. REC. 4510 (1917) (listing states that repealed their prohibition laws around the time of the Civil War); LENDER & MARTIN, *supra* note 1, at 85.

Amdt18.2.3 Post Civil War Temperance Organizations

After the Civil War, the temperance movement again surged in popularity as the nation grappled with rapid industrialization and urbanization.¹ This renewed social reform movement attracted a diverse group of supporters.² For instance, a large number of women led and participated in temperance and prohibition efforts, believing that lower rates of alcohol abuse and the closure of saloons would strengthen families and decrease the prevalence of domestic violence.³ Employers, including prominent industrialists such as Andrew Carnegie, sought to stem alcoholism's pernicious effects on productivity and safety in the workplace.⁴

Temperance and prohibition ideals also found expression in the works of some African American writers, such as Frederick Douglass, F.E.W. Harper, and Booker T. Washington, who argued that the liquor traffic negatively impacted African Americans' economic standing, morals, and welfare.⁵ Some Christian clergy preached about the evils of saloon culture,⁶ and physicians warned of alcoholism's health effects.⁷ The temperance movement also attained support among nativists who opposed European immigrants' drinking customs.⁸

Several social reform groups played a pivotal role in the Eighteenth Amendment's inception, proposal, and ratification. In 1869, temperance supporters organized one of

¹ MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* 92–93 (1982).

² DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 1, 41–42 (2010).

³ *History of the WCTU*, WOMEN'S CHRISTIAN TEMPERANCE UNION, <https://www.wctu.org/history> (last visited June 13, 2023). See also ERIC BURNS, *THE SPIRITS OF AMERICA: A SOCIAL HISTORY OF ALCOHOL* 98–99, 122 (2004). Many female temperance advocates were also seeking the right to vote, own property, and participate in society on an equal basis with men. *Id.* After a men's temperance organization refused to allow them to speak at its annual convention, women's rights activists Susan B. Anthony and Mary C. Vaughn formed the Woman's New York State Temperance Society with Elizabeth Cady Stanton as its president. *Id.* at 98–99. See also Susan B. Anthony, Address to the State Temperance Convention (June 17, 1852), in *THE LILY* (July 1852), <https://rbcspl.lib.rochester.edu/viewer/545> (last visited June 13, 2023).

⁴ LENDER & MARTIN, *supra* note 1, at 108.

⁵ See, e.g., Booker T. Washington, *Prohibition and the Negro*, 88 *OUTLOOK* 519, 587 (1908) (“The prohibition movement is based upon a deep-seated desire to get rid of whisky in the interest of both races because of its hurtful economic and moral results.”); FRANCES E.W. HARPER, *Nothing and Something*, in *ATLANTA OFFERING: POEMS* 42–44 (1900) (describing alcoholism's destructive impact on a family); Frederick Douglass, Editorial, *Prohibition*, *SAN MARCO FREE PRESS*, May 19, 1887, at 1 (“Few things could do more for the elevation and happiness, or for the welfare of [African Americans] than the banishment of intoxicating liquors from the state of Mississippi.”). See also Mark Lawrence Schrad, *The Forgotten History of Black Prohibitionism*, *POLITICO MAG.* (Feb. 6, 2021), <https://www.politico.com/news/magazine/2021/02/06/forgotten-black-history-prohibition-temperance-movement-461215>.

⁶ LENDER & MARTIN, *supra* note 1, at 114. Saloons became “prominent” by 1850. As one commentator noted: “On the urban East coast, these generally took the form of politically-oriented saloons, while on the American frontier saloons were commonly characterized as having swinging doors, a long bar, spittoons, and tables for playing cards, but the variety of saloons was in fact immense.” *Indomitable Spirits: Prohibition in the United States, Saloons*, DIGITAL PUB. LIBR. OF AM., <https://dp.la/exhibitions/spirits/early-alcohol-consumption/saloons> (last visited June 13, 2023). In some neighborhoods, saloons “cashed paychecks, extended credit, supplied a mailing address,” and offered cheap lodging. OKRENT, *supra* note 2, at 28. Saloon culture became a target for social reformers who viewed the establishments as a source of family strife, capitalist exploitation, and political corruption. *Id.* at 29, 33, 47, 75–76.

⁷ LENDER & MARTIN, *supra* note 1, at 120–21.

⁸ *Id.* at 98.

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the earliest of these post-Civil War groups, the National Prohibition Party.⁹ This political party called for Congress to propose an amendment to the Constitution banning the liquor traffic.¹⁰ In 1874, a group of women founded a national temperance organization, the Women's Christian Temperance Union (WCTU), in Cleveland, Ohio.¹¹ The WCTU staged “pray-ins” outside of establishments that sold alcoholic beverages, forcing some illegal saloons to shut their doors.¹² Frances Willard, the WCTU's second leader, created programs to educate American students about the dangers of alcoholism¹³ and pushed for Congress and the state legislatures to mandate temperance education in schools.¹⁴ The WCTU's lobbying efforts helped to secure restrictions on the liquor traffic in some states and U.S. territories by the late 1800s.¹⁵ However, the National Prohibition Party and WCTU failed to persuade Congress to propose a federal prohibition amendment.

The organization most responsible for the Eighteenth Amendment's proposal and ratification was the Anti-Saloon League.¹⁶ Founded in 1893 in Oberlin, Ohio by clergyman Howard Hyde Russell, the League engaged strategically with Protestant churches and both of the major political parties, publishing political pamphlets and giving speeches in support of temperance and Prohibition.¹⁷ League Counsel Wayne B. Wheeler led the organization's lobbying and fundraising efforts, which targeted politicians at all levels of government throughout the United States.¹⁸ Some of the League's efforts exploited World War I-era xenophobia toward German-Americans, who were active in the brewing industry, as well as racism toward African Americans and other minority groups.¹⁹

Amdt18.3 Early Federal and State Prohibition Laws

Before the Civil War, several states enacted laws that restricted or banned the manufacture and sale of alcoholic beverages statewide.¹ However, by the war's end, most of these states had repealed or weakened their prohibition laws.² In the late 1800s, a resurgent temperance movement prompted the enactment of new statewide bans or

⁹ *Prohibition Party*, OHIO HIST. CENT. https://ohiohistorycentral.org/w/Prohibition_Party (last visited June 13, 2023).

¹⁰ LENDER & MARTIN, *supra* note 1, at 93–95. In the decades after the Civil War, Members of Congress introduced various proposed prohibition amendments to the Constitution. *E.g.*, S.J. Res. 12, 50th Cong. (1887) (“The manufacture, importation, exportation, transportation, and sale of all alcoholic liquors as a beverage shall be, and hereby is, forever prohibited in the United States and in every place subject to their jurisdiction.”).

¹¹ VCU LIBR. SOC. WELFARE HIST. PROJECT, *Women's Christian Temperance Union—(1874-Present)* <https://socialwelfare.library.vcu.edu/religious/womens-christian-temperance-union> (last visited June 13, 2023).

¹² *Id.*; LENDER & MARTIN, *supra* note 1, at 90–91. Carrie Amelia Moore Nation, known as “Carry A. Nation,” a temperance advocate, employed more radical methods of advocacy, including destroying saloon property with hatchets. *See Carrie Nation: Topics in Chronicling America*, LIBR. OF CONG., <https://guides.loc.gov/chronicling-america-carrye-nation/introduction> (last visited, June 13, 2023).

¹³ KATHARINE LENT STEVENSON, A BRIEF HISTORY OF THE WOMEN'S CHRISTIAN TEMPERANCE UNION 33–34 (1907); LENDER & MARTIN, *supra* note 1, at 110.

¹⁴ BURNS, *supra* note 3, at 115.

¹⁵ *Id.* at 121.

¹⁶ OKRENT, *supra* note 2, at 2–3, 35–38.

¹⁷ ANTI-SALOON LEAGUE YEAR BOOK 1915, 5–30 (Ernest H. Cherrington ed.); LENDER & MARTIN, *supra* note 1, at 126–27. The League formed in Ohio in 1893 and became a nationwide organization in 1895. *Id.* at 127.

¹⁸ LENDER & MARTIN, *supra* note 1 at 127–28; BURNS, *supra* note 3, at 159.

¹⁹ LENDER & MARTIN, *supra* note 1, at 129–30; BURNS, *supra* note 3, at 177–78.

¹ *See* Amdt18.2.2 Temperance Movements of the Nineteenth and Twentieth Centuries.

² *See id.*

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restrictions on the liquor traffic.³ Producers and sellers of alcoholic beverages challenged some of these state prohibition laws in federal court, contending that they violated various provisions of the Constitution, including the Commerce Clause.⁴

In evaluating constitutional challenges to late nineteenth century state prohibition laws, the Supreme Court confirmed the states' power to prohibit the intrastate manufacture and sale of alcoholic beverages.⁵ However, the Court held that the Commerce Clause prevented the states from banning the importation or initial sale of out-of-state beverages that remained in their original packages.⁶ The Court decided that, absent contrary federal law, such state bans impermissibly burdened interstate commerce.⁷

Responding to concerns that the Supreme Court's decisions would prevent "dry" states from enforcing their prohibition laws fully, Congress enacted various statutes that specifically subjected imported alcoholic beverages to state regulation.⁸ For instance, the Webb-Kenyon Act of 1913 effectively authorized the states to restrict the direct shipment of imported alcoholic beverages to consumers for personal use.⁹ In 1917, Congress enacted the Reed Amendment to penalize anyone who imported alcoholic beverages into a "dry" state for personal use by subjecting them to imprisonment or payment of a fine.¹⁰

In addition to facilitating state prohibition efforts, Congress passed nationwide laws restricting the production and sale of alcoholic beverages during the United States'

³ By April 1917, twenty-six of the forty-eight states had enacted such restrictions. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 5 n.6 (2006); ANTI-SALOON LEAGUE YEAR BOOK 1917, 5–6 (Ernest H. Cherrington ed.) (estimating that 55 million people in the United States lived under prohibition laws in March 1917). See also Post, *supra*, at 177–81 tbl. 2 (listing, for each state with statewide prohibition laws in 1918, the "activities prohibited," "substances prohibited," and "notable exceptions" for noncommercial use). Even the remaining "wet" states generally allowed local governments to exercise some form of the "local option" and restrict the liquor trade within their boundaries. *Id.* at 5 n.6, 182–83 tbl. 3 (listing, for each state without a statewide prohibition law, the "type of regulation" (e.g., local option) and "activities that may be regulated" (e.g., manufacture and sale)).

⁴ *E.g.*, *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 498 (1888). Although the Commerce Clause empowers Congress to pass federal laws, it also limits state authority to regulate commerce. In contrast to the doctrine of preemption, which generally applies in areas where Congress has acted, the so-called Dormant Commerce Clause doctrine may bar state or local regulations even in the absence of relevant congressional legislation. For more information on the dormant aspects of the Commerce Clause, see ArtI.S8.C3.7.1 Overview of Dormant Commerce Clause.

⁵ *E.g.*, *Mugler v. Kansas*, 123 U.S. 623, 659 (1887). Drawing a distinction between intrastate manufacture and interstate commerce, the Court held that states could prohibit the manufacture of liquor for an out-of-state market. *Kidd v. Pearson*, 128 U.S. 1, 22–23 (1888). For a discussion of the Court's temperance-law jurisprudence, see *Granholt v. Heald*, 544 U.S. 460, 476–82 (2005); and *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, No. 18-96, slip op. at 12–20 (U.S. June 26, 2019). See also ArtI.S8.C3.7.7 Congressional Authorization of Otherwise Impermissible State Action.

⁶ See *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 498 (1888); *Leisy v. Hardin*, 135 U.S. 100, 122–23 (1890).

⁷ See sources cited *supra* note 3.

⁸ *E.g.*, *Wilson Act*, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121). The Supreme Court interpreted the Wilson Act narrowly to authorize states to regulate the resale of imported liquor after delivery to the consignee in the state, but not the direct shipment of liquor to a consumer for personal use. *Rhodes v. Iowa*, 170 U.S. 412, 424 (1898); *Scott v. Donald*, 165 U.S. 58, 100 (1897) (holding that the Wilson Act did not authorize a South Carolina law requiring all liquor sales to be channeled through the state liquor commissioner, and thus such a requirement was an impermissible burden on interstate commerce). See also *Vance v. W. A. Vandercook Co.*, 170 U.S. 438, 456–57 (1898).

⁹ *Webb-Kenyon Act*, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122). The Supreme Court upheld the constitutionality of the Webb-Kenyon Act. See *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 331 (1917).

¹⁰ Act of Mar. 3, 1917, ch. 162, § 5, 39 Stat. 1058, 1069.

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participation in World War I.¹¹ Wartime prohibition laws were ostensibly designed to preserve grain and other food ingredients for soldiers' provisions. For instance, in May 1917, one month after declaring war on Germany, Congress prohibited the sale of alcoholic beverages to soldiers in uniform.¹² Three months later, Congress enacted the Food Control Act or "Lever Act," which prohibited liquor producers from using food materials to manufacture distilled alcoholic beverages.¹³ The President, acting pursuant to authority delegated to him in the Act,¹⁴ proclaimed restrictions on the production of less potent beverages, including beer.¹⁵

In November 1918, about two months before the states ratified the Eighteenth Amendment—and a little more than a year before Prohibition took effect—Congress enacted the War-Time Prohibition Act.¹⁶ The Act banned the sale of "intoxicating" alcoholic beverages until the President declared an end to the country's mobilization for World War I.¹⁷ Charged with enforcing the Act, the Commissioner of Internal Revenue determined that "a beverage containing as much as one-half of one per centum of alcohol by volume would be regarded as intoxicating."¹⁸ Thus, even before the states ratified the Eighteenth Amendment, the federal government had imposed stringent nationwide restrictions on the liquor trade to facilitate state prohibition laws and support the nation's efforts in World War I.

¹¹ In the decades leading up to the Eighteenth Amendment's proposal and ratification, the Supreme Court had adopted a narrow view of Congress's power to regulate the local manufacture and sale of products under the Commerce Clause. *See, e.g.,* *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918) (striking down the federal Keating-Owen Child Labor Act, which prohibited the transportation in interstate commerce of products made in a factory that had employed child labor, because Congress lacked authority under the Commerce Clause to regulate local manufacturing), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941); *Kidd v. Pearson*, 128 U.S. 1, 17 (1888) (suggesting that Congress's Commerce Clause power did not extend to "the purely internal domestic commerce of a state, which is carried on between man and man within a state or between different parts of the same state."). However, the Supreme Court held that Congress could rely on its war powers to enact federal prohibition legislation prohibiting the production and sale of intoxicating liquors within a state "in order to promote the Nation's efficiency in men, munitions and supplies." *Jacob Ruppert v. Caffey*, 251 U.S. 264, 282 (1920). After Prohibition's repeal, the Court began to adopt a more expansive view of Congress's Commerce Clause authority. By 1942, the Court held that Congress's power under the Commerce Clause and Necessary and Proper Clause extended to intrastate activities that, in the aggregate, substantially affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 124 (1942). *See also* *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (considering whether the cultivation, distribution, or possession of marijuana for personal medical purposes pursuant to the California Compassionate Use Act of 1996 could be prosecuted under the federal Controlled Substances Act and holding that the Court would defer to Congress if there was a rational basis to believe that regulation of home-consumed marijuana would affect the market for marijuana generally).

¹² Military Prohibition Act, ch. 15, § 12, 40 Stat. 76, 82–83 (1917).

¹³ Food Control Act, ch. 53, § 15, 40 Stat. 276, 282 (1917).

¹⁴ *See id.*

¹⁵ *E.g.,* Proclamation of Dec. 8, 1917, 40 Stat. 1728, 1728–29; Proclamation of Sept. 16, 1918, 40 Stat. 1848, 1848–49. *See also* *Jacob Ruppert*, 251 U.S. at 278–80 (discussing presidential proclamations under the Lever Act).

¹⁶ War-Time Prohibition Act, ch. 212, 40 Stat. 1045, 1046–47 (1918). The Act took effect in July 1919 after World War I had ended. *Id.*

¹⁷ *Id.* The Act, which also banned beer and wine production, exempted some beverages destined for export to foreign countries. *Id.*

¹⁸ *See* *Jacob Ruppert*, 251 U.S. at 278–80. In a case decided only weeks before Prohibition took effect, the Supreme Court disregarded the Commissioner's interpretation, deeming it inconsistent with the War-Time Prohibition Act. *United States v. Standard Brewery, Inc.*, 251 U.S. 210, 219 (1920). However, the Volstead Act, which provided for Prohibition's enforcement, specifically adopted the Commissioner's stringent interpretation of "intoxicating liquor." *See* "Volstead Act."

Amdt18.4 Proposal and Ratification of the Eighteenth Amendment

By 1917, the widespread proliferation of state restrictions on the liquor trade and Congress's enactment of wartime prohibition measures had laid the foundation for nationwide Prohibition.¹ The states' ratification of the Sixteenth Amendment in 1913 boosted the Eighteenth Amendment's prospects by empowering Congress to impose a nationwide income tax to offset the loss of federal alcohol excise tax revenue.² With the Anti-Saloon League's political influence at its peak, a wave of "dry" candidates swept into Congress in 1916.³ Although earlier nationwide prohibition efforts had failed to gain enough political support,⁴ advocates recognized that the political environment was favorable for Congress's proposal of the Eighteenth Amendment.⁵

On April 4, 1917, Senator Morris Sheppard of Texas introduced the joint resolution that would, as revised, become the Eighteenth Amendment.⁶ The Senate Judiciary Committee, to which the joint resolution was referred, reported it favorably.⁷ The committee's report, relying on statements from prior Congresses, contended that the amendment should be submitted to the states because of popular support for Prohibition; the "evils" of alcoholic beverages; and the presumption that Congress lacked constitutional authority to regulate the intrastate manufacture and sale of alcoholic beverages comprehensively in peacetime.⁸

During the summer of 1917, the Senate debated the draft Prohibition amendment. Supporters echoed the temperance movement, arguing that drinking was detrimental to the health and welfare of society.⁹ They contended that federal enforcement of nation-

¹ See Amdt18.3 Early Federal and State Prohibition Laws.

² U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."); ERIC BURNS, *THE SPIRITS OF AMERICA: A SOCIAL HISTORY OF ALCOHOL* 164–65 (2004); DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 54 (2010) (noting that, by 1910, taxes on alcoholic beverages accounted for more than 30 percent of total federal tax revenues).

³ MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* 129 (1982). Malapportionment of congressional House seats, which gave anti-Prohibition, urban regions of the country less representation in Congress, likely contributed to dry candidates' successes in the 1916 elections. OKRENT, *supra* note 2, at 81, 104.

⁴ *E.g.*, S. Res. 12, 50th Cong. § 1 (1887) ("The manufacture, importation, exportation, transportation, and sale of all alcoholic liquors as a beverage shall be, and hereby is, forever prohibited in the United States and in every place subject to their jurisdiction."). Senator Morris Sheppard of Texas introduced a prohibition amendment in the Senate in 1913. S.J. Res. 88, 63d Cong. (1913). Representative Richmond Pearson Hobson of Alabama introduced a prohibition amendment in the House in 1914 that was reported out of committee; however, it did not secure the requisite two-thirds vote for passage. H.J. Res. 168, 63rd Cong. (1914); 52 CONG. REC. 616 (1914). For more on the history of the Hobson Amendment and the evolution of the Eighteenth Amendment's enforcement provisions, see RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920* (STUDIES IN LEGAL HISTORY) 228–35 (1995).

⁵ LENDER & MARTIN, *supra* note 3, at 129. The brewing industry lobbied against the Eighteenth Amendment but could not overcome the strength of the Anti-Saloon League and the Prohibition lobby. See OKRENT, *supra* note 2, at 30–34. In an effort to tip the political balance further toward Prohibition, the Anti-Saloon League announced its support for women's suffrage in 1916. *Id.* at 65.

⁶ S.J. Res. 17, 65th Cong. (1917).

⁷ S. REP. NO. 65-52, at 1 (1917). The committee removed language from the amendment that specifically preserved the states' powers to enact and enforce prohibition laws. *Id.* The House later added state enforcement provisions.

⁸ See *id.* at 1–5. See also *supra* note 1.

⁹ 55 CONG. REC. 5549–51 (1917).

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wide Prohibition would prevent persons in “wet” states from smuggling alcoholic beverages into “dry” states, thereby undermining state prohibition laws.¹⁰ Opponents, on the other hand, argued that granting the federal government the power to police individuals’ social habits would intrude upon the states’ reserved powers and violate the American tradition of local self-governance.¹¹ Senator Henry Cabot Lodge of Massachusetts predicted that Prohibition would become impossible for the federal government to enforce and widely disobeyed.¹² Nonetheless, the Senate approved the joint resolution by the requisite two-thirds vote on August 1, 1917, sending it to the House for further action.¹³

Four months later, the House considered the draft amendment. The House Judiciary Committee, to which the amendment had been referred, reported the joint resolution favorably with revisions.¹⁴ Among other changes, the House version of the amendment clarified that the states would maintain the power to enforce prohibition laws within their jurisdictions.¹⁵ In reporting the joint resolution, the committee declined to evaluate the merits of Prohibition, instead noting that popular support for the amendment, as evidenced by the prevalence of state prohibition laws, made it “incumbent upon the Congress, to submit the issue to the States in the manner requested.”¹⁶ However, the amendment’s opponents raised concerns about the federal government’s intrusion on state sovereignty; loss of tax revenues; enforcement costs; and the creation of an illegal liquor traffic.¹⁷

The House held a single day of debate on the amendment.¹⁸ Supporters echoed arguments made during the Senate debates, contending that the federal government should enforce a ban of alcoholic beverages and saloons in order to protect Americans’ health, safety, and morals.¹⁹ They also noted that a majority of the states had adopted “dry” laws, which evidenced popular support for the amendment.²⁰ Opponents raised concerns about state sovereignty and predicted that the federal and state governments would find it difficult to enforce a nationwide criminal prohibition on activities supported by popular majorities in many state and local jurisdictions.²¹

The House approved the proposed amendment, as revised, by a vote of 282 to 128.²² After the Senate approved the revised version,²³ Congress submitted the Eighteenth

¹⁰ *Id.* at 5552, 5626.

¹¹ *Id.* at 5555.

¹² *Id.* at 5586–87.

¹³ *Id.* at 5666.

¹⁴ H. REP. NO. 65-211, pt. 1, at 1–2 (1917).

¹⁵ *Id.* Brewers and distillers obtained one year in which to wind down their business operations before the amendment took effect. *Id.* The committee also increased the deadline for ratification from six to seven years. *Id.*

¹⁶ *Id.*

¹⁷ *Id.* pt. 3, at 1, 4–8. Opponents also argued that Prohibition would distract the nation from its war effort and violate beverage producers’ and liquor dealers’ property rights. *E.g., id.*

¹⁸ 56 CONG. REC. 422 (1917).

¹⁹ *Id.* at 425, 427.

²⁰ *Id.* at 427.

²¹ *Id.* at 428, 436–37.

²² *Id.* at 469–70.

²³ *Id.* at 477–78.

EIGHTEENTH AMENDMENT—PROHIBITION OF LIQUOR

Volstead Act

Amendment to the states for ratification on December 18, 1917.²⁴ Although Congress imposed a seven-year deadline on the Eighteenth Amendment's ratification, the requisite three-fourths of the states approved it in little more than a year. On January 29, 1919, Acting Secretary of State Frank L. Polk certified that the Amendment had been ratified.²⁵ By its terms, the Amendment did not become effective until January 17, 1920, which was one year after ratification.²⁶

Amdt18.5 Volstead Act

Despite its broad scope, the Eighteenth Amendment did not “prescribe any penalties, forfeitures, or mode of enforcement.”¹ Instead, it empowered Congress and the state legislatures to enact “appropriate legislation” to enforce Prohibition.² At the time of the Amendment's ratification, a majority of states had enacted laws prohibiting the liquor traffic within their jurisdictions.³ To enforce Prohibition nationwide and regulate beverage and non-beverage uses of alcohol, Congress enacted the National Prohibition Act or “Volstead Act” on October 28, 1919.⁴

The Volstead Act prohibited the production, sale, transportation, and possession of beverages that contained 0.5% or greater alcohol by volume—a stringent definition that encompassed beer and light wines in addition to distilled alcoholic beverages, such as whiskey or gin.⁵ Declaring every place where liquor was illegally manufactured, sold, or kept to be a “nuisance,” the Volstead Act established civil and criminal penalties, including property forfeiture, for violations of Prohibition.⁶ The Act also granted federal Prohibition agents the power to enforce its requirements throughout the United States.⁷

Despite imposing a stringent ban on the liquor traffic, the Volstead Act allowed the licensed manufacture, production, use, and sale of alcohol for certain purposes (e.g., medicinal or religious), subject to valid state or local restrictions.⁸ The Act did not

²⁴ *Joint Resolution Proposing an Amendment to the Constitution of the United States*, 40 Stat. 1050, 1050 (1917).

²⁵ *Certificate of Adoption of the Eighteenth Amendment to the Constitution*, 40 Stat. 1941, 1941–42 (1919).

²⁶ See U.S. CONST. amend. XVIII, § 1.

¹ *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 126 (1923).

² U.S. CONST. amend. XVIII, § 2.

³ Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 5 n.6 (2006).

⁴ Volstead Act, ch. 85, tit. II, § 3, 41 Stat. 305, 308–09 (1919) (effective Jan. 17, 1920), *repealed by* Liquor Law Repeal and Enforcement Act, ch. 740, tit. I, § 1, 49 Stat. 872, 872 (1935). See also *Donnelley v. United States*, 276 U.S. 505, 513–15 (1928) (describing the enforcement provisions of the Act). Representative Andrew John Volstead of Minnesota, chairman of the House Judiciary Committee, sponsored and promoted the Act.

⁵ Volstead Act § 3, 41 Stat. at 307–08. Congress enacted the Volstead Act over President Woodrow Wilson's veto. See 58 CONG. REC. 7610–11, 7633–34 (1919). Wilson apparently objected to the Volstead Act's extension of wartime prohibition measures to cover the time period between the end of mobilization for World War I and the entry into force of the Eighteenth Amendment. See *id.*

⁶ Volstead Act §§ 3, 18, 21, 25–29, 41 Stat. at 314–16.

⁷ The Bureau of Internal Revenue initially exercised primary responsibility for the Volstead Act's enforcement. *Id.* §§ 2, 28, 41 Stat. at 308, 316. In 1927, Congress reorganized the Treasury Department and created a separate component, the Bureau of Prohibition, to enforce the Act. See Treasury Department Reorganization Plan of 1927, P.L. 69-751, ch. 348, 44 Stat. 1381. Three years later, Congress moved the Bureau into the Department of Justice. See Prohibition Reorganization Act of 1930, P.L. 71-273, ch. 342, § 2(a), 46 Stat. 427.

⁸ Volstead Act §§ 3-7, 41 Stat. at 307–11 (1919); *McCormick & Co. v. Brown*, 286 U.S. 131, 133, 141, 143–45 (1932) (referencing the Tenth Amendment when upholding a West Virginia law that required nonresident

EIGHTEENTH AMENDMENT—PROHIBITION OF LIQUOR

The Eighteenth Amendment and the Supreme Court

specifically prohibit drinking, and it allowed the private possession and consumption of intoxicating beverages that had been legally acquired.⁹

Amdt18.6 The Eighteenth Amendment and the Supreme Court

Prohibition took effect throughout the United States on January 17, 1920, which was one year after the states ratified the Eighteenth Amendment.¹ Beginning with the consolidated *National Prohibition Cases* in 1920, the Supreme Court outlined the Eighteenth Amendment's scope and the federal and state governments' "concurrent" powers to enforce it.² The Court also confronted questions about whether the circumstances of the Eighteenth Amendment's proposal and ratification violated the requirements of Article V of the Constitution.³ The Court rejected these Article V challenges, determining that the Amendment had "become a part of the Constitution" and was to "be respected and given effect the same as other provisions of that instrument."⁴

companies to obtain state permits before shipping alcoholic "preparations" to West Virginia dealers, regardless of whether the nonresidents held federal permits authorizing shipment).

⁹ The Volstead Act allowed the private possession and consumption of alcoholic beverages that were obtained before the Act took effect. Volstead Act § 33, 41 Stat. at 317; *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 127 (1923) (noting that the exception applied when the liquor was "kept in the owner's dwelling for use therein by him, his family, and his bona fide guests."); *Corneli v. Moore*, 257 U.S. 491, 497 (1922) (holding that even lawfully acquired alcoholic beverages could not be legally transported from a government bonded warehouse to a person's home for personal use because the beverages were not under the individual's possession when stored in the warehouse); *Street v. Lincoln Safe Deposit Co.*, 254 U.S. 88, 94–95 (1920) (determining that individuals could legally transport liquor from a third-party warehouse to the individuals' dwelling because the individuals had retained possession during storage). In 1930, the Supreme Court confirmed that the Volstead Act did not criminalize the purchase of alcohol. *United States v. Farrar*, 281 U.S. 624, 634 (1930).

¹ See Intro6.5 Early Twentieth Century (Sixteenth Through Twenty-Second Amendments. See also *Druggan v. Anderson*, 269 U.S. 36, 38–39 (1925) (determining that Congress possessed the power to enact the Volstead Act after the states had ratified the Eighteenth Amendment, even though the Amendment had not yet become effective). To enforce Prohibition nationwide and regulate beverage and non-beverage uses of alcohol, Congress enacted the Volstead Act. See Amdt18.5 Volstead Act.

² See generally *National Prohibition Cases*, 253 U.S. 350, 386–87 (1920).

³ E.g., *id.* at 386. For more on Article V's process for amending the Constitution, see Art5 Amending the Constitution.

⁴ *National Prohibition Cases*, 253 U.S. at 386. See also *United States v. Sprague*, 282 U.S. 716, 729–30 (1931) (holding that Congress could choose to have state legislatures, rather than state ratifying conventions, approve an amendment conferring new powers on Congress to abridge individual rights by enacting laws to enforce Prohibition because the "choice . . . of the mode of ratification, lies in the sole discretion of Congress."); *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921) (upholding Congress's specification of a seven-year deadline for the Eighteenth Amendment's ratification because the Constitution implicitly authorized Congress to fix a reasonable and definite period for ratification); *National Prohibition Cases*, 253 U.S. at 386 (holding that (1) Congress alone would judge whether an amendment was "necessary" under Article V; (2) a two-thirds vote of the Members present in each house, rather than two-thirds of all Members present or absent, was sufficient to propose a constitutional amendment, assuming the presence of a quorum; (3) the "referendum provisions of state constitutions and statutes cannot be applied, consistently with the Constitution . . . in the ratification or rejection of amendments to it"; and (4) that the Eighteenth Amendment's prohibition on the manufacture, sale, transport, import, and export of intoxicating liquors for beverage purposes was "within the power to amend reserved by Article 5 of the Constitution"); *Hawke v. Smith*, 253 U.S. 221, 231 (1920) (holding that a state lacked the power to require submission of the state's ratification of the Eighteenth Amendment to a popular referendum).

Amdt18.7 Scope of the Eighteenth Amendment’s Prohibition

Only a few months after Prohibition took effect, the Supreme Court confirmed the sweeping scope of the Eighteenth Amendment and Volstead Act.¹ In the *National Prohibition Cases*, the Court upheld the Eighteenth Amendment and provisions of the Volstead Act against various legal challenges.² The Court determined that Section 1 of the Amendment, which barred the manufacture, sale, or transportation of alcohol for beverage purposes, established Prohibition throughout the “entire territorial limits of the United States.”³ The Amendment’s prohibitions applied to interstate, intrastate, and foreign transactions subject to U.S. jurisdiction.⁴

In addition to possessing a broad territorial and transactional scope, the Eighteenth Amendment bound both private entities and government actors, including Congress, the state legislatures, federal and state courts, and public officers.⁵ Section 1’s prohibitions were self-executing and invalidated any legislative act—by Congress, the states, or territorial assemblies—that authorized the use of alcohol contrary to Prohibition.⁶ Nonetheless, the Eighteenth Amendment did not establish any mechanism for its enforcement but instead relied on Congress and the states to implement its commands.⁷

Amdt18.8 Federal and State Enforcement Powers

Despite its broad scope, the Eighteenth Amendment did not “prescribe any penalties, forfeitures, or mode of enforcement.”¹ Instead, Section 2 of the Amendment authorized Congress and the state legislatures to enact legislation to implement Prohibition.² To enforce Prohibition nationwide and regulate beverage and non-beverage uses of alcohol, Congress enacted the Volstead Act on October 28, 1919.³

¹ Between the time of the Amendment’s ratification on January 16, 1919 and its effective date of January 17, 1920, the Supreme Court interpreted the Eighteenth Amendment in at least one case. *See* *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146, 163–64 (1919) (rejecting the argument that the Eighteenth Amendment’s one-year delay of Prohibition had implicitly invalidated the War-Time Prohibition Act, which prohibited the sale of intoxicating alcoholic beverages until the President proclaimed that World War I had ended).

² 253 U.S. 350, 386–87 (1920).

³ *Id.*; *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 122 (1923) (defining “transportation” for purposes of the Eighteenth Amendment as “any real carrying about or from one place to another” and “territory” as “the regional areas—of land and adjacent waters—over which the United States claims and exercises dominion and control as a sovereign power,” including, “the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.”). Both domestic and foreign merchant ships were subject to penalties for violating the Eighteenth Amendment and Volstead Act, even if they carried the illegal alcoholic beverages in sea stores, so long as they were in U.S. territorial waters, ports, or harbors outside of certain places in the Panama Canal Zone. *Id.* at 127–30. The United States and Great Britain later concluded a bilateral treaty relaxing some of these requirements with respect to British vessels. *See* *The Convention for the Prevention of Smuggling of Intoxicating Liquors*, Jan. 23, 1924, *United States-Great Britain*, 43 Stat. 1761–63 (1924).

⁴ *United States v. Lanza*, 260 U.S. 377, 381 (1922).

⁵ *National Prohibition Cases*, 253 U.S. at 386–87. *See also* *Lanza*, 260 U.S. at 381.

⁶ *National Prohibition Cases*, 253 U.S. at 386–87.

⁷ *See* U.S. CONST. amend. XVIII, §§ 1–2.

¹ *Cunard S.S. Co. v. Mellon*, 262 U.S. 100, 126 (1923).

² U.S. CONST. amend. XVIII, § 2.

³ *See* Amdt18.5 Volstead Act.

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Federal and State Enforcement Powers

The Supreme Court interpreted the scope of Congress's power to enforce the Eighteenth Amendment in several cases, applying a deferential standard of review to federal enforcement legislation. For instance, the Court determined that Congress had reasonably exercised its enforcement power by enacting controversial provisions of the Volstead Act prohibiting traffic in beverage "liquors" containing only 0.5% alcohol by volume, which included beer and light wines.⁴

The Court also confronted questions about the "concurrent power" of Congress and the states to enforce Prohibition under Section 2 of the Eighteenth Amendment. The Court determined that "concurrent power" did not mean "joint power," and thus federal enforcement legislation could become effective without the states' approval.⁵ Moreover, the Eighteenth Amendment did not neatly divide federal and state power to enforce Prohibition along the lines separating interstate from intrastate commerce.⁶ Consequently, the federal government could enforce Prohibition against intrastate activities involving alcoholic beverages, such as their manufacture and sale.⁷ Moreover, state legislatures could restrict the importation of alcoholic beverages without violating the dormant Commerce Clause doctrine.⁸

⁴ *National Prohibition Cases*, 253 U.S. 350, 387–88 (1920). For other cases addressing the scope of Congress's Eighteenth Amendment enforcement power, see *Lambert v. Yellowley*, 272 U.S. 581, 587–90, 594–97 (1926) (determining that Congress could reasonably conclude that restricting a physician's ability to prescribe wines and spirits for medicinal purposes would help to enforce the Eighteenth Amendment and Prohibition); *Selzman v. United States*, 268 U.S. 466, 467–69 (1925) (holding that Congress's regulation of industrial alcohol not usable for beverage purposes was a reasonable exercise of its Eighteenth Amendment enforcement powers "to prevent the proper industrial use of it from being perverted to drinking it"); *James Everard's Breweries v. Day*, 265 U.S. 545, 558–61 (1924) (determining that Congress had reasonably exercised its Eighteenth Amendment enforcement powers by prohibiting physicians from prescribing intoxicating malt liquors for medicinal purposes while allowing doctors to prescribe distilled spirits or wines for such purposes because "the power to prohibit traffic in intoxicating liquors includes, as an appropriate means of making that prohibition effective," the power to stop "clandestine" and illegal traffic in alcoholic beverages disguised as medicines by prohibiting "traffic in similar liquors, although non-intoxicating.").

⁵ *National Prohibition Cases*, 253 U.S. at 387.

⁶ *Id.*

⁷ *Id.* ("The power confided to Congress . . . while not exclusive . . . embraces manufacture and other intrastate transactions as well as importation, exportation and interstate traffic, and is in no wise dependent on or affected by action or inaction on the part of the several states or any of them."). After the end of Prohibition, the Supreme Court held that Congress's power under the Commerce Clause and Necessary and Proper Clause extended to intrastate activities that, in the aggregate, affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 124 (1942). See also *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (considering whether the cultivation, distribution, or possession of marijuana for personal medical purposes pursuant to the California Compassionate Use Act of 1996 could be prosecuted under the federal Controlled Substances Act and holding that the Court would defer to Congress if there was a rational basis to believe that regulation of home-consumed marijuana would affect the market for marijuana generally).

⁸ *United States v. Lanza*, 260 U.S. 377, 381–82 (1922) (discussing the historical restrictions on states' powers to regulate alcoholic beverages under the Commerce Clause and opining that state prohibition laws do not "derive their force" from the Eighteenth Amendment but rather "from power originally belonging to the States, preserved to them by the Tenth Amendment, and now relieved from the restriction heretofore arising out of the federal Constitution."). For more on the dormant Commerce Clause doctrine, see Art.I.S8.C3.7.1 Overview of Dormant Commerce Clause. For a discussion of the Court's jurisprudence on the relationship between the Eighteenth Amendment and the Fifth Amendment's Double Jeopardy Clause, see *Hebert v. Louisiana*, 272 U.S. 312, 314 (1926) ("The Eighteenth Amendment to the Constitution contemplates that the manufacture of intoxicating liquor for beverage purposes may be denounced as a criminal offense both by the federal law and by the state law, and that these laws may not only coexist, but be given full operation, each independently of the other."); *Lanza*, 260 U.S. at 381–85 (rejecting Fifth Amendment Double Jeopardy arguments and determining that defendants charged with trafficking in liquors were, in the absence of contrary federal law, subject to prosecution, conviction, and punishment in federal court for violating the Volstead Act, and to prosecution in state court for violating state prohibition laws).

EIGHTEENTH AMENDMENT—PROHIBITION OF LIQUOR

Repeal of the Eighteenth Amendment

The Supreme Court's Eighteenth Amendment jurisprudence thus confirmed the states' powers to augment federal enforcement efforts.⁹ However, state laws that authorized conduct prohibited under the Eighteenth Amendment or other federal law were preempted.¹⁰

Amdt18.9 Repeal of the Eighteenth Amendment

The Eighteenth Amendment and Volstead Act were controversial in part because they empowered the federal government to police activities that implicated individual social habits and morality—a role traditionally led by state and local governments.¹ Nationwide Prohibition quickly fell out of favor with the American public because of ineffective enforcement, harsh enforcement techniques, crime related to the illegal liquor traffic, a need for tax revenue during the Great Depression, and widespread defiance of the law.² The Eighteenth Amendment was repealed when the states ratified the Twenty-First Amendment on December 5, 1933.³

The Supreme Court decided a few cases that examined the repeal's legal implications. In *United States v. Chambers*, the Court held that the Twenty-First Amendment's ratification immediately rendered the Eighteenth Amendment inoperative.⁴ Consequently, "[n]either the Congress nor the courts could give it continued vitality."⁵ The

⁹ *McCormick & Co. v. Brown*, 286 U.S. 131, 133, 140–45 (1932) (referencing the Tenth Amendment and federal Webb-Kenyon Act when upholding a West Virginia law that required nonresident companies to obtain state permits before shipping alcoholic “preparations” to West Virginia dealers, regardless of whether the nonresidents held federal permits authorizing shipment); *Lanza*, 260 U.S. at 381 (“Each State, as also Congress, may exercise an independent judgment in selecting and shaping measures to enforce prohibition.”). *See also* *Hixon v. Oakes*, 265 U.S. 254, 255–56 (1924) (upholding a Los Angeles ordinance prohibiting the filling of any prescription that called for more than eight ounces of liquor and determining that the law did not conflict with the Eighteenth Amendment or Volstead Act); *Vigliotti v. Pennsylvania*, 258 U.S. 403, 407–09 (1922) (determining that neither the Eighteenth Amendment nor the Volstead Act preempted a stricter Pennsylvania statute prohibiting the sale of liquor without a license because the state law was an appropriate aid, rather than an obstacle, to federal enforcement of Prohibition).

¹⁰ *See National Prohibition Cases*, 253 U.S. at 386–87.

¹ NAT'L COMM'N ON LAW OBSERVANCE AND ENF'T, ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, H.R. Doc. No. 71-722, at 20 (1931) (“The Eighteenth Amendment represents the first effort in our history to extend directly by Constitutional provision the police control of the federal government to the personal habits and conduct of the individual.”); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 2–4, 6–7 & n.8, 11–12 (2006) (noting that the Eighteenth Amendment “caused a major crisis in the theory and practice of American federalism, as the national government, which lacked the courts or police necessary for implementing the [Amendment], sought to conscript state judicial and law enforcement resources.”). For more on the gradual development of a limited federal police power during the early twentieth century, see RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT SHAPING THE EIGHTEENTH AMENDMENT TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920 (STUDIES IN LEGAL HISTORY)* 189 (1995).

² Post, *supra* note 1, at 1–4, 11–12, 20; DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 206, 275–76, 361, 373 (2010). Some enforcement techniques that federal or state authorities employed to investigate violations of Prohibition, such as wiretapping telephone lines, were challenged in federal court as violations of criminal defendants' constitutional rights. *See, e.g., Olmstead v. United States*, 277 U.S. 438, 465 (1928) (holding that the Fourth Amendment did not protect conversations transmitted via telephone wires beyond a person's house), *overruled by Katz v. United States*, 389 U.S. 347, 359 (1967); OKRENT, *supra*, at 285–86. For more on the Supreme Court's Prohibition Era Fourth Amendment jurisprudence, see Amdt4.3.2 Early Doctrine on Fourth Amendment and Amdt4.6.4.2 Vehicle Searches.

³ U.S. CONST. amend. XXI, § 1; Intro.6.5 Early Twentieth Century Amendments (Sixteenth Through Twenty-Second Amendments).

⁴ 291 U.S. 217, 222 (1934).

⁵ *Id.*

EIGHTEENTH AMENDMENT—PROHIBITION OF LIQUOR

Repeal of the Eighteenth Amendment

Twenty-First Amendment also nullified provisions of the Volstead Act that rested upon Congress's Eighteenth Amendment powers, including provisions that imposed penal sanctions for violations of Prohibition.⁶ Courts were thus required to dismiss for lack of jurisdiction all pending prosecutions for Volstead Act violations, including proceedings on appeal.⁷

Nonetheless, Prohibition's repeal did not extinguish all forms of legal liability related to the transportation, sale, or manufacture of alcoholic beverages (e.g., liability for federal taxes on alcohol).⁸ Moreover, the Twenty-First Amendment recognized that states could regulate or prohibit alcoholic beverages within their jurisdictions for nonprotectionist purposes, such as health or safety.⁹ Exercising this authority, a few states banned the liquor traffic within their borders until the mid-20th century.¹⁰ In addition, the federal government continued to regulate or tax activities involving alcoholic beverages, including aspects of beverage production, wholesale distribution, importation, labeling, and advertising.¹¹

⁶ *Id.* at 222–23. *See also* United States v. Constantine, 296 U.S. 287, 294–96 (1935) (holding that the Eighteenth Amendment's repeal deprived Congress of the power to impose penalties for violating state liquor laws that criminalized the sale of alcoholic beverages). Congress repealed Titles I and II of the Volstead Act in the Liquor Law Repeal and Enforcement Act of August 27, 1935, ch. 740, § 1, 49 Stat. 872, 872.

⁷ *Chambers*, 291 U.S. at 222–23, 226. *See also* Massey v. United States, 291 U.S. 608, 609–10 (1934). The Supreme Court declined to consider whether final judgments of conviction entered before the Eighteenth Amendment's repeal remained valid. *Chambers*, 291 U.S. at 226.

⁸ *See* United States v. Rizzo, 297 U.S. 530, 533 (1936) (noting that the Eighteenth Amendment's repeal did not extinguish liability for federal taxes on alcohol unless such taxes were imposed as penalties for violating liquor laws); United States v. Mack, 295 U.S. 480, 481–84 (1935) (holding that the owner of a vessel seized for illegally transporting intoxicating liquors remained liable on a bond executed pursuant to the Volstead Act). In *Mack*, the Court noted that the bond became payable when the owner failed to return the vessel to an officer's custody before the day of trial. Conviction and sentencing of the crew had occurred before the end of Prohibition. *Id.*

⁹ U.S. CONST. amend. XXI, § 2 (“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”). *See also* Tenn. Wine & Spirits Retailers Ass’n v. Thomas, No. 18-96, slip op. at 31–32 (U.S. 26, 2019) (“[Section 2] allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests.”); *Granholm v. Heald*, 544 U.S. 460, 476–482 (2005); *Bacchus Imp. v. Dias*, 468 U.S. 263, 276 (1984).

¹⁰ OKRENT, *supra* note 2, at 374. Some “dry” counties in the United States continue to exercise the local option under state law and prohibit the liquor trade.

¹¹ *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. § 1 (prohibiting “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations”); 26 U.S.C. § 5001 (imposing taxes on various activities related to distilled spirits, wines, and beer); Federal Alcohol Administration Act, 27 U.S.C. §§ 201–212 (requiring producers, importers, and wholesalers of certain alcoholic beverages to obtain federal permits and regulating the advertising and labeling of such beverages). In 1987, the Supreme Court upheld the National Minimum Drinking Age Act against constitutional challenges. The Act threatened to withhold 5% of highway funding from states that refused to adopt a minimum drinking age of 21. *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987). For more on federal and state authority over alcoholic beverages after Prohibition, see, Amdt21 Repeal of Prohibition. *See also* Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, 445 U.S. 97, 110 (1980) (“[Prior Supreme Court] decisions demonstrate that there is no bright line between federal and state powers over liquor. . . . Although States retain substantial discretion to establish . . . liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a ‘concrete case.’” (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964))); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 172–73 (1939) (*per curiam*) (“Here, the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution, U.S.C.A., gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States. We see no substance in this contention.”).

Amdt18.10 Ratification Deadline

The Eighteenth Amendment was the first to specify a deadline for its ratification.¹ Section 3 of the Amendment required state legislatures to ratify the Amendment within seven years of its submission to the states for it to become part of the Constitution.² The Eighteenth Amendment was submitted to the states on December 18, 1917.³ The states ratified the Amendment on January 16, 1919, and it became effective one year later on January 17, 1920.⁴ The Eighteenth Amendment was repealed when the states ratified the Twenty-First Amendment on December 5, 1933.⁵

¹ See *Dillon v. Gloss*, 256 U.S. 368, 375–76 (1921) (upholding Congress’s specification of a seven-year deadline for the Eighteenth Amendment’s ratification).

² U.S. CONST. amend. XVIII, § 3.

³ See Intro6.5 Early Twentieth Century Amendments (Sixteenth Through Twenty-Second Amendments).

⁴ See *id.*

⁵ U.S. CONST. amend. XXI, § 1; Intro.6.5 Early Twentieth Century Amendments (Sixteenth Through Twenty-Second Amendments).

NINETEENTH AMENDMENT

WOMEN'S SUFFRAGE

Amdt19.1 Overview of the Nineteenth Amendment, Women's Suffrage

The Nineteenth Amendment prohibits the federal and state governments from denying or abridging a U.S. citizen's right to vote on the basis of sex, thereby recognizing women's suffrage.¹ Section 2 of the Amendment grants Congress the power to enforce the prohibitions in Section 1 by enacting "appropriate legislation."² The Supreme Court has not decided many cases interpreting the Nineteenth Amendment.³ Nonetheless, the Amendment has had a significant impact outside of the Court by helping to increase women's participation in politics and other domains of public life.⁴

As proposed and ratified by men in the late 1780s, the Constitution did not prohibit the states from establishing gender-based restrictions on voting.⁵ From the Founding of the United States in 1776 to the end of the Civil War in 1865, none of the states consistently recognized a woman's right to vote in federal or state elections.⁶ Nonetheless, in the decades prior to the Civil War, women gained significant experience in organizing and leading political reform movements, including women's suffrage campaigns.⁷

After the Civil War, the states' ratification of Reconstruction Amendments to the Constitution that aimed to protect African-Americans' civil rights brought new attention to issues of women's rights and suffrage.⁸ During the Reconstruction Era, the women's suffrage movement unsuccessfully sought federal recognition of women's voting rights by petitioning Congress and pursuing litigation in federal court.⁹ Despite slow progress at the federal level in the late nineteenth century, state-level campaigns succeeded in obtaining full women's voting rights in eleven western states, and partial voting rights in many others, by 1916.¹⁰

By the late 1910s, as a result of women's suffrage campaigns and shifting views of traditional gender roles during World War I, the political environment became more favorable for the enactment of a women's suffrage amendment.¹¹ Congress proposed the Nineteenth Amendment in June 1919, and the states ratified it in August 1920.¹²

¹ U.S. CONST. amend. XIX, § 1.

² *Id.* § 2. The Supreme Court has held that, because the Nineteenth Amendment is self-executing, its prohibitions became effective upon ratification without the need for further government action. *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937), *overruled on other grounds*, *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 668–669 (1966).

³ See Amdt19.4 The Scope of the Nineteenth Amendment.

⁴ See Amdt19.5 Impact of the Nineteenth Amendment Beyond the Supreme Court.

⁵ See Amdt19.3 Women's Suffrage from the Founding Era to the Civil War.

⁶ See *id.*

⁷ See *id.*

⁸ See Amdt19.3.1 The Reconstruction Amendments and Women's Suffrage.

⁹ See Amdt19.3.3 Women's Suffrage and the Progressive Era.

¹⁰ See Amdt19.3.3 Women's Suffrage and the Progressive Era.

¹¹ See *id.*

¹² See Amdt19.3.4 Proposal and Ratification of the Nineteenth Amendment.

Amdt19.2 Historical Background

Amdt19.2.1 Women's Suffrage from the Founding Era to the Civil War

As proposed and ratified by men in the late 1780s, the Constitution did not prohibit the states from establishing gender-based restrictions on voting.¹ From the Founding of the United States in 1776 to the end of the Civil War in 1865, none of the states consistently recognized a woman's right to vote in federal or state elections.² In fact, several state constitutions in existence at the time of the Founding specifically limited suffrage to men.³ Many women faced additional barriers to voting because of "coverture," a legal doctrine derived from English common law.⁴ Coverture denied a married woman a separate legal status from her husband, thereby preventing her from voting.⁵

Although women could not vote in the early 1800s,⁶ they actively led and participated in political reform movements.⁷ Female activists, many of whom advocated for the abolition of slavery, increasingly wrote and gave speeches in support of women's suffrage.⁸ In 1848, two of these activists, Elizabeth Cady Stanton and Lucretia Mott, organized a convention in Seneca Falls, New York, to discuss women's rights.⁹

¹ See *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 172 (1875), *superseded by* U.S. CONST. amend. XIX. In March 1776, only a few months before the United States declared its independence from Great Britain, Abigail Adams wrote to her husband, John Adams, imploring him to "remember the Ladies" when drafting a legal framework for the new government. Letter from Abigail Adams to John Adams, Nat'l Archives (Mar. 31, 1776), <https://founders.archives.gov/documents/Adams/04-01-02-0241>. She wrote that if "particular care and attention is not paid to the Ladies we are determined to foment a Rebellion, and will not hold ourselves bound by any Laws in which we have no voice, or Representation." *Id.* John Adams, who was serving as ambassador to Great Britain, did not attend the Constitutional Convention. See *Meet the Framers of the Constitution*, NAT'L ARCHIVES (Mar. 16, 2020), <https://www.archives.gov/founding-docs/founding-fathers>. See also ELEANOR FLEXNER & ELLEN F. FITZPATRICK, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* 13–14 (1996).

² FLEXNER & FITZPATRICK, *supra* note 1, at 8. New Jersey's 1776 constitution permitted some women to vote if they owned a specified amount of property. See N.J. CONST. OF 1776, art. IV ("That all Inhabitants of this Colony of full Age, who are worth Fifty Pounds proclamation Money clear Estate in the same, & have resided within the County in which they claim a Vote for twelve Months immediately preceding the Election, shall be entitled to vote for Representatives in Council & Assembly; and also for all other publick Officers that shall be elected by the People of the County at Large."). However, in 1807, the New Jersey legislature enacted a law denying women and African-Americans the right to vote. See *Did You Know: Women and African Americans Could Vote in NJ before the 15th and 19th Amendments?*, NAT'L PARK SERV. (July 3, 2018), <https://www.nps.gov/articles/voting-rights-in-nj-before-the-15th-and-19th.htm>.

³ See *Minor*, 88 U.S. at 172–73 (listing provisions of state constitutions addressing voter qualifications at the time of the Founding).

⁴ *Coverture*, BLACK'S LAW DICTIONARY 446 (10th ed. 2014).

⁵ *Id.* See also 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 430–33 (1765) ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband . . ."). Unless a woman obtained her husband's permission, the common law imposed significant restrictions on her ability to own property, enter into contracts, or sue in court. See *id.*

⁶ The Kentucky Legislature granted some "women who were heads of households and taxpayers" the right to vote on education-related issues from 1838 to 1902. *Kentucky and the Nineteenth Amendment*, NAT'L PARK SERV. (Sept 3, 2019), <https://www.nps.gov/articles/kentucky-and-the-19th-amendment.htm>.

⁷ FLEXNER & FITZPATRICK, *supra* note 1, at 38. See also Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 658 (1996).

⁸ See O'Connor, *supra* note 7, at 658.

⁹ *Seneca Falls and Building a Movement, 1776–1890*, LIBR. OF CONG., <https://www.loc.gov/exhibitions/women-fight-for-the-vote/about-this-exhibition/seneca-falls-and-building-a-movement-1776-1890/> (last visited Feb. 10,

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Amendments and Women's Suffrage

At this convention of a few hundred women and men, Stanton presented her Declaration of Sentiments, which was modeled after the United States' Declaration of Independence.¹⁰ Stanton's Declaration stated that "all men and women are created equal."¹¹ The Declaration listed various grievances against the government and the system of coverture, including the denial of women's "inalienable right to the elective franchise."¹² One hundred convention attendees signed this declaration, including Stanton, Mott, and African-American abolitionist Frederick Douglass.¹³ Convention attendees also narrowly passed a separate resolution calling for women's suffrage.¹⁴

After the Seneca Falls Convention, women and men organized other conventions throughout the United States to advocate for women's rights, including suffrage.¹⁵ During the 1850s, some formerly enslaved African-American women, who faced barriers to voting because of race and gender, organized and attended conventions advocating for women's suffrage.¹⁶ These women included Sojourner Truth and Sarah Redmond.¹⁷ As a result of these efforts, in the years leading up to the Civil War, the campaign for women's suffrage attained broader public awareness and support¹⁸

Amdt19.3 Women's Suffrage from the Founding Era to the Civil War
Amdt19.3.1 The Reconstruction Amendments and Women's Suffrage

Shortly after the Civil War, Congress proposed three amendments to the Constitution known as the Reconstruction Amendments that aimed to safeguard African-Americans' civil rights. These are the Thirteenth Amendment, ratified in 1865, which abolished slavery;¹ the Fourteenth Amendment, ratified in 1868, defining the concept of national citizenship and guaranteeing due process and equal protection of the laws to all persons;² and the Fifteenth Amendment, ratified in 1870, prohibiting the federal and state governments from restricting a U.S. citizen's eligibility to vote on the basis of "race, color, or previous condition of servitude."³ The states' ratification of amendments that aimed to protect African-Americans' civil rights brought new attention to issues of women's rights and suffrage.⁴

2023). See also 1 HISTORY OF WOMAN SUFFRAGE 63–75 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joselyn Gage, eds., 1887), https://www.gutenberg.org/cache/epub/28020/pg28020-images.html#CHAPTER_I.

¹⁰ Elizabeth Cady Stanton, *Declaration of Sentiments*, NAT'L PARK SERV. (Feb. 7, 2023), <https://www.nps.gov/word/learn/historyculture/declaration-of-sentiments.htm>.

¹¹ *Id.* (emphasis added).

¹² *Id.*

¹³ *Id.*

¹⁴ 1 HISTORY OF WOMAN SUFFRAGE, *supra* note 9, at 73. The women's suffrage resolution passed by a "small majority" because some attendees believed it was not a "rational" course of action at the time. *Id.*

¹⁵ O'Connor, *supra* note 7, at 660. See also FLEXNER & FITZPATRICK, *supra* note 1, at 76.

¹⁶ Sharon Harley, *African-American Women and the Nineteenth Amendment*, NAT'L PARK SERV. (Apr. 10, 2019), <https://www.nps.gov/articles/african-american-women-and-the-nineteenth-amendment.htm>.

¹⁷ *Id.*

¹⁸ O'Connor, *supra* note 7, at 660.

¹ See Amdt13.1 Overview of the Thirteenth Amendment, Abolition of Slavery.

² See Amdt14.1 Overview of the Fourteenth Amendment, Equal Protection and Rights of Citizens.

³ See Amdt15 Right of Citizens to Vote.

⁴ Sandra Day O'Connor, *The History of the Women's Suffrage Movement*, 49 VAND. L. REV. 657, 660–61(1996).

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Debates over the Reconstruction Amendments led to disagreements within the women's suffrage movement. In particular, during congressional debates over the Fifteenth Amendment, the movement's leaders divided over whether to support an amendment that granted African-American men the right to vote but did not address women's suffrage.⁵ Believing that the Constitution should not grant voting rights to African-American men unless it also recognized women's suffrage, Elizabeth Cady Stanton and Susan B. Anthony split from the American Equal Rights Association they had founded in 1866 and formed the National Woman Suffrage Association (NWSA) in 1869.⁶ NWSA focused its efforts on obtaining federal legislation or a constitutional amendment recognizing women's suffrage.⁷ Later in 1869, women's rights activists who supported the Fifteenth Amendment's adoption, including Lucy Stone, founded the American Woman Suffrage Association (AWSA).⁸ AWSA generally adopted a state-by-state approach to seeking voting rights.⁹

Although NWSA and AWSA would later merge in 1890, some women's rights leaders increasingly excluded African-Americans from participation in suffrage events in an effort to gain southern White voters' support.¹⁰ In 1896, African-American women formed a national organization, the National Association of Colored Women (NACW), with Mary Church Terrell as its first president.¹¹ NACW advocated for women's voting rights and other issues important to African-American women.¹²

Amdt19.3.2 Federal and State Campaigns for Women's Voting Rights

During the Reconstruction Era, the women's suffrage movement pursued its objectives at both the federal and state levels of government. At the federal level, proponents argued before federal courts and Congress that the Fourteenth Amendment granted women the right to vote. In particular, proponents of women's suffrage theorized that the Fourteenth Amendment's Privileges or Immunities Clause prohibited states from denying women's suffrage.¹ This Clause provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."²

⁵ Sharon Harley, *African-American Women and the Nineteenth Amendment*, NAT'L PARK SERV. (Apr. 10, 2019), <https://www.nps.gov/articles/african-american-women-and-the-nineteenth-amendment.htm>. Congressional debates over the Fourteenth Amendment also touched upon issues of women's suffrage. As ratified, the Fourteenth Amendment did not specifically address women's suffrage, but Section 2 generally penalized states that restricted the voting rights of "male inhabitants" who were citizens at least 21 years of age by reducing the states' congressional representation. See U.S. CONST. amend. XIV, § 2, *superseded in part by id.* amend. XIX.

⁶ *The Women's Rights Movement, 1848–1917*, U.S. HOUSE OF REP., <https://history.house.gov/Exhibitions-and-Publications/WIC/Historical-Essays/No-Lady/Womens-Rights/> (last visited Feb. 10, 2023).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ Harley, *supra* note 8.

¹¹ *Id.*

¹² *Id.*

¹ See, e.g., *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 165 (1875). In the 1872 presidential election, Susan B. Anthony cast a ballot in Rochester, New York. She was arrested and charged with illegally voting in violation of federal law. She unsuccessfully claimed that the Fourteenth Amendment gave her the right to vote as a privilege of citizenship. A federal district court imposed a fine of \$100 on Anthony, but she never paid it. See *United States v. Anthony*, 24 F. Cas. 829, 830–33 (C.C. N.D.N.Y. 1873); *Susan B. Anthony and the Struggle for Suffrage*, NAT'L ARCHIVES (Aug. 15, 2016), <https://www.archives.gov/education/lessons/suffrage.html>.

² U.S. CONST. amend. XIV, § 1.

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In the Supreme Court case *Minor v. Happersett*, a women's suffrage activist, Virginia Minor, sued a registrar in Missouri who denied her application to vote in the 1872 general election.³ Minor maintained that, as a citizen of the United States and Missouri, she was entitled to the "privilege" of voting.⁴ She argued that the Missouri Constitution and registry law denying her that privilege violated the Fourteenth Amendment.⁵

The Supreme Court agreed that Minor was a natural-born citizen of the United States.⁶ However, the Court determined that the right to vote was not one of the "necessary privileges" of citizenship.⁷ The Court noted that, at the time of the Constitution's adoption, none of the states allowed all citizens to vote—an arrangement the Framers implicitly accepted.⁸ The Court also observed that Section 2 of the Fourteenth Amendment penalized states that denied the right to vote to "male inhabitants" who were citizens at least 21 years of age by reducing their congressional representation.⁹ This language, in the Court's view, indicated that suffrage was not an "absolute right of all citizens" under the Constitution.¹⁰ Drawing inferences from the Fourteenth Amendment's text and history, the Court concluded that states could deny voting rights to women.¹¹

In addition to pursuing recognition of women's suffrage in federal court, proponents petitioned Congress for legislation requiring the states to recognize women's voting rights.¹² For example, in her 1871 petition to the House Judiciary Committee, Victoria Woodhull maintained that the Fourteenth and Fifteenth Amendments implicitly recognized such rights. Congressional committees rejected Woodhull's petition and many similar petitions during the 1870s.¹³ In 1878, Senator Aaron Sargent of California introduced a resolution proposing a suffrage amendment to the Constitution that contained the same prohibition on abridging women's voting rights as the later-ratified Nineteenth Amendment.¹⁴ However, this resolution lacked the political support needed for passage at the time.

Despite setbacks at the federal level, proponents of women's suffrage achieved some progress at the state level during the Reconstruction Era. A few western state governments accorded women full or partial voting rights.¹⁵ For example, in 1869, the Territory of Wyoming—and, later, the State of Wyoming—granted its female citizens full voting

³ *Minor*, 88 U.S. at 165.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.* at 165, 170.

⁷ *Id.* at 177–78.

⁸ *Id.* at 172–73.

⁹ *Id.* at 174–75.

¹⁰ *Id.*

¹¹ *Id.* at 177–78. Since the 1970s, the Fourteenth Amendment's Equal Protection Clause has played a role in combatting gender discrimination by subjecting gender-based classifications to intermediate scrutiny. See generally *Craig v. Boren*, 429 U.S. 190, 197 (1976). See also Amdt14.S1.8.8.3 General Approach to Gender Classifications.

¹² See H.R. REP. NO. 41-22, at 1 (2d Sess. 1871).

¹³ See *id.* See also, e.g., *Petition for Woman Suffrage*, U.S. HOUSE OF REP., <https://history.house.gov/HouseRecord/Detail/15032436231>.

¹⁴ See S. REP. NO. 45-523 (2d Sess. 1878) (discussing S. Res. 12, 45th Cong., 2d Sess. (1878)).

¹⁵ *Wyoming and the 19th Amendment*, NAT'L PARK SERV. (Aug. 22, 2019), <https://home.nps.gov/articles/wyoming-women-s-history.htm>.

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rights. Similarly, the Territory of Utah enacted a law granting women the right to vote in 1870.¹⁶ Although Congress legislatively deprived Utah women of this right in 1887, the State of Utah's constitution again recognized women's suffrage in 1896.¹⁷ Michigan granted women limited suffrage, allowing them to vote in school board elections after the Civil War.¹⁸

Amdt19.3.3 Women's Suffrage and the Progressive Era

The Progressive Era, which lasted from the late 1890s to the early 1920s, was a period of increased political activism and social reform in the United States.¹ During this era, the National American Woman Suffrage Association² initially emphasized state-level efforts to secure voting rights for women.³ By 1916, women had obtained full voting rights in eleven western states and partial voting rights in many others.⁴ Nonetheless, the slow pace of progress at the state level spurred activists such as Carrie Chapman Catt to intensify their efforts to obtain an amendment to the Constitution recognizing women's right to vote.⁵ Some suffragists, such as Alice Paul, combined traditional advocacy efforts with more radical forms of protest, including parades, picketing, and hunger strikes in support of a federal amendment.⁶

The year 1917 marked a turning point in the fight for women's suffrage.⁷ In that year, the first woman elected to Congress, Representative Jeannette Rankin of Montana, took office.⁸ In addition, New York passed a referendum approving women's suffrage, becoming the first eastern state to do so.⁹ As the United States entered World War I in April 1917 to fight for democracy abroad, it became more difficult for opponents of women's suffrage to argue that women should be denied a fundamental democratic right at home.¹⁰ By the end of the year, the women's suffrage movement had secured significant

¹⁶ *Women's Suffrage in Utah*, NAT'L PARK SERV. (May 30, 2021), <https://www.nps.gov/articles/000/women-s-suffrage-in-utah.htm>.

¹⁷ *Id.*

¹⁸ *Michigan and the 19th Amendment*, NAT'L PARK SERV. (Aug. 9, 2019), <https://www.nps.gov/articles/michigan-and-the-19th-amendment.htm>.

¹ See *Women's Suffrage in the Progressive Era*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/womens-suffrage-in-progressive-era/> (last visited Feb. 10, 2023).

² For more information on NAWSA's formation as result of the merger of the National Woman Suffrage Association and the American Woman Suffrage Association, see Amdt19.3.1 The Reconstruction Amendments and Women's Suffrage.

³ ELEANOR FLEXNER & ELLEN F. FITZPATRICK, *CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES* 208–13 (1996).

⁴ Katie Anastas & James Gregory, *Timeline and Map of Woman Suffrage Legislation State by State 1838–1919*, UNIV. OF WASH., https://depts.washington.edu/moves/WomanSuffrage_map.shtml (last visited Feb. 10, 2023). As the creators of this timeline and map note, “many state legislatures were persuaded to allow partial voting rights, typically limited to school elections or the right to vote only in municipal or presidential elections.” *Id.* Article I, Section 2, Clause 1 of the Constitution gave states the ability to determine voter qualifications for congressional elections based on the qualifications required to vote in state elections. See ArtI.S2.C1.2 Voter Qualifications for House of Representatives Elections.

⁵ FLEXNER & FITZPATRICK, *supra* note 3, at 271–74.

⁶ *Id.* at 255–56, 262.

⁷ *Id.* at 275–76.

⁸ *Id.* at 276. Montana had granted women equal suffrage rights in 1914. See *Montana and the 19th Amendment*, NAT'L PARK SERV. (Aug. 19, 2019), <https://www.nps.gov/articles/montana-and-the-19th-amendment.htm>.

⁹ FLEXNER & FITZPATRICK, *supra* note 3, at 282.

¹⁰ *Id.* at 280.

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political support for a federal amendment, but obtaining the approval of Congress and the state legislatures proved to be a difficult task.¹¹

Amdt19.3.4 Proposal and Ratification of the Nineteenth Amendment

The language that would become the Nineteenth Amendment was first introduced in Congress during the Reconstruction Era. In 1878, Senator Aaron Sargent of California introduced a joint resolution proposing an amendment to the Constitution that would have prohibited the federal and state governments from restricting U.S. citizens' voting rights "on account of sex."¹ This language was modeled after the Fifteenth Amendment's prohibition on race-based voting restrictions.² The Senate did not act on Senator Sargent's proposal at the time; however, it later voted down the proposed women's suffrage amendment, as reintroduced, in 1887.³

After decades of slow progress at the federal level, the women's suffrage amendment attained a critical level of political support in the late 1910s.⁴ In December 1917, Representative John E. Raker of California reintroduced the joint resolution proposing a women's suffrage amendment in the 65th Congress.⁵ During the House of Representative's debate on the resolution, proponents argued that women should have the right to vote because they had played a key role in the nation's labor force during World War I.⁶ Moreover, U.S. allies, including Great Britain, had already granted suffrage to many women.⁷ At least one congressman argued that the extension of the franchise to women would recognize their increasing social and economic independence from their husbands.⁸ Proponents also noted that many women paid taxes without having a role in choosing their political representatives.⁹

In general, opponents argued that amending the Constitution to recognize women's suffrage would intrude on each state's authority to determine the composition of its

¹¹ See Amdt19.3.4 Proposal and Ratification of the Nineteenth Amendment.

¹ See S. REP. NO. 45-523 (2d Sess. 1878) (discussing S. Res. 12, 45th Cong., 2d Sess. (1878)). An earlier suffrage amendment, introduced in 1868 by Senator Samuel Pomeroy of Kansas, would have granted suffrage on the basis of citizenship. S.J. Res. 180, 40th Cong., 3rd Sess. (1868) ("The basis of suffrage in the United States shall be that of citizenship, and all native or naturalized citizens shall enjoy the same rights and privileges of the elective franchise ..."). This bill was never acted upon. See CONG. GLOBE, 40th Cong., 3rd Sess. 38 (1868). Another early suffrage amendment, introduced by Representative George W. Julian of Indiana, would have provided that suffrage "shall be based on citizenship, and shall be regulated by Congress," and all U.S. citizens "shall enjoy this right equally, without any distinction or discrimination whatever founded on sex." H.J. Res. 15, 41st Cong., 1st Sess. (1869).

² Compare S. Res. 12, 45th Cong., 2d Sess. (1878), with U.S. CONST. amend. XV.

³ 18 CONG. REC. 1002-03 (Jan. 25, 1887). During the late 1800s, several House and Senate committee reports recommended the passage of joint resolutions proposing a women's suffrage amendment. For example, in 1882, the Senate Committee on Woman Suffrage reported a suffrage amendment favorably, stating that "to deny to one-half of the citizens of the republic all participation in framing the laws by which they are to be governed, simply on account of their sex, is political despotism to those who are excluded, and 'taxation without representation' to such of them as have property liable to taxation." S. REP. NO. 47-686, at 1-6 (1882).

⁴ ELEANOR FLEXNER & ELLEN F. FITZPATRICK, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 275-76 (1996). See also Amdt19.3.3 Women's Suffrage and the Progressive Era.

⁵ H.J. Res. 200, 65th Cong., 2d Sess. (1917).

⁶ E.g., 56 CONG. REC. 765 (1918).

⁷ E.g., *id.*

⁸ *Id.* at 788.

⁹ See *id.* at 765.

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electorate¹⁰ and disrupt the traditional notion of the American family.¹¹ A few congressmen objected because the Nineteenth Amendment would, at least on paper, enfranchise African-American women.¹² Despite some opposition, the joint resolution narrowly achieved the two-thirds majority needed for passage in the House on January 10, 1918.¹³

The Senate debated the joint resolution for several months in 1918. Senate debates touched on many of the same issues as the House debates, including women's contribution to the war effort, states' rights, and race.¹⁴ In September 1918, shortly before the midterm elections, President Woodrow Wilson gave a speech to the Senate in support of the women's suffrage amendment.¹⁵ President Wilson noted that women supported the nation's fight in World War I and contended that the United States could not fight for democracy abroad while denying women the right to vote at home.¹⁶ In addition to arguing that women's suffrage was key to winning the war, Wilson stated that the resolution of the nation's "great problems" after the war would "depend upon the direct and authoritative participation of women in our counsels."¹⁷ The day after Wilson's speech, on October 1, 1918, the Senate rejected the joint resolution proposing the women's suffrage amendment.¹⁸ The amendment again failed in the Senate during the 65th Congress on February 10, 1919.¹⁹

In May 1919, after the new 66th Congress convened, President Wilson called a special session of the national legislature to consider a number of issues, including the women's suffrage amendment.²⁰ Progress in Congress was swift. The House passed the joint resolution proposing the Nineteenth Amendment on May 21, 1919,²¹ and the Senate approved it on June 4, 1919.²² Thereafter, it was sent to the states for ratification.²³ Although the new Congress acted quickly on the Amendment, more than a year elapsed before it attained the three-fourths majority of the states necessary for ratification on August 18, 1920.²⁴ About a week later, on August 26, U.S. Secretary of State Bainbridge Colby certified the Amendment to have been ratified.²⁵

Despite the Nineteenth Amendment's ratification, many African-American women and other female minority groups throughout the United States continued to face significant

¹⁰ *Id.* at 764.

¹¹ *Id.* at 785.

¹² *Id.* at 766.

¹³ *Id.* at 810.

¹⁴ *See, e.g., id.* at 10977–81.

¹⁵ *Id.* at 10928–29.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 10987–88. The joint resolution failed to attain the two-thirds majority required to propose an amendment to the Constitution.

¹⁹ 57 CONG. REC. 3062 (1919).

²⁰ FLEXNER & FITZPATRICK, *supra* note 4, at 307.

²¹ 58 CONG. REC. 93–94 (1919).

²² *Id.* at 635.

²³ *See* Joint Resolution Proposing an Amendment to the Constitution Extending the Right of Suffrage to Women, H.R.J. Res. 1, 66th Cong., 1st Sess., 41 Stat. 362 (1919).

²⁴ The Amendment became law when Tennessee ratified it. *Tennessee and the Nineteenth Amendment*, NAT'L PARK SERV. (July 31, 2020), <https://www.nps.gov/articles/tennessee-women-s-history.htm>.

²⁵ Amendment to the Constitution, 1920, 41 Stat. 1823 (1920).

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The Scope of the Nineteenth Amendment

obstacles to voting, such as poll taxes and literacy tests. These barriers were addressed when the states ratified the Twenty-Fourth Amendment in 1964.²⁶ Congress then enacted the Voting Rights Act in 1965 to enforce the Fifteenth Amendment.²⁷

Amdt19.4 The Scope of the Nineteenth Amendment

The Supreme Court has not decided many cases interpreting the Nineteenth Amendment.¹ In the only significant case addressing the Amendment's effect, *Breedlove v. Suttles*, the Court upheld a Georgia law that required state residents between the ages of twenty-one and sixty to pay a poll tax.² The law exempted women who did not register to vote from paying the tax.³ However, men between twenty-one and sixty years of age were required to pay the tax, regardless of whether they registered to vote.⁴

A twenty-eight-year-old male who sought to register to vote challenged the law as a violation of the Fourteenth and Nineteenth Amendments.⁵ The Court acknowledged that the Nineteenth Amendment protected men's voting rights in addition to women's.⁶ However, the Court determined, without much elaboration, that the tax did not deny or abridge a man's right to vote on account of his sex.⁷

Almost three decades later, in *Harper v. Virginia State Board of Elections*, the Supreme Court overruled *Breedlove*, determining that imposing a poll tax on voters in state elections violated the Fourteenth Amendment's Equal Protection Clause.⁸ The Court held that conditioning a voter's participation in state elections upon payment of a poll tax discriminated against prospective voters based on their wealth.⁹ However, in *Harper*, the Court did not revisit *Breedlove*'s Nineteenth Amendment holding.

²⁶ The Twenty-Fourth Amendment prohibits the federal and state governments from conditioning a U.S. citizen's right to vote in *federal* elections on payment of a poll tax or "other tax." See Amdt24.1 Overview of Twenty-Fourth Amendment, Abolition of Poll Tax.

²⁷ 52 U.S.C. §§ 10101–10702. See also *Nineteenth Amendment to the U.S. Constitution: Women's Right to Vote*, NAT'L ARCHIVES, <https://www.archives.gov/milestone-documents/19th-amendment>.

¹ In the 1922 case *Leser v. Garnett*, the Supreme Court rejected Maryland voters' arguments that the Nineteenth Amendment had not become part of the Constitution. 258 U.S. 130, 136–37 (1922) (rejecting, among other arguments, Maryland voters' contention that the people of a state could deprive the state's legislature of the power to ratify the Nineteenth Amendment by enacting state constitutional provisions that limited suffrage to men). See also *Fairchild v. Hughes*, 258 U.S. 126, 127–30 (1922) (holding that federal courts lacked jurisdiction to rule upon a taxpayer's challenge to the procedures by which the Nineteenth Amendment was ratified). The *Fairchild* plaintiff sought an injunction to prevent the Secretary of State from proclaiming the ratification of the amendment and the U.S. Attorney General from enforcing it. *Id.*

² 302 U.S. 277, 279–80 (1937), *overruled by* *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 668–69 (1966).

³ *Breedlove*, 302 U.S. at 279–80. The law also exempted blind people from paying the tax. *Id.*

⁴ See *id.*

⁵ *Id.* at 280.

⁶ *Id.* at 283.

⁷ *Id.* at 283–84. The Court also rejected the plaintiff's challenges under the Fourteenth Amendment's Equal Protection and Privileges or Immunities Clauses. *Id.* at 282.

⁸ 383 U.S. 663, 670 (1966). The Twenty-Fourth Amendment, ratified in 1964, prohibits the federal and state governments from conditioning a U.S. citizen's right to vote in *federal* elections on payment of a poll tax or "other tax." See Amdt24.1 Overview of Twenty-Fourth Amendment, Abolition of Poll Tax.

⁹ *Harper*, 383 U.S. at 668–70 ("[W]ealth or fee paying has, in our view, no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.").

NINETEENTH AMENDMENT—WOMEN'S SUFFRAGE

Impact of the Nineteenth Amendment Beyond the Supreme Court

Since *Breedlove*, the Supreme Court has occasionally referenced the Nineteenth Amendment when resolving claims brought under the Fourteenth Amendment's Due Process or Equal Protection Clauses. For example, when striking down Georgia's county-unit system for tabulating votes in state primary elections as a violation of the Fourteenth Amendment's Equal Protection Clause, the Court suggested that the Nineteenth Amendment stands for "political equality" and illustrates the concept of "one person, one vote."¹⁰

In a later equal protection case involving the Virginia Military Institute's "male-only" admission policy, the Court traced its application of heightened scrutiny to official actions that deny "rights or opportunities based on sex," in part, to the history of sex discrimination that preceded the Nineteenth Amendment's recognition of women's suffrage.¹¹

Although the Court has occasionally referenced the Nineteenth Amendment in its opinions, a number of questions concerning the Amendment's scope remain unresolved. For example, it is unclear whether a successful Nineteenth Amendment claim requires a showing of intentional gender-based discrimination¹² and how far Congress's Section 2 enforcement power extends.¹³

Amdt19.5 Impact of the Nineteenth Amendment Beyond the Supreme Court

Although the Supreme Court has not decided many cases interpreting the Nineteenth Amendment,¹ the Constitution's recognition of women's suffrage has had a significant impact outside of the Court. As the late Justice Ruth Bader Ginsburg noted at an event celebrating the centennial of the Nineteenth Amendment's ratification, the Amendment "was the first step toward equal-citizenship stature for women" in the political and civil spheres of public life.²

¹⁰ *E.g.*, *Gray v. Sanders*, 372 U.S. 368, 381 (1963). *See also* *Adkins v. Children's Hosp.*, 261 U.S. 525, 553, 561–62 (1923) (striking down a federal law that set a minimum wage for women employed in the private sector as a violation of the Fifth Amendment's substantive due process guarantee of liberty to contract and noting "the great . . . changes which have taken place . . . in the contractual, political and civil status of women, culminating in the Nineteenth Amendment" such that differences between women and men had "come almost, if not quite, to the vanishing point"), *overruled by* *W. Coast Hotel v. Parrish*, 300 U.S. 379, 400 (1937).

¹¹ *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("Today's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of [a history of sex discrimination] . . . Through a century plus three decades and more of [American] history, women did not count among voters composing 'We the People'; not until 1920 did women gain a constitutional right to the franchise." (internal citations and quotation marks omitted)). Since the 1970s, the Fourteenth Amendment's Equal Protection Clause has played a role in combatting gender discrimination by subjecting gender-based classifications to intermediate scrutiny. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197–98 (1976). *See also* Amdt14.S1.5.8.5 General Approach to Gender Classifications.

¹² *See* *Jones v. Governor of Fla.*, 15 F.4th 1062, 1067–68 (11th Cir. 2021).

¹³ *See, e.g.*, Richard L. Hasen & Leah M. Litman, *Thin and Thick Conceptions of the Nineteenth Amendment Right to Vote and Congress's Power to Enforce It*, 108 GEO. L.J. 19TH AMEND. SPECIAL EDITION 27, 50 (2020).

¹ *See* Amdt19.4 The Scope of the Nineteenth Amendment.

² Ruth Bader Ginsburg, *Searching for Equality: The Nineteenth Amendment and Beyond, A Conversation Between United States Supreme Court Justice Ruth Bader Ginsburg and Ninth Circuit Court of Appeals Judge M. Margaret McKeown*, 108 GEO. L.J. 19TH AMEND. SPECIAL EDITION 5, 10 (2020).

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In the political domain, the Nineteenth Amendment changed voter demographics by adding millions of potential female voters to the electorate.³ As a result, many women immediately acquired a direct role in choosing their elected leaders and representatives for the first time. Nonetheless, many African-American women and other female minority groups throughout the United States continued to face significant obstacles to voting even after the Nineteenth Amendment's ratification.⁴

Another visible legacy of the Nineteenth Amendment has been an increase in the number of women holding public office. As a result of the suffrage movement, the Nineteenth Amendment, and other societal developments, the twentieth and twenty-first centuries witnessed a number of electoral "firsts" for women. These included Jeannette Rankin's 1916 election to the House of Representatives;⁵ Hattie Wyatt Caraway's 1932 election to the Senate;⁶ Nancy Pelosi's 2007 election as Speaker of the House;⁷ and Kamala Harris's 2020 election to the vice presidency.⁸ At the beginning of the 117th Congress in January 2021, a record number of 151 women took office, accounting for about 28% percent of Congress's total membership.⁹

In addition to increasing women's involvement in politics, the Nineteenth Amendment helped to increase women's participation in other domains of public life. For example, during the twentieth century, women increasingly served on juries, pursued higher education, and entered the work force in the United States.¹⁰ Nonetheless, despite progress on women's rights issues, some advocates, such as the National Woman's Party, continued to campaign for the removal of all "existing sex distinctions" from the law.¹¹ These advocates sought an amendment to the Constitution that would have guaranteed full legal equality between women and men.¹² This proposed Equal Rights Amendment

³ Sherrilyn Ifill, *Foreword*, 110 GEO. L.J. 1255, 1262 (2022).

⁴ *Nineteenth Amendment to the U.S. Constitution: Women's Right to Vote*, NAT'L ARCHIVES (Feb. 8, 2022), <https://www.archives.gov/milestone-documents/19th-amendment>. State laws continued to impose barriers to voting by African-Americans, Native Americans, Asian-Americans, immigrants, and other minority groups for decades until Congress's enactment of the Voting Rights Act of 1965 and other federal laws. *See id.*; *Voting Rights After the Nineteenth Amendment*, NAT'L PARK SERV. (Dec. 4, 2019), <https://www.nps.gov/articles/2020-crash-course.htm>.

⁵ *Biography of Jeannette Rankin*, U.S. HOUSE OF REP., [https://history.house.gov/People/Listing/R/RANKIN,-Jeannette-\(R000055\)/](https://history.house.gov/People/Listing/R/RANKIN,-Jeannette-(R000055)/) (last visited Feb. 10, 2023). Jeannette Rankin was elected to the House of Representatives almost four years before the Nineteenth Amendment's ratification. *Id.*

⁶ *Biography of Hattie Wyatt Caraway*, U.S. HOUSE OF REP., [https://history.house.gov/People/Listing/C/CARAWAY,-Hattie-Wyatt-\(C000138\)/](https://history.house.gov/People/Listing/C/CARAWAY,-Hattie-Wyatt-(C000138)/) (last visited Feb. 10, 2023). Hattie Wyatt Caraway had previously been appointed to the Senate seat that her husband vacated when he died. *Id.*

⁷ *Biography of Nancy Pelosi*, U.S. HOUSE OF REP., <https://history.house.gov/People/Detail/19519> (last visited Feb. 10, 2023).

⁸ Kamala Harris, Vice President-Elect Acceptance Speech, ABC NEWS (Nov. 7, 2020), <https://abcnews.go.com/Politics/read-kamala-harris-full-speech-historic-election-win/story?id=74084644> (recognizing "all the women who have worked to secure and protect the right to vote for over a century," including those who advocated for the Nineteenth Amendment and Voting Rights Act of 1965).

⁹ JENNIFER E. MANNING, CONG. RSCH. SERV., R46705, MEMBERSHIP OF THE 117TH CONGRESS: A PROFILE (2022), <https://crsreports.congress.gov/product/pdf/R/R46705>. This statistic includes three women who took office as congressional delegates and one woman who took office as the Resident Commissioner of Puerto Rico.

¹⁰ Ginsburg, *supra* note 2, at 10, 16.

¹¹ Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1209 n.549 (1994).

¹² *See id.* After more than fifty years of advocacy campaigns, Congress proposed the Equal Rights Amendment (ERA) in 1972. Joint Resolution Proposing an Amendment to the Constitution of the United States Relative to Equal Rights for Men and Women, H.R.J. Res. 208, 92nd Cong., 2nd Sess., 86 Stat. 1523–24 (1972). The

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(ERA) was ultimately unsuccessful; however, efforts to obtain an ERA received new attention during the 2020 centennial celebration of the Nineteenth Amendment's ratification.¹³

amendment would have provided that “equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.” *Id.* However, the amendment did not attain the necessary number of state ratifications by Congress’s imposed deadlines. *See also What Happened After?: Women’s History*, NAT’L PARK SERV. (Aug. 15, 2019), <https://www.nps.gov/articles/what-happened-after-women-s-history.htm>.

¹³ Ginsburg, *supra* note 2, at 10.

TWENTY-FIRST AMENDMENT

REPEAL OF PROHIBITION

Amdt21.S1 Repeal of Eighteenth Amendment

Amdt21.S1.1 Overview of Twenty-First Amendment, Repeal of Prohibition

The Twenty-First Amendment repealed the Eighteenth Amendment, thereby ending the Constitution’s nationwide ban on the manufacture, sale, or transportation of “intoxicating liquors” for beverage purposes.¹ Section 2 of the Twenty-First Amendment authorized the states to regulate or prohibit alcoholic beverages within their jurisdictions for legitimate, nonprotectionist purposes, such as health or safety.² Much of the Supreme Court’s Twenty-First Amendment jurisprudence has addressed the scope of the states’ Section 2 powers.³

The Twenty-First Amendment’s proposal and ratification resulted from the United States’ problematic experience with Prohibition. From their inception, the Eighteenth Amendment and its implementing law, the Volstead Act, were controversial in part because they empowered the federal government to police activities that implicated individual social habits and morality—a role traditionally led by state and local governments.⁴ Nationwide Prohibition quickly fell out of favor with the American public because of ineffective enforcement, harsh enforcement techniques, crime related to the illegal liquor traffic, a need for tax revenue during the Great Depression, and widespread defiance of the law.⁵ The Twenty-First Amendment’s framers sought to eliminate the Eighteenth Amendment’s inflexible and problematic nationwide ban on the liquor trade while recognizing the states’ authority to regulate or prohibit alcoholic beverages within their borders in keeping with local sentiment.⁶ However, it is unclear whether

¹ U.S. CONST. amend. XXI, § 1. The Eighteenth Amendment had also forbidden importation of beverage liquor into the United States or its exportation therefrom. *Id.* amend. XVIII, § 1. This group of essays often refers to the Eighteenth Amendment’s nationwide ban on the liquor trade as “Prohibition.” For additional background and analysis of the Eighteenth Amendment, see Amdt18 Eighteenth Amendment: Prohibition of Liquor.

² U.S. CONST. amend. XXI, § 2 (providing that “transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited”); *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, No. 18-96, slip op. at 31–32 (U.S. June 26, 2019) (“[Section 2] allows each State leeway to enact the measures that its citizens believe are appropriate to address the public health and safety effects of alcohol use and to serve other legitimate interests, but it does not license the States to adopt protectionist measures with no demonstrable connection to those interests.”); *Granholm v. Heald*, 544 U.S. 460, 484–85 (2005). Legitimate reasons for states to regulate alcoholic beverages might include “promot[ing] temperance and responsible drinking,” “ensur[ing] an orderly marketplace,” preventing beverage producers’ “undue influence” over retailers, and “maintain[ing] oversight through reporting and taxation.” Daniel J. Croxall, *Delirium of Disorder: Tension Between the Dormant Commerce Clause and the Twenty-First Amendment Stunts Independent Craft Brewery Growth*, 126 PENN. ST. L. REV. 435, 447 n.87, 463 (2022).

³ See Amdt21.S1.1 Overview of Twenty-First Amendment, Repeal of Prohibition The states also possess some authority to regulate alcoholic beverages through the exercise of their traditional police powers. See David S. Versfelt, *The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1578 (1975).

⁴ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, H.R. DOC. NO. 71-722, at 20 (1931) (“The Eighteenth Amendment represents the first effort in our history to [extend] directly by Constitutional provision the police control of the federal government to the personal habits and conduct of the individual.”); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 2–4, 6–7 & n.8, 11–12 (2006).

⁵ See NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 54; Post, *supra* note 4, at 1–4, 11–12, 20; DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 206, 275–76, 361, 373 (2010).

⁶ See Amdt21.S1.2.4 Drafting of the Twenty-First Amendment. Congress proposed the Twenty-First Amendment on February 20, 1933, requiring state ratifying conventions to approve it within seven years in order for

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the Amendment's framers intended to give the states sweeping regulatory power over alcoholic beverages or merely sought to protect "dry" states from beverage imports that were illegal under state law.⁷

In its early decisions interpreting the Twenty-First Amendment, the Supreme Court adopted an expansive view of the states' authority to regulate the importation, transportation, sale, distribution, and use of alcoholic beverages within their jurisdictions.⁸ The Court initially determined that Section 2 superseded some of the Constitution's limits on state action, including the Dormant Commerce Clause doctrine, which prohibits states from discriminating against interstate commerce.⁹ However, beginning later in the twentieth century, the Court embraced a much narrower view of the states' Twenty-First Amendment powers.¹⁰ Viewing the Amendment as "one part of a unified constitutional scheme,"¹¹ the Court has held that Section 2 did not automatically override limits on state authority found in the Commerce Clause¹² and other provisions of the Constitution,¹³ such as the First Amendment's Establishment and Free Speech Clauses¹⁴ and the Fourteenth Amendment's Due Process and Equal Protection Clauses.¹⁵

In the decades after the Twenty-First Amendment's ratification, the Supreme Court also confirmed that Congress's constitutional authority over interstate and foreign commerce allows the federal government to regulate many aspects of the liquor trade.¹⁶ Generally,

it to become part of the Constitution. U.S. CONST. amend. XXI, § 3. On December 5, 1933, Acting Secretary of State William Phillips certified that the Amendment had been adopted by the requisite number of state conventions, thereby ending almost 14 years of nationwide Prohibition. *See Twenty-First Amendment to the Constitution*, 48 Stat. 1749, 1749–50 (1933); *Intro.6.5 Early Twentieth Century Amendments (Sixteenth Through Twenty-Second Amendments)*.

⁷ *See* Amdt21.S1.2.4 Drafting of the Twenty-First Amendment (discussing ambiguity in congressional debates over the scope of the states' Section 2 powers).

⁸ *See, e.g.,* Amdt21.S1.2.4 Overview of State Power over Alcohol and Discrimination Against Interstate Commerce.

⁹ *See id.* For more on the dormant aspects of Congress's Commerce Clause power, see ArtI.S8.C3.7.1 Overview of Dormant Commerce Clause.

¹⁰ *See, e.g.,* Amdt21.S1.2.4 Overview of State Power over Alcohol and Discrimination Against Interstate Commerce; Amdt21.S2.1 Scope of the States' Section 2 Powers over Interstate and Foreign Commerce in Alcoholic Beverages.

¹¹ *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, No. 18-96, slip op. at 12 (U.S. June 26, 2019) (discussing the Supreme Court's contextual approach to interpreting the Twenty-First Amendment).

¹² In 2005, the Supreme Court confirmed that the Twenty-First Amendment does not authorize states to enact laws that discriminate in favor of local alcoholic beverage products. Such laws are invalid under the Commerce Clause unless the state "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (citation and internal quotation marks omitted).

¹³ *See* Amdt21.S2.1 Scope of the States' Section 2 Powers over Interstate and Foreign Commerce in Alcoholic Beverages.

¹⁴ U.S. CONST. amend. I. The First Amendment applies to the states via the Fourteenth Amendment's Due Process Clause. *See* *Everson v. Bd. of Educ.*, 330 U.S. 1, 8 (1947) (incorporating the First Amendment's Establishment Clause against the states); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment's guarantees of freedom of speech and the press against the states). *See also* *Larkin v. Grendel's Den*, 459 U.S. 116, 122 n.5 (1982); Amdt1.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens.

¹⁵ U.S. CONST. amend. XIV, § 1. *See also* *Craig v. Boren*, 429 U.S. 190, 207–08 (1976); Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens.

¹⁶ *See generally* U.S. CONST. art. I, § 8, cl. 3. The federal government taxes and regulates various activities involving alcoholic beverages, including aspects of beverage production, wholesale distribution, importation, labeling, and advertising. *See* Amdt21.S2.10 State and Federal Regulation of Alcohol Sales.

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federal law may preempt conflicting state liquor laws when the federal government's regulatory interests outweigh those asserted by the states.¹⁷

Amdt21.S1.2 Historical Background

Amdt21.S1.2.1 The Eighteenth Amendment and Prohibition

Prior to its repeal, the Eighteenth Amendment banned the manufacture, sale, or transportation of “intoxicating liquors” for “beverage purposes” within the United States.¹ To enforce Prohibition,² Congress enacted the National Prohibition Act or “Volstead Act.”³ The Volstead Act forbade, among other activities, the production, sale, transportation, or possession of beverages that contained 0.5% or greater alcohol by volume—a stringent definition of “intoxicating liquors” that encompassed beer and light wines in addition to distilled alcoholic beverages, such as whiskey or gin.⁴ However, the Act allowed the licensed production, sale, and use of alcohol for certain purposes, subject to valid state or local restrictions.⁵

The Eighteenth Amendment was the product of nationwide temperance movements that first emerged in the decades after the Founding and steadily grew in influence during the Progressive Era.⁶ From the Colonial Era to the early 1800s, many Americans viewed

¹⁷ See Amdt21.S2.10 State and Federal Regulation of Alcohol Sales.

¹ U.S. CONST. amend. XVIII, § 1. The Amendment also forbade the importation of beverage liquor into the United States or its exportation therefrom. *Id.* For additional background on the history of the Eighteenth Amendment, see Amdt18 Eighteenth Amendment: Prohibition of Liquor.

² The Eighteenth Amendment granted Congress and the state legislatures “concurrent power” to enforce Prohibition by enacting “appropriate legislation.” U.S. CONST. amend. XVIII, § 2. The Supreme Court held that the Eighteenth Amendment gave the federal government broad power to enforce Prohibition, even with respect to activities conducted within a single state, such as the manufacture and sale of alcoholic beverages. See *National Prohibition Cases*, 253 U.S. 350, 387 (1920). The Court also confirmed the states’ power to augment the federal government’s enforcement efforts with potentially stricter requirements by targeting aspects of the liquor trade that fell within state jurisdiction. *E.g.*, *Vigliotti v. Pennsylvania*, 258 U.S. 403, 407–09 (1922). For more information, see Amdt18.8 Federal and State Enforcement Powers.

³ Volstead Act, ch. 85, tit. II, § 3, 41 Stat. 305, 308–09 (1919) (effective Jan. 17, 1920), *repealed by* Liquor Law Repeal and Enforcement Act, ch. 740, tit. I, § 1, 49 Stat. 872, 872 (1935). The National Prohibition Act was popularly known as the Volstead Act because Representative Andrew John Volstead of Minnesota, chairman of the House Judiciary Committee, sponsored and promoted the Act. Shortly after the Twenty-First Amendment’s adoption, Congress repealed federal prohibition laws in various districts and territories. See, e.g., Act of April 5, 1933, ch. 19, § 2, 48 Stat. 25, 25 (District of Columbia); Act of January 24, 1934, ch. 4, § 2, 48 Stat. 319, 319 (District of Columbia); Act of March 2, 1934, ch. 37, § 1, 48 Stat. 361, 361 (Puerto Rico and Virgin Islands); Act of March 26, 1934, ch. 88, §§ 1–3, 48 Stat. 467, 467 (Hawaii); Act of June 19, 1934, ch. 657, §§ 1–3, 48 Stat. 1116, 1116 (Panama Canal Zone).

⁴ Volstead Act § 3, 41 Stat. at 308–09.

⁵ *Id.* §§ 3–7, 41 Stat. at 308–11 (allowing licensed manufacture and use for certain industrial, medicinal, religious, and scientific purposes); *McCormick & Co. v. Brown*, 286 U.S. 131, 133, 141, 143–45 (1932) (referencing the Tenth Amendment when upholding a West Virginia law that required nonresident companies to obtain state permits before shipping alcoholic “preparations” to West Virginia dealers, regardless of whether the nonresidents held federal permits authorizing shipment). The Volstead Act did not specifically prohibit drinking or purchasing alcoholic beverages, and it allowed the private possession and consumption of legally acquired intoxicating beverages. See Volstead Act § 33, 41 Stat. at 317; *United States v. Farrar*, 281 U.S. 624, 634 (1930) (confirming that the Volstead Act did not criminalize the purchase of alcoholic beverages).

⁶ See Amdt18.2.2 The Temperance Movements of the Nineteenth and Twentieth Centuries. The Progressive Era, which lasted from the 1890s to the 1920s, was a period of increased political activism and social reform in the United States. See *Progressive Era to New Era, 1900–1929: Overview*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/overview/>.

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moderate alcohol consumption as a normal aspect of life.⁷ Early Americans, including many of the Founders, drank, purchased, or manufactured large quantities of alcoholic beverages.⁸ However, as Americans' consumption of hard liquor increased significantly from the 1790s to the 1830s, Protestant Christians, concerned about alcoholism's effects on society, formed some of the first temperance groups.⁹

In the decades leading up to the Civil War, temperance groups adopted an increasingly stringent attitude toward alcohol consumption and successfully pressured some states to enact laws prohibiting the liquor trade.¹⁰ However, as the nation became embroiled in disagreements over the issue of slavery, Americans' interest in the temperance movement waned, and many state legislatures repealed or weakened their prohibition laws.¹¹

After the Civil War, the temperance movement again surged in popularity as the nation grappled with rapid industrialization and urbanization.¹² The organization most responsible for the Eighteenth Amendment's proposal and ratification was the Anti-Saloon League.¹³ Founded in 1893, the League engaged strategically with Protestant churches and both of the major political parties, publishing political pamphlets and giving speeches in support of Prohibition.¹⁴ One of the League's most prominent leaders, Wayne B. Wheeler, directed the organization's lobbying and fundraising efforts, which targeted politicians at all levels of government nationwide.¹⁵

By 1917, the proliferation of state prohibition laws and Congress's enactment of wartime restrictions on the production and sale of alcoholic beverages had laid the foundation for nationwide Prohibition.¹⁶ With the Anti-Saloon League's political influence at its peak, a wave of "dry" candidates swept into Congress in 1916.¹⁷ On December 18, 1917, Congress proposed the Eighteenth Amendment.¹⁸ Although Congress imposed a seven-year deadline on the Amendment's ratification, the requisite three-fourths of the states approved it in little more than a year.¹⁹ On January 29, 1919, Acting Secretary of State Frank L. Polk certified that the Amendment had been ratified on January 16, 1919.²⁰ By

⁷ See Amdt18.2.1 Eighteenth Amendment: Alcoholic Beverages in Colonial America.

⁸ See *id.*

⁹ See Amdt18.2.2 Eighteenth Amendment: Temperance Movements Before the Civil War.

¹⁰ See *id.* Early temperance groups also convinced some states to adopt other "prohibitory measures," including "high license" laws that imposed large fees for selling alcoholic beverages and "local option" laws under which "local political units [were] permitted to decide whether[, or under what terms,] licenses to sell liquor should be granted." Clark Byse, *Alcoholic Beverage Control Before Repeal*, 7 LAW & CONTEMP. PROBS. 544, 558 (1940).

¹¹ See Amdt18.2.2 Temperance Movements of the Nineteenth and Twentieth Centuries.

¹² See Amdt18.2.3 Post-Civil War Temperance Organizations.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See Amdt18.3 Early Federal and State Prohibition Laws. Responding to concerns that late nineteenth-century Supreme Court decisions interpreting the Commerce Clause would prevent "dry" states from enforcing their prohibition laws fully, Congress enacted statutes that specifically subjected imported alcoholic beverages to state regulation. See *id.*

¹⁷ See Amdt18.4 Proposal and Ratification of the Eighteenth Amendment.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

its terms, the Amendment did not become effective until January 17, 1920, which was one year after the states ratified it.²¹

Amdt21.S1.2.2 Problems with the Eighteenth Amendment and Prohibition

From their inception, the Eighteenth Amendment and its implementing law, the Volstead Act, were controversial in part because they empowered the federal government to police activities that implicated individual social habits and morality—a role traditionally led by state and local governments.¹ By the end of the “dry decade” of the 1920s, the Eighteenth Amendment had failed to eliminate the illegal manufacture and sale of alcoholic beverages within the United States.² Shortly after entering office in 1929, President Herbert Hoover established an investigatory committee to identify obstacles to Prohibition’s enforcement.³ Two years later, the “Wickersham Commission”—named for its chair, former Attorney General George W. Wickersham—released a report identifying a number of these obstacles.⁴

Observing that “[s]ettled habits and social customs do not yield readily to legislative fiat,” the Wickersham Report detailed the American public’s widespread defiance of Prohibition.⁵ Americans patronized clandestine retail liquor establishments, such as “speakeasies”; exploited loopholes in the Volstead Act to obtain medicinal liquor and sacramental wine for recreational purposes; and brewed alcoholic beverages at home, often without significant legal consequences.⁶

The Wickersham Report also noted significant problems with the federal and state governments’ efforts to enforce Prohibition. Federal agencies responsible for investigat-

²¹ See *id.*

¹ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 20 (“The Eighteenth Amendment represents the first effort in our history to [extend] directly by Constitutional provision the police control of the federal government to the personal habits and conduct of the individual.”); Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 2–4, 6–7 & n.8, 11–12 (2006) (noting that the Eighteenth Amendment “caused a major crisis in the theory and practice of American federalism, as the national government, which lacked the courts or police necessary for implementing the [Amendment], sought to conscript state judicial and law enforcement resources.”).

² NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 50–52.

³ In March 1929, Congress appropriated funds for a “thorough investigation” into Prohibition enforcement. See *id.* at iii. See also President Herbert Hoover, Inaugural Address (March 4, 1929), https://avalon.law.yale.edu/20th_century/hoover.asp.

⁴ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at vi, 50–52. The committee’s members included law enforcement officers, judges, and law professors. *Id.* at iii. Although most of the report focused on Prohibition’s failures, the committee noted that drinking and deaths from alcoholism initially declined. *Id.* at 22. However, “after a brief period in the first years of the amendment,” drinking increased. *Id.*

⁵ *Id.* at 43, 49, 53–54. Opposition to Prohibition was particularly prevalent in large cities. *Id.* at 43.

⁶ *Id.* at 22, 32, 37, 58–59; OKRENT, *supra* note 5, at 184–85, 193. The federal Bureau of Prohibition and some lower federal courts interpreted Section 29 of the Volstead Act to allow home brewing of hard cider. NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 32–33; OKRENT, *supra* note 5, at 112. Some officials serving at the highest levels of the federal government drank alcoholic beverages during Prohibition. Warren G. Harding, who served as President during Prohibition’s early years, transferred liquor that he had legally acquired before Prohibition to the White House from his home to drink during his tenure. *Id.* at 129. George Cassiday, also known as “The Man in the Green Hat,” was “Congress’s primary bootlegger” during Prohibition until his 1930 arrest and conviction. *The Man in the Green Hat*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/The_Man_in_the_Green_Hat.htm.

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ing Volstead Act violations lacked the funds necessary for a serious enforcement effort.⁷ Many federal Prohibition agents received low salaries and had little formal training.⁸ This contributed to widespread corruption as some agents ignored violations of the law in exchange for bribes from criminal organizations.⁹

Moreover, although the Eighteenth Amendment granted the states “concurrent power” to enforce Prohibition, fewer than half of the states funded their own enforcement efforts.¹⁰ Instead, many states sought to preserve their limited fiscal resources for other priorities by relying on the federal government to enforce laws that were unpopular with a large number of state residents.¹¹ During the 1920s, public support for Prohibition enforcement declined further as federal and state authorities employed harsh enforcement techniques, such as conducting violent police raids and wiretapping suspects’ telephone lines, when investigating some alleged Volstead Act violations.¹²

Public defiance of Prohibition and ineffective law enforcement fostered an illicit liquor traffic known as “bootlegging.”¹³ Bootleggers smuggled alcoholic beverages into the United States through its expansive international borders, shore lines, and inland waterways.¹⁴ Bootleggers also produced and distributed alcoholic beverages within the United States.¹⁵ Organized criminal gangs, attracted by the illegal liquor trade’s profitability, fought violent turf battles in Chicago, Detroit, and other major American cities.¹⁶

⁷ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 44–48; OKRENT, *supra* note 5, at 112 (noting that the “total initial appropriation for federal enforcement” of the Volstead Act “amounted to \$2.1 million,” which was “slightly less than the amount paid in one day . . . for muskrat pelts at the St. Louis fur auction.”). The Bureau of Internal Revenue initially exercised primary responsibility for the Volstead Act’s enforcement. Volstead Act, ch. 85, tit. II, §§ 2, 28, 41 Stat. 305, 308, 316 (1919) (effective Jan. 17, 1920), *repealed by* Liquor Law Repeal and Enforcement Act, ch. 740, tit. I, § 1, 49 Stat. 872, 872 (1935). In 1927, Congress reorganized the Treasury Department and created a separate component, the Bureau of Prohibition, to enforce the Act. *See* Treasury Department Reorganization Plan of 1927, Pub. L. No. 69-751, ch. 348, 44 Stat. 1381. Three years later, Congress moved the Bureau into the Department of Justice. *See* Prohibition Reorganization Act of 1930, Pub. L. No. 71-273, ch. 342, § 2(a), 46 Stat. 427.

⁸ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 12–13, 17; OKRENT, *supra* note 5, at 134–37.

⁹ *Id.* *See also* NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 12–13.

¹⁰ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 39, 53; OKRENT, *supra* note 5, at 141.

¹¹ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 39, 53; OKRENT, *supra* note 5, at 141.

¹² NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 46; OKRENT, *supra* note 5, at 283–86, 318–19. *See also* *Olmstead v. United States*, 277 U.S. 438, 455 (1928) (holding that the Fourth Amendment did not protect conversations transmitted via telephone wires beyond a person’s house), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967). For more on the Supreme Court’s Prohibition Era Fourth Amendment jurisprudence, *see* Amdt4.3.2 Early Doctrine on Fourth Amendment and Amdt4.6.4.2 Vehicle Searches.

¹³ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 14, 22, 52, 60 (summarizing the testimony of a Treasury Department official who discussed “smuggling, the diversion of medicinal spirits, the diversion of industrial alcohol, (which was the principal source or the backbone of bootleg liquor that was then sold), and in the south and middle west moonshine liquor”); President Herbert Hoover, Inaugural Address (March 4, 1929), https://avalon.law.yale.edu/20th_century/hover.asp (stating that the failure of state enforcement efforts had resulted in “a dangerous expansion in the criminal elements who have found enlarged opportunities in dealing in illegal liquor”).

¹⁴ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 14, 22, 52.

¹⁵ OKRENT, *supra* note 5, at 128, 180, 201. Some bootleggers repurposed and sold industrial alcohol. Adulterated alcohol could be dangerous or even lethal. *Id.* at 209, 286–87.

¹⁶ NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, *supra* note 4, at 36–37, 51–52; OKRENT, *supra* note 5, at 272–75, 284, 320–22.

Although the Wickersham Commission identified significant problems with Prohibition, it opposed the Eighteenth Amendment's repeal.¹⁷ However, a few individual commissioners wrote separately to advocate for the Eighteenth Amendment's revision or elimination.¹⁸

Amdt21.S1.2.3 The Repeal Movement and the 1932 Presidential Election

The Wickersham Commission's 1931 report, which identified numerous problems with Prohibition,¹ helped to encourage public support for the Eighteenth Amendment's repeal. Various social reform groups advocated for an end to Prohibition, including the Association Against the Prohibition Amendment and the Women's Organization for National Prohibition Reform.² Pro-repeal advocates maintained that Prohibition intruded upon individual liberty, interfered with state sovereignty, and encouraged the growth of crime, among other objections.³

Several influential business leaders also supported the Eighteenth Amendment's repeal in the late 1920s and early 1930s. These included newspaper publisher William Randolph Hearst, who viewed Prohibition as a failure,⁴ and philanthropist John D. Rockefeller, Jr.⁵ A longtime supporter of the Anti-Saloon League, Rockefeller revealed his opposition to Prohibition in a June 1932 letter to educator and philosopher Nicholas Murray Butler.⁶ Rockefeller wrote that Prohibition's benefits were "more than outweighed by the evils that have developed and flourished since its adoption, evils which, unless promptly checked, are likely to lead to conditions unspeakably worse than those which prevailed before."⁷

Despite growing public opposition to the Eighteenth Amendment, incumbent President Herbert Hoover and the Republican Party adopted an equivocal approach toward Prohibition during the 1932 presidential campaign. The Republican Party platform attempted to appease both "dry" and "wet" supporters by opposing the Eighteenth Amendment's repeal while supporting Congress's proposal of a new amendment to the Constitution that would allow each state to decide whether to prohibit liquor or saloons within its jurisdiction.⁸

¹⁷ NAT'L COMM'N ON LAW OBSERVANCE AND ENF'T, *supra* note 4, at 83–84. It also opposed relaxation of the Volstead Act's stringent requirements. *Id.*

¹⁸ *E.g.*, *id.* at 113 (separate statement of Ada L. Comstock, advocating for the Eighteenth Amendment's revision); *id.* at 111 (separate statement of Newton D. Baker, advocating for the Eighteenth Amendment's repeal).

¹ See Amdt21.S1.2.2 Problems with the Eighteenth Amendment and Prohibition.

² OKRENT, *supra* note 5, at 233, 295, 298, 332, 339–40, 350 (2010).

³ *Id.*

⁴ *Id.* at 317–18.

⁵ Letter from John D. Rockefeller, Jr. to Nicholas Murray Butler (June 6, 1932), <https://ia800408.us.archive.org/10/items/355897-1932-rockefeller-to-butler-letter/355897-1932-rockefeller-to-butler-letter.pdf>.

⁶ *Id.*

⁷ *Id.* at 4.

⁸ *Republican Party Platform of 1932*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/republican-party-platform-1932>; Arthur Krock, *Hoover Approves Dry-Wet Prohibition Plank; His Steam Roller Crushes Threatened Revolt; Convention Receives Keynote Speech Coolly*, N.Y. TIMES (June 15, 1932), <https://archive.nytimes.com/www.nytimes.com/library/politics/camp/320615convention-gop-ra.html>.

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By contrast, President Hoover's challenger, Democratic Party candidate Franklin D. Roosevelt, openly supported the Eighteenth Amendment's repeal.⁹ Speaking at a campaign event in August 1932, Roosevelt referred to Prohibition as a "complete and tragic failure" in many parts of the country that encouraged corruption and crime.¹⁰ He argued that vesting the state governments with primary regulatory authority over alcoholic beverages would better promote temperance goals if federal law protected dry states from illegal liquor imports.¹¹ Campaigning during the depths of the Great Depression, Roosevelt contended that repealing the Eighteenth Amendment would also provide a much needed source of tax revenue to the federal government.¹² On November 8, 1932, Roosevelt won a landslide victory in the presidential election, signaling a potential end to Prohibition.¹³

Amdt21.S1.2.4 Drafting of the Twenty-First Amendment

The November 1932 elections resulted in victories for many candidates who supported the Eighteenth Amendment's repeal, including President-elect Franklin D. Roosevelt.¹ Shortly after the elections, the lame-duck 72nd Congress renewed its efforts to end nationwide Prohibition.² On December 6, 1932, Senator John J. Blaine of Wisconsin introduced a joint resolution, S.J. Res. 211, that would, as modified, be ratified by the states as the Twenty-First Amendment.³

As originally introduced in the Senate, the Blaine resolution did not clearly repeal the Eighteenth Amendment.⁴ Instead, the resolution barred Congress from authorizing the

⁹ Franklin D. Roosevelt, Campaign Address on Prohibition in Sea Girt, New Jersey (Aug. 27, 1932), <https://www.presidency.ucsb.edu/documents/campaign-address-prohibition-sea-girt-new-jersey>. In 1928, the Democratic Party nominated Al Smith, the governor of New York, for president. Smith was the first major national party candidate to support Prohibition's repeal. OKRENT, *supra* note 5, at 302, 306. Smith lost to Republican Herbert Hoover, who supported Prohibition. *Id.* at 308.

¹⁰ Franklin D. Roosevelt, Campaign Address on Prohibition in Sea Girt, New Jersey (Aug. 27, 1932), <https://www.presidency.ucsb.edu/documents/campaign-address-prohibition-sea-girt-new-jersey>.

¹¹ *Id.*

¹² *Id.* ("Unquestionably our tax burden would not be so heavy nor the forms that it takes so objectionable if some reasonable proportion of the uncounted millions now paid to those whose business has been reared upon this stupendous blunder could be made available for the expenses of Government.").

¹³ *Senate Stories: Beer by Christmas*, U.S. SENATE, <https://www.senate.gov/artandhistory/senate-stories/beer-by-christmas.htm>.

¹ *See Senate Stories: Beer by Christmas*, U.S. SENATE, <https://www.senate.gov/artandhistory/senate-stories/beer-by-christmas.htm>.

² *Id.* Because the Twentieth Amendment, which prescribes the date on which the terms of Senators and Representatives end, did not become effective until October 15, 1933, the 72nd Congress ended in March 1933. Beginning with the 73rd Congress, the terms of Representatives and Senators ended on January 3 after an election year. U.S. CONST. amend. XX, § 1; Intro.6.5 Early Twentieth Century Amendments (Sixteenth Through Twenty-Second Amendments).

³ S.J. Res. 211, 72d Cong., 2d Sess. (1932); 76 CONG. REC. 64–65 (1932). On December 5, 1932, a joint resolution to repeal the Eighteenth Amendment was introduced in the House. H.J. Res. 480, 72d Cong., 2d Sess. (1932). On December 5, 1932, the House narrowly rejected the resolution. 76 CONG. REC. 12–13 (1932). During debate over the resolution, some House Members suggested that they would vote against the measure on procedural grounds because it had been offered under suspension of the rules with no amendments allowed and minimal time allotted for debate. *Id.* at 8–9.

Since the beginning of Prohibition, a number of resolutions that would have repealed or revised the Eighteenth Amendment were introduced in the House and Senate. *See, e.g.*, S. DOC. NO. 163, at 1–3, 24–27, 87th Cong., 2d Sess. (1963) (listing joint resolutions proposing amendments to the Constitution that had been introduced in various Congresses).

⁴ S.J. Res. 211, 72d Cong., 2d Sess. (1932).

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transportation or importation of intoxicating liquors into “dry” states in violation of state law while permitting federal legislation that would assist the states in enforcing their prohibition laws.⁵ During a January 1933 markup session, the Senate Judiciary Committee significantly revised the resolution.⁶ The revised resolution, which the committee reported favorably, specifically repealed the Eighteenth Amendment and protected dry states from illegal liquor imports.⁷

During Senate debates over the draft Twenty-First Amendment, opponents argued that repealing the Eighteenth Amendment would permit licensed saloons and their negative societal impacts.⁸ Responding to such objections, Senator Blaine, the resolution’s floor manager, noted that, during the 1932 elections, both major political parties had supported Congress’s submission of an amendment to the states revising or repealing Prohibition.⁹ Describing the Eighteenth Amendment as an “inflexible police regulation which might be appropriate in a municipal ordinance,”¹⁰ Senator Blaine offered his interpretations of the draft Twenty-First Amendment’s provisions.¹¹

Section 1 of the draft Twenty-First Amendment, which repealed the Eighteenth Amendment, did not require much explanation. However, Section 2 was more ambiguous and controversial.¹² Senator Blaine contended that Section 2 would “restor[e] to the States” the power to regulate alcoholic beverages that they had exercised in the nation’s early years.¹³ Noting that the Supreme Court’s pre-Prohibition Era Commerce Clause jurisprudence had limited the states’ power over liquor imports,¹⁴ Senator Blaine contended

⁵ *Id.* (prohibiting Congress from exercising its commerce power to allow liquor imports into “dry states”).

⁶ See S. REP. NO. 72-1022, at 1 (1933).

⁷ 76 CONG. REC. 4138–39 (1933) (reproducing the text of S.J. Res. 211 as reported by the Senate Judiciary Committee). The revised joint resolution imposed a ratification deadline of seven years. *Id.* Initially, Section 3 of the revised joint resolution granted Congress “concurrent power” to “regulate or prohibit the sale of intoxicating liquors” for consumption on premises (e.g., restaurants or bars)—a provision intended to prohibit the return of the licensed saloon. See *id.* at 4138–39, 4141. The Senate agreed to an amendment removing Section 3 after some Senators suggested it would defeat the purpose of repealing Prohibition by granting the federal government a general police power to impose on the states a “single standard of conduct . . . without regard to local sentiment and local habits.” *Id.* at 4145–46, 4178–79.

⁸ See, e.g., *id.* at 4216 (statement of Sen. Robinson); *id.* at 4219–20 (statement of Sen. Glass).

⁹ *Id.* at 4139–40.

¹⁰ *Id.* at 4143.

¹¹ *Id.* at 4139–41.

¹² Section 2, which was ratified as part of the Twenty-First Amendment, provides that “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”

¹³ See 76 CONG. REC. 4141 (1933). Since the Founding, the states had possessed broad authority to regulate or prohibit the manufacture and sale of alcoholic beverages within their borders. See *Mugler v. Kansas*, 123 U.S. 623, 659 (1887). Early American laws regulating establishments that served alcoholic beverages established licensing requirements, closing times, “limitations on the volume of liquor served,” and imposed fines for excessive drinking on patrons and businesses. *Indomitable Spirits: Prohibition in the United States: Saloons*, DIGITAL PUB. LIBR. OF AM., <https://dp.la/exhibitions/spirits/early-alcohol-consumption/saloons>; Clark Byse, *Alcoholic Beverage Control Before Repeal*, 7 LAW & CONTEMP. PROBS. 544, 544–47, 552 (1940) (surveying the history of early American legislation regulating the retail sale of alcoholic beverages, including licensing, regulatory, and taxation provisions that applied to taverns); NAT’L COMM’N ON LAW OBSERVANCE AND ENF’T, ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES, H.R. DOC. NO. 71-722, at 3 (1931) (describing “systems of restriction, through taxation and excise, closing hours, prohibition of selling to certain types of person, high license, local option, state dispensaries, state prohibition, and finally national prohibition”).

¹⁴ See 76 CONG. REC. 4141 (1933). During the late 1800s, the Supreme Court held that the Commerce Clause prevented the states from banning the importation or initial sale of out-of-state beverages that remained in their original packages. See *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 498 (1888); *Leisy v. Hardin*, 135 U.S.

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that Section 2 would “assure the so-called dry States against the importation of intoxicating liquor into those States [by writing] permanently into the Constitution a prohibition along that line.”¹⁵ Several other Members of Congress echoed Sen. Blaine’s characterization of Section 2 as “protecting” dry states from liquor imports that a future Congress or Supreme Court majority might authorize after Prohibition’s repeal.¹⁶ Nonetheless, a few remarks of Blaine and other Senators suggest Congress may have intended to grant the states even broader authority over alcoholic beverages.¹⁷

During consideration of the draft Twenty-First Amendment, the Senate amended the joint resolution to provide for its submission to specially elected delegates in state ratifying conventions rather than state legislatures.¹⁸ At the time of its proposal, many politicians believed that only state ratifying conventions should approve constitutional amendments governing individual rights and morals.¹⁹ In addition to seeking a ratification method deemed to better reflect the popular will, Congress may have also wished to bypass the temperance lobby, which remained powerful in state legislatures.²⁰ According to this view, by requiring ratification from specially selected state delegates, rather than state legislators, Congress increased the Amendment’s chances of successful ratification.²¹

100, 122–23 (1890). The Court decided that, absent contrary federal law, such state bans impermissibly burdened interstate commerce. *See* sources cited *supra*. In response to concerns that various Supreme Court decisions would prevent “dry” states from enforcing their prohibition laws fully, Congress enacted the Webb-Kenyon Act and other federal laws that specifically subjected imported alcoholic beverages to state regulation. For a discussion of these federal laws and the Court’s earlier temperance-law jurisprudence, see *Granholt v. Heald*, 544 U.S. 460, 476–482 (2005); and *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, No. 18-96, slip op. at 12–20 (U.S. June 26, 2019). *See also* Amdt18.4 Early Federal and State Prohibition Laws.

¹⁵ *See* 76 CONG. REC. 4141 (1933).

¹⁶ *Id.* at 4170–71. *See also* *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, No. 18-96, slip op. at 21 (U.S. June 26, 2019) (citing 76 Cong. Rec. 4172 (1933) (statement of Sen. Borah) (arguing that Section 2 of the Twenty-First Amendment would “incorporat[e] [the Webb-Kenyon Act] permanently in the Constitution of the United States”); *id.* at 4168 (statement of Sen. Fess) (“[T]he second section of the joint resolution . . . is designed to permit the Federal authority to assist the States that want to be dry to remain dry.”); *id.* at 4518 (statement of Rep. Robinson) (“Section 2 attempts to protect dry states.”)).

¹⁷ During the debates, Senator Blaine stated that Section 2 was intended “to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States.” 76 CONG. REC. 4143 (1933). *See also id.* at 4225 (statement of Sen. Swanson) (“[I]t is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported.”). It is unclear whether these brief remarks accurately reflected the views of Senator Blaine or other proponents of the Twenty-First Amendment. The Supreme Court later wrote that the apparently incompatible statements of Senator Blaine demonstrated the “obscurity” of the intended scope of the states’ authority under Section 2. *See, e.g., Bacchus Imps. v. Dias*, 468 U.S. 263, 274–75 (1984). Nonetheless, early in the twenty-first century, the Court emphasized that the Twenty-First Amendment’s framers did not intend to allow states to discriminate against imported liquor in favor of domestically produced liquor. *See, e.g., Tenn. Wine & Spirits Retailers Ass’n*, slip op. at 21.

¹⁸ 76 CONG. REC. 4169–70 (1933).

¹⁹ EVERETT S. BROWN, RATIFICATION OF THE TWENTY FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: STATE CONVENTION RECORDS AND LAWS 3 (2003).

²⁰ Robert P. George & David A. J. Richards, *The Twenty-First Amendment*, NAT’L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-xxi/interpretations/151> (“[P]olitical prudence pointed in the direction of ratifying conventions as a way of leaving gun-shy legislators with their eyes on re-election out of the process and ‘off the hook.’”).

²¹ *See id.*; Letter from the Women’s Committee for Repeal of the 18th Amendment to the United States Congress Regarding the Repeal of Prohibition (Jan. 25, 1930), <https://www.docsteach.org/documents/document/letter-from-womens-committee-for-repeal-of-the-18th-amendment-to-the-united-states-congress-regarding-the-repeal-of-prohibition> (advocating for submission of a repeal amendment to state ratifying conventions and noting that delegates would not be “running for a political office” and would therefore have “no political axe to grind”); OKRENT, *supra* note 5, at 352 (stating that Congress’s submission of the Twenty-First Amendment

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On February 16, 1933, the Senate agreed to the joint resolution, as amended, by a vote of 63-23.²² Four days later, after a short debate, the House passed the joint resolution under suspension of the rules by a vote of 289-121.²³ With the House's approval, the Twenty-First Amendment was submitted to the states on February 20, 1933.²⁴ In anticipation of the Eighteenth Amendment's repeal, on March 22, 1933, Congress enacted the Cullen-Harrison Act.²⁵ The Act legalized the manufacture and sale of beer and light wines with up to 3.2% alcohol by weight, except where prohibited by state law, effective April 7, 1933.²⁶

Amdt21.S1.2.5 Ratification of the Twenty-First Amendment

Congress proposed the Twenty-First Amendment on February 20, 1933, requiring state ratifying conventions to approve it within seven years in order for it to become part of the Constitution.¹ The requisite thirty-six state ratifying conventions approved the Twenty-First Amendment in less than a year.² In general, the delegates at these state conventions, most of whom had pledged to vote for the Eighteenth Amendment's repeal, spent little time debating an issue that had already received strong popular support at the polls.³ On December 5, 1933, Acting Secretary of State William Phillips certified that the Amendment had been adopted, thereby ending almost fourteen years of nationwide Prohibition.⁴

On the day of the Twenty-First Amendment's ratification, President Franklin D. Roosevelt proclaimed the end of nationwide Prohibition.⁵ Noting that the Twenty-First Amendment prohibited importing liquor into states in violation of their laws, Roosevelt urged Americans to ensure "that this return of individual freedom shall not be accompanied by the repugnant conditions that obtained prior to the adoption of the Eight-

to state ratifying conventions was "mindful of the complications of legislative schedules and the continued domination of state legislatures by rural minorities").

²² 76 CONG. REC. 4231 (1933).

²³ *Id.* at 4508-16. During the House debates, proponents of the draft Twenty-First Amendment argued that repealing the Eighteenth Amendment would increase government tax revenues, respect each state's authority to determine how to regulate liquor, and end the illicit liquor traffic. *E.g., id.* at 4513-14 (statements of Reps. Dyer and LaGuardia). Opponents argued that the Eighteenth Amendment's repeal would lead to the return of the licensed saloon and its attendant societal problems. *E.g., id.* at 4511 (statement of Rep. Christopherson).

²⁴ *Id.* at 4516.

²⁵ Cullen-Harrison Act, Pub. L. No. 73-3, §§ 1-10, 48 Stat. 16, 16-20 (1933).

²⁶ *Id.* See also OKRENT, *supra* note 5, at 352.

¹ 76 CONG. REC. 4516 (1933); U.S. CONST. amend. XXI, § 3.

² Intro.6.5 Early Twentieth Century Amendments (Sixteenth Through Twenty-Second Amendments); EVERETT S. BROWN, RATIFICATION OF THE TWENTY FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: STATE CONVENTION RECORDS AND LAWS 5-9 (2003).

³ BROWN, *supra* note 97, at 5-9. Although many of the state ratifying conventions left limited records of their proceedings, at least some delegates indicated that one of the Twenty-First Amendment's major purposes was to return the authority to regulate alcoholic beverages to the states. *See, e.g., id.* at 50 (statement of President Robinson of the Connecticut convention) ("[F]undamentally our fight has been . . . for the return to the peoples of the several states of their constitutional right to govern themselves in their internal affairs."); *id.*, at 174 (statement of Del. Simmons to the Kentucky convention) ("The regulation of the sale of liquor is a state concern.").

⁴ *See Twenty-First Amendment to the Constitution*, 48 Stat. 1749, 1749-50 (1933). Prohibition took effect on January 17, 1920. The Twenty-First Amendment repealed the Eighteenth Amendment on December 5, 1933. Intro.6.5 Early Twentieth Century Amendments (Sixteenth Through Twenty-Second Amendments).

⁵ Proclamation No. 2065, 48 Stat. 1720, 1721 (Dec. 5, 1933).

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eenth Amendment and those that have existed since its adoption.”⁶ Roosevelt implored Americans to stop buying untaxed, bootlegged liquor and asked “that no State shall by law or otherwise authorize the return of the saloon either in its old form or in some modern guise.”⁷

With the Eighteenth Amendment’s repeal, the states—and many local governments acting under delegated state authority—again assumed primary responsibility for regulating alcoholic beverages.⁸ Exercising this authority, a few states banned or significantly restricted liquor traffic statewide until the mid-20th century.⁹ Nearly all of the states that permitted the sale of alcoholic beverages adopted a three-tier distribution system,¹⁰ and some states granted an administrative agency a monopoly over the retailing or wholesaling of some types of alcoholic beverages sold for off-premises consumption.¹¹ State and local jurisdictions adopted a variety of laws and policies governing the licensing, taxation, availability, prices, and production of alcoholic beverages.¹² Moreover, the federal government continued to regulate or tax activities involving alcoholic beverages, including aspects of beverage production, wholesale distribution, importation, labeling, and advertising.¹³

Amdt21.S1.2.6 Repeal of Prohibition

The Eighteenth Amendment was repealed when the states ratified the Twenty-First Amendment on December 5, 1933.¹ Thereafter, the Supreme Court decided a few cases that examined the repeal’s legal implications. In *United States v. Chambers*, the Court held that the Twenty-First Amendment’s ratification immediately rendered the Eighteenth Amendment inoperative.² Consequently, “neither the Congress nor the courts could give it continued vitality.”³ The Twenty-First Amendment also nullified provisions

⁶ *Id.*

⁷ *Id.*

⁸ OKRENT, *supra* note 5, at 374.

⁹ *Id.* Some “dry” counties in the United States continue to prohibit the liquor traffic.

¹⁰ *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, No. 18-96, slip op. at 2 (U.S. June 26, 2019) (describing a three-tier distribution system as one in which “[p]roducers may sell only to licensed wholesalers; wholesalers may sell only to licensed retailers or other wholesalers; and only licensed retailers may sell to consumers”). As one commentator has noted, “[t]he three-tier system generally prohibits a given tier from influencing licensees of another tier or performing the functions reserved to another tier.” Daniel J. Croxall, *Delirium of Disorder: Tension Between the Dormant Commerce Clause and the Twenty-first Amendment Stunts Independent Craft Brewery Growth*, 126 PENN. ST. L. REV. 435, 440 (2022).

¹¹ *See Control State Directory and Info*, NAT’L ALCOHOL BEVERAGE CONTROL ASS’N, <https://www.nabca.org/control-state-directory-and-info>.

¹² Jesse D.H. Snyder, *Watering Down the Exceptionalism of the Twenty-First Amendment*, 36 J. L. & POL. 31, 59 (2021); John M. Faust, *Of Saloons and Social Control: Assessing the Impact of State Liquor Control on Individual Expression*, 80 VA. L. REV. 745, 748 (1994).

¹³ *See, e.g.*, 26 U.S.C. ch. 51 (imposing taxes on various activities related to distilled spirits, wines, and beer); Federal Alcohol Administration Act, 27 U.S.C. §§ 201–212 (requiring producers, importers, and wholesalers of alcoholic beverages to obtain federal permits, obey state law, and comply with federal regulations relating to beverage advertising and labeling). For more on the relationship between federal and state authority over alcoholic beverages after Prohibition, see Amdt21.S2.10 State and Federal Regulation of Alcohol Sales; Amdt21.S2.11 State and Federal Regulation of Minimum Drinking Age.

¹ U.S. CONST. amend. XXI, § 1; Intro.6.5 Early Twentieth Century Amendments (Sixteenth Through Twenty-Second Amendments).

² 291 U.S. 217, 222 (1934).

³ *Id.* The Court also noted that “[t]he Twenty-First Amendment contained no saving clause as to prosecutions for offenses [committed before its adoption].” *Id.* at 224.

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of the Volstead Act that rested upon Congress’s Eighteenth Amendment powers, including provisions that imposed penal sanctions for violations of Prohibition.⁴ Courts were thus required to dismiss for lack of jurisdiction all pending prosecutions for Volstead Act violations, including proceedings on appeal.⁵

Nonetheless, Prohibition’s repeal did not extinguish all forms of legal liability related to the transportation, sale, or manufacture of alcoholic beverages (e.g., liability for federal taxes on alcohol).⁶ Moreover, the Twenty-First Amendment recognized that the states could regulate or prohibit alcoholic beverages within their jurisdictions for legitimate, nonprotectionist purposes, such as health or safety.⁷ The federal government continued to regulate or tax activities involving alcoholic beverages, including aspects of beverage production, wholesale distribution, importation, labeling, and advertising.⁸

Amdt21.S2 Importation, Transportation, and Sale of Liquor

Amdt21.S2.1 Scope of the States’ Section 2 Powers over Interstate and Foreign Commerce in Alcoholic Beverage

Although Section one of the Twenty-First Amendment repealed nationwide Prohibition, Section two authorized the states to regulate or prohibit the importation, transportation, sale, distribution, and use of alcoholic beverages within their borders.¹ Questions about the extent of the states’ authority to regulate beverages imported from other states or a foreign country have played a prominent role in the Supreme Court’s Twenty-First Amendment jurisprudence.

In its early decisions interpreting the Twenty-First Amendment, the Supreme Court held that states could adopt legislation discriminating against alcoholic beverages

⁴ *Id.* at 222–23. *See also* *United States v. Constantine*, 296 U.S. 287, 294–96 (1935) (holding that the Eighteenth Amendment’s repeal deprived Congress of the power to impose penalties for violating state liquor laws that criminalized the sale of alcoholic beverages); *United States v. Kesterson*, 296 U.S. 299, 300 (1935) (same). Congress repealed Titles I and II of the Volstead Act in the Liquor Law Repeal and Enforcement Act, ch. 740, tit. I, § 1, 49 Stat. 872, 872 (1935).

⁵ *Chambers*, 291 U.S. at 222–23, 226. *See also* *Massey v. United States*, 291 U.S. 608, 609–10 (1934). The Supreme Court declined to consider whether final judgments of conviction entered before the Eighteenth Amendment’s repeal remained valid. *Chambers*, 291 U.S. at 226.

⁶ *See* *United States v. Rizzo*, 297 U.S. 530, 533 (1936) (noting that the Eighteenth Amendment’s repeal did not extinguish liability for federal taxes on alcohol unless such taxes were imposed as penalties for violating liquor laws); *United States v. Mack*, 295 U.S. 480, 481–84 (1935) (holding that the owner of a vessel seized for illegally transporting intoxicating liquors remained liable on a bond executed pursuant to the Volstead Act). In *Mack*, the Court noted that the bond became payable when the owner failed to return the vessel to an officer’s custody before the day of trial. Conviction and sentencing of the crew had occurred before the end of Prohibition. *Id.*

⁷ U.S. CONST. amend. XXI, § 2 (“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”); *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, No. 18-96, slip op. at 31–32 (U.S. June 26, 2019). For more information on state liquor control regimes after Prohibition, see Amdt21.S1.2.5 Ratification of the Twenty-First Amendment.

⁸ *See* Amdt21.S2.10 State and Federal Regulation of Alcohol Sales; Amdt21.S2.11 State and Federal Regulation of Minimum Drinking Age.

¹ U.S. CONST. amend. XXI, § 2; *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, No. 18-96, slip op. at 31–32 (U.S. June 26, 2019). Congress may exercise its positive Commerce Clause power to regulate some aspects of commerce in alcoholic beverages. *See* Amdt21.S2.10 State and Federal Regulation of Alcohol Sales; Amdt21.S2.11 State and Federal Regulation of Minimum Drinking Age.

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imported from other states in favor of those of domestic origin without violating the Commerce Clause.² Modern cases, however, have recognized that the states' regulation of alcoholic beverages is limited by the Dormant Commerce Clause doctrine.³ This doctrine restricts the states' power to discriminate against imported products and other out-of-state economic interests, including those of consumers, producers, and retail liquor store license applicants.⁴ The Supreme Court has also held that the Foreign Commerce Clause and Import-Export Clause restrain the states' power to regulate international trade in alcoholic beverages, including imports and exports.⁵

Amdt21.S2.2 Overview of State Power over Alcohol and Discrimination Against Interstate Commerce

In addition to empowering Congress to enact federal laws, the Commerce Clause in Article I of the Constitution limits the states' authority to regulate interstate commerce.¹ Absent contrary federal legislation, states generally cannot discriminate against interstate commerce.² Nonetheless, in its early decisions interpreting Section two of the Twenty-First Amendment, the Supreme Court held that the states could adopt legislation discriminating against imported alcoholic beverages in favor of those of domestic origin without violating the Commerce Clause.³ Because Section 2 of the Amendment authorized states to prohibit *all* imports of alcoholic beverages, the Court reasoned that states could impose “lesser” forms of regulation on such imports, including discrimina-

² *E.g.*, *Heublein, Inc. v. S.C. Tax Comm'n*, 409 U.S. 275, 283–84 (1972) (“[A] State is totally unconfin ed by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.” (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964))); *see also* Amdt21.S2.2 Overview of State Power over Alcohol and Discrimination Against Interstate Commerce.

³ *See* Amdt21.S2.2 Overview of State Power over Alcohol and Discrimination Against Interstate Commerce.

⁴ *See id.*

⁵ *See* Amdt21.S2.5 Imports, Exports, Foreign Commerce, and Alcohol.

¹ For more on the dormant aspects of Congress's Commerce Clause power, *see* ArtI.S8.C3.7.1 Overview of Dormant Commerce Clause.

² *Id.*; *Nat'l Pork Producers Council v. Ross*, No. 21-468, slip op. at 7, 9–17 (U.S. May 11, 2023). For more information on the Supreme Court's analytical framework for evaluating Dormant Commerce Clause challenges to state laws, *see* ArtI.S8.C3.7.4 Modern Dormant Commerce Clause Jurisprudence Generally.

³ *See, e.g.*, *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 395–98 (1939) (upholding against a Commerce Clause challenge a Missouri law that banned state licensees from transporting, importing, possessing, purchasing, receiving, or selling alcoholic beverages manufactured in a state that discriminated against liquor produced in Missouri); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 392–94 (1939) (determining that a retaliatory Michigan law that banned the sale of imported beer from states that discriminated against Michigan-produced beer did not violate the Dormant Commerce Clause doctrine because, after the Twenty-First Amendment's ratification, “the right of a state to prohibit or regulate the importation of intoxicating liquor [was] not limited by the Commerce Clause”); *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59, 60–63 (1936) (upholding a California law that imposed a license fee on wholesale importers of beer and concluding that the Twenty-First Amendment authorized each state “to forbid all importations which do not comply with the conditions which it prescribes” while rejecting the argument that a state “must let imported liquors compete with the domestic on equal terms”). Because the California law challenged in *Young's Market* also imposed a higher license fee on *domestic* manufacturers of competing liquor products, the Supreme Court's conclusion that the Twenty-First Amendment authorized the states to discriminate against imported products could be characterized as nonbinding dicta. *See id.* at 62–63 (stating, elsewhere in the opinion, that the fee “would be a[n unconstitutional] direct burden on interstate commerce” in the Twenty-First Amendment's absence and noting that “the case does not *present a question of discrimination prohibited by the commerce clause*”) (emphasis added). For a discussion of when state laws discriminating against imported beverages might violate equal protection principles, *see* Amdt21.S2.9 Alcohol Regulation and the Fourteenth Amendment Due Process and Equal Protection Clauses.

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tory regulations and taxes.⁴ Modern cases, however, have recognized that state regulation of alcoholic beverages is limited by the Dormant Commerce Clause doctrine, which prohibits states from discriminating against interstate commerce.⁵

Amdt21.S2.3 Early Doctrine on State Power over Alcohol and
Discrimination Against Interstate Commerce

The Supreme Court's jurisprudence on the relationship between the Commerce Clause and the Twenty-First Amendment evolved gradually in the decades after the Amendment's 1933 ratification. By the 1960s, the Supreme Court had abandoned the notion that the Twenty-First Amendment entirely "repealed" Congress's power over interstate commerce in alcoholic beverages.¹ During the 1980s, the Court more clearly rejected the view that the Twenty-First Amendment allowed the states to discriminate against such commerce without a legitimate justification.² For example, in the 1984 case *Bacchus*

⁴ *E.g.*, *Young's Market*, 299 U.S. at 62 (indicating that a state could lawfully prohibit the importation of alcoholic beverages while allowing the sale of domestically manufactured beverages). *See also* *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138–39 (1939) ("The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause.").

⁵ *See, e.g.*, *Tenn. Wine and Spirits Retailers Ass'n. v. Thomas*, No. 18-96, slip op. at 23 (U.S. June 26, 2019); *Granholm v. Heald*, 544 U.S. 460, 487 (2005). Dormant Commerce Clause principles do not prohibit a state from imposing reasonable regulatory requirements on "through shipments" of alcoholic beverages in order to prevent the beverages' diversion to local markets. *E.g.*, *Gordon v. Texas*, 355 U.S. 369, 369 (1958) (per curiam) (citing the Twenty-First Amendment when summarily affirming a Texas court's judgment upholding the state's imposition of a tax on the possession of rum in transit from Mexico to North Carolina); *Carter v. Virginia*, 321 U.S. 131, 132–34, 137–38 (1944) (rejecting, in the absence of contrary federal law, a Dormant Commerce Clause challenge to the Virginia Alcoholic Beverage Control Act and its implementing regulations that required carriers engaged in through-shipments to use the most direct route, carry a bill of lading describing that route, and post a \$1,000 bond conditioned on lawful transportation, among other requirements); *Duckworth v. Arkansas*, 314 U.S. 390, 391–96 (1941) (upholding against a Dormant Commerce Clause challenge the application of an Arkansas state law that required a company shipping distilled spirits through the state from Illinois for delivery in Mississippi to obtain a permit for a small fee as a legitimate exercise of the state's inherent police power to prevent diversion of shipments to the local market); *see also* *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329–34 (1964) (holding that a state could not totally prohibit the shipment of imported alcoholic beverages through the state for sale at an airport to departing travelers under the supervision of federal customs authorities when the beverages were destined for delivery to the travelers upon their arrival in foreign countries and the state had "not sought to regulate or control the passage of intoxicants through [its] territory in the interest of preventing their unlawful diversion into [its] internal commerce"). For a discussion of Supreme Court cases addressing states' regulation of "through shipments" destined for federal areas within state boundaries, *see* Amdt21.S2.6 Regulation of Alcohol Destined for a Federal Area.

¹ *E.g.*, *Hostetter*, 377 U.S. at 331–32. Even before the 1960s, the Supreme Court had suggested some limits to the states' Section 2 powers. *See, e.g.*, *Nippert v. City of Richmond*, 327 U.S. 416, 425 n.15 (1946) (stating, in dicta, that "even the commerce in intoxicating liquors, over which the Twenty-First Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate when the State's regulation squarely conflicts with regulation imposed by Congress governing interstate trade or traffic . . .") (citing *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 295, 299 (1945) (upholding the federal government's prosecution of alcoholic beverage producers, wholesalers, and retailers for violating the Sherman Antitrust Act by conspiring to fix and maintain retail prices of alcoholic beverages imported into Colorado and opining that the Twenty-First Amendment did not grant the states "plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries.")); *see also* Amdt21.S2.6 Regulation of Alcohol Destined for a Federal Area.

² This shift in the Court's jurisprudence accompanied a series of decisions in which the Court determined that the Twenty-First Amendment did not authorize the states to disregard their obligations under various other provisions of the Constitution when regulating alcoholic beverages. *E.g.*, *Capital Cities Cable v. Crisp*, 467 U.S. 691, 712 (1984) ("[O]ur prior cases have made clear that the [Twenty-First] Amendment does not license the States to ignore their obligations under other provisions of the Constitution."); *see also* Amdt21.S2.1 Scope of the States' Section 2 Powers over Interstate and Foreign Commerce in Alcoholic Beverages.

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Imports, Ltd. v. Dias, the Supreme Court held that the Twenty-First Amendment could not shield a state tax that discriminated against liquor imports from Dormant Commerce Clause scrutiny.³ The Court struck down a twenty percent Hawaii excise tax on wholesale liquor transactions, including all imports, that exempted two domestically produced alcoholic beverages, okolehao and fruit wine.⁴ According to a majority of the Justices, the tax could not be maintained under the Twenty-First Amendment because it aimed to protect local industry rather than “combat the perceived evils of an unrestricted traffic in liquor.”⁵ The Court wrote, “It is by now clear that the [Twenty-First] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause.”⁶

The Supreme Court continued to subject the states’ regulation of alcoholic beverages to Dormant Commerce Clause restrictions in the 1980s, striking down state price affirmation statutes that discriminated against out-of-state economic interests.⁷ For instance, in a 1986 case, the Court invalidated a New York law that conditioned a New York-licensed liquor producer’s ability to sell alcoholic beverages to wholesalers in New York on the producer’s affirmation that it would charge wholesalers located elsewhere in the United States an amount no less than its scheduled prices during the remainder of the month.⁸ In 1989, the Court struck down a Connecticut price affirmation statute that required out-of-state shippers of beer to affirm that the prices they charged Connecticut wholesalers during a particular month were “as of the moment of posting, no higher than the prices at which those products” were sold in bordering states.⁹

In both cases, the Supreme Court held that the statutes violated the Dormant Commerce Clause doctrine because they discriminated against out-of-state commerce and directly regulated out-of-state commercial transactions.¹⁰ According to the Court, the state laws thus disrupted the “maintenance of a national economic union” without adequate justification.¹¹ The Court determined that the states could not rely upon their Twenty-First Amendment powers to maintain these price affirmation requirements

³ 468 U.S. 263, 268–76 (1984).

⁴ *Id.* at 265, 276 “Okolehao is a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii.” *Id.* at 265.

⁵ *Id.* at 268–76.

⁶ *Id.* at 275.

⁷ *Healy v. Beer Inst.*, 491 U.S. 324, 335–43 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–85 (1986).

⁸ *Brown-Forman Distillers Corp.*, 476 U.S. at 575–76, 585.

⁹ *Healy*, 491 U.S. at 326, 335–43. In contrast to *Brown-Forman*, the out-of-state beer shippers in *Healy* could alter the prices they charged to any wholesaler after posting them. *Id.* at 330.

¹⁰ *Brown-Forman Distillers Corp.*, 476 U.S. at 579–84; *Healy*, 491 U.S. at 335–43 (determining that retrospective price affirmation statutes also violated the Commerce Clause because they necessarily regulate out-of-state prices for alcoholic beverages), *overruling* *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966). In a 2023 case, the Supreme Court emphasized that the price affirmation statutes at issue in *Brown-Forman* and *Healy* had a discriminatory impact on out-of-state businesses and consumers, clarifying that the Dormant Commerce Clause doctrine’s rule against state laws with extraterritorial effects is limited to cases addressing “price control or price affirmation statutes that tie[] the price of . . . in-state products to out-of-state prices.” *Nat’l Pork Producers Council v. Ross*, No. 21-468, slip op. at 9–13 (U.S. May 11, 2023) (citations and internal quotation marks omitted).

¹¹ *Brown-Forman Distillers Corp.*, 476 U.S. at 579–84.

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because such authority did not extend to the regulation of out-of-state commerce in alcoholic beverages.¹²

Amdt21.S2.4 Modern Doctrine on State Power over Alcohol and Discrimination Against Interstate Commerce

In the early 2000s, the Supreme Court confirmed that the Twenty-First Amendment does not authorize the states to regulate alcoholic beverages contrary to general Dormant Commerce Clause principles.¹ In 2005, the Court held that discrimination in favor of local products can be upheld only if the state “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”² This interpretation stemmed from the Court’s conclusion that the Twenty-First Amendment restored the states’ pre-Prohibition powers “to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use” in a manner that did not discriminate against out-of-state goods.³

Consequently, in *Granholm v. Heald*, the Supreme Court struck down regulatory schemes in Michigan and New York that discriminated against out-of-state wineries.⁴ Both states employed a “three-tier system” requiring separate state licenses for producers, wholesalers, and retailers.⁵ The Court first affirmed its prior cases holding that, as a general matter, “States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment.”⁶ However, within their three-tier systems, Michigan and New York accorded certain advantages to in-state wineries by creating special licensing systems allowing them to ship wine directly to in-state consumers.⁷ While recognizing that both states possessed significant authority to regulate the importation and sale of liquor, the Court wrote that the challenged systems “involve[d] straightforward attempts to discriminate in favor of local producers . . .

¹² *Id.* at 584–85; *Healy*, 491 U.S. at 341–43. The Court in *Brown-Forman* also noted that the New York law might interfere with other states’ Twenty-First Amendment powers because a distiller that had scheduled prices in New York could not immediately lower them to fulfill its regulatory obligations in another state without potentially losing its New York license. *Brown-Forman Distillers Corp.*, 476 U.S. at 585.

¹ *Granholm v. Heald*, 544 U.S. 460, 465–66, 487 (2005).

² *Id.* at 487, 489, 493 (invalidating Michigan and New York laws allowing in-state but not out-of-state wineries to make direct sales to consumers). This is the same test the Supreme Court applies outside the context of alcoholic beverages. See *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (noting that once discrimination against interstate commerce is established, “the burden falls on the State to demonstrate both that the statute ‘serves a legitimate local purpose,’ and that this purpose could not be served as well by available nondiscriminatory means”) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979)).

³ *Granholm*, 544 U.S. at 484–85. According to Justice Anthony Kennedy’s opinion for the Court, these pre-Prohibition state powers were framed by the Wilson and Webb-Kenyon Acts, and the Twenty-First Amendment evidenced a “clear intention of constitutionalizing the Commerce Clause framework established under those statutes.” *Id.* (citation omitted); accord *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, No. 18-96, slip op. at 21 (U.S. June 26, 2019). However, in *Tennessee Wine*, the Court rejected the suggestion that a law should be deemed constitutional under the Twenty-First Amendment merely because it—or a similar law—predated Prohibition. *Tenn. Wine & Spirits Retailers Ass’n*, slip op. at 30. The Court clarified that pre-Prohibition laws that were “never tested” in the Supreme Court could have been held invalid then and, consequently, might remain invalid in modern times. *Id.*

⁴ *Granholm*, 544 U.S. at 493.

⁵ *Id.* at 466–67.

⁶ *Id.* at 466 (discussing *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion); *id.* at 447 (Scalia, J., concurring)).

⁷ *Id.* at 469–70.

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contrary to the Commerce Clause,” and that these schemes could not be “saved by the Twenty-first Amendment.”⁸

The states argued in *Granholm* that their restrictions on out-of-state wineries’ direct shipments passed muster under Dormant Commerce Clause principles because they advanced two legitimate local purposes: “keeping alcohol out of the hands of minors and facilitating tax collection.”⁹ The Supreme Court rejected these claims, concluding that there was insufficient evidence to show that prohibiting direct shipments would solve either of these problems.¹⁰ The Court also suggested that the states could achieve “their regulatory objectives . . . without discriminating against interstate commerce.”¹¹

The Court struck down another discriminatory regulatory regime in *Tennessee Wine and Spirits Retailers Ass’n v. Thomas*.¹² In that case, the Court considered specific aspects of Tennessee’s three-tier system.¹³ In particular, Tennessee would issue new retail licenses only to individuals who had been residents of the state for the previous two years.¹⁴ In defense of the law, a trade association representing Tennessee liquor stores argued that the case was not governed by *Granholm*.¹⁵ In its view, *Granholm*’s analysis was limited to laws that discriminate against out-of-state products and producers, whereas Tennessee’s provision concerned “the licensing of domestic retail alcohol stores.”¹⁶ The Court disagreed, explaining that instead, *Granholm* established that the Constitution “prohibits state discrimination against all ‘out-of-state economic interests.’”¹⁷

Ultimately, the Court concluded in *Tennessee Wine* that the challenged law was unconstitutional because its “predominant effect” was protectionism, writing that the law had “at best a highly attenuated relationship to public health or safety.”¹⁸ The trade association argued that the provision was justified because it made retailers “amenable to the direct process of state courts,” allowed the state “to determine an applicant’s fitness to sell alcohol,” and “promote[d] responsible alcohol consumption.”¹⁹ However, in the

⁸ *Id.* at 488–89.

⁹ *Granholm v. Heald*, 544 U.S. 460, 489 (2005).

¹⁰ *Id.* at 490–91.

¹¹ *Id.* at 491.

¹² No. 18-96 (U.S. June 26, 2019).

¹³ *Id.* at 2–3.

¹⁴ *Id.* at 3. Some additional aspects of Tennessee’s regulatory scheme had been invalidated by the lower courts, and the state did not defend those provisions on appeal to the Supreme Court. *Id.* at 1.

¹⁵ *Id.* at 26.

¹⁶ *Id.*

¹⁷ *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, No. 18-96, slip op. at 27 (U.S. June 26, 2019) (quoting *Granholm v. Heald*, 544 U.S. 460, 472 (2005)). The Supreme Court also characterized the association’s reading of the Twenty-First Amendment as “implausible.” *Id.* at 26. Although the association conceded that Section 2 of the Twenty-First Amendment could not shield discriminatory laws that addressed the importation of alcohol, it argued that Section 2 authorized discriminatory laws addressing the licensing of domestic retail stores. *Id.* The Court noted that the Twenty-First Amendment specifically prohibits the “importation” of alcohol into a state in violation of that state’s laws but does not literally address states’ ability to license domestic retailers. *Id.* The majority argued that “if § 2 granted States the power to discriminate in the field of alcohol regulation, that power would be at its apex when it comes to regulating the activity to which the provision expressly refers.” *Id.* at 26–27. However, because Section 2 did *not* shield importation laws from analysis under the Dormant Commerce Clause, the Court reasoned that it would be odd for the provision to nonetheless protect other types of discriminatory regulations. *Id.*

¹⁸ *Id.* at 33.

¹⁹ *Id.* at 33–35.

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Court’s view, there was no “concrete evidence’ showing that the two-year residency requirement actually promote[d] public health or safety; nor [was] there evidence that nondiscriminatory alternatives would be insufficient to further those interests.”²⁰

Amdt21.S2.5 Imports, Exports, Foreign Commerce, and Alcohol

Although the Twenty-First Amendment recognized the states’ authority to control the “importation” of alcoholic beverages,¹ it did not displace other provisions of the Constitution that restrict the states’ power over international trade between the United States and foreign countries.² One such provision, the Import-Export Clause, generally prohibits states from laying “imposts” or “duties” on imports or exports with foreign nations, absent congressional consent, except for purposes of covering charges associated with state inspection laws.³ In *Department of Revenue v. James B. Beam Distilling Co.*, the Supreme Court held that the Twenty-First Amendment had not repealed the Import-Export Clause with respect to alcoholic beverages.⁴ Thus, the State of Kentucky lacked authority to levy an excise tax on imported Scotch whiskey while the liquor remained in an unbroken package in the original importer’s possession and had not been resold or used within the state.⁵

The Commerce Clause, which gives Congress the power to regulate interstate and foreign commerce, also limits the states’ regulatory authority over international trade in alcoholic beverages. The Supreme Court has held that the Commerce Clause “operates with full force whenever one State attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in a foreign country or another State.”⁶ The dormant aspects of Congress’s commerce power thus nullified New York’s attempt to prohibit the importation of out-of-state liquor for delivery to a retailer at John F. Kennedy Airport that sold the beverages duty-free to departing international airline passengers.⁷ In rejecting the state’s argument that the Twenty-First Amendment authorized prohibition as a means of preventing the diversion of liquor into the state’s local market, the Court noted that the transactions were supervised by federal customs

²⁰ *Id.* at 33.

¹ See *Tenn. Wine and Spirits Retailers Ass’n. v. Thomas*, No. 18-96, slip op. at 26 (U.S. June 26, 2019).

² For information on the states’ powers to regulate *interstate* commerce in alcoholic beverages with other states, see Amdt21.S2.3 Early Doctrine on State Power over Alcohol and Discrimination Against Interstate Commerce and Amdt21.S2.4 Modern Doctrine on State Power over Alcohol and Discrimination Against Interstate Commerce.

³ U.S. CONST. art. I, § 10, cl. 2. For more information, see ArtI.S10.C2.1 Overview of Import-Export Clause.

⁴ 377 U.S. 341, 345–46 (1964). Although the Supreme Court has not overruled *James B. Beam Distilling Co.*, it subsequently modified its approach to determining whether a state tax is an “impost” or “duty” under the Import-Export Clause, evaluating (1) whether it interferes with the Federal Government’s ability to speak with one voice in commercial relations with foreign governments; (2) whether it diverts import revenues from the federal to state government; and (3) whether it may jeopardize harmony between the states. For more on the Court’s modern approach to Import-Export Clause cases, see ArtI.S10.C2.5 Whether a Charge Qualifies as an Impost or Duty.

⁵ *James B. Beam Distilling Co.*, 377 U.S. at 342–43. The Court distinguished two of its prior decisions upholding fees imposed on the possession or sale of liquor brought into the United States from a foreign country, *Gordon v. Texas*, 355 U.S. 369 (1958) and *De Bary v. Louisiana*, 227 U.S. 108 (1913), on the grounds that these cases did not involve taxes on imports.

⁶ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 585 (1986) (citation omitted).

⁷ *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 325–26, 329–34 (1964).

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authorities and destined for delivery to passengers upon their arrival in a foreign country.⁸

Amdt21.S2.6 Regulation of Alcohol Destined for a Federal Area

Generally, a state cannot rely on its Twenty-First Amendment powers to regulate or tax the import of alcoholic beverages destined for delivery or use in a federal area within the state's boundaries.¹ In *Collins v. Yosemite Park & Curry Co.*, the Supreme Court considered whether the Twenty-First Amendment authorized the State of California to regulate alcoholic beverages imported for sale within a national park located in the state.² Because California had not reserved such regulatory authority when it ceded exclusive jurisdiction over the park land to the federal government, the state attempted to rely on its Twenty-First Amendment powers to impose various regulatory requirements (e.g., licensing) on the beverages' importation from other states.³

The *Collins* Court rejected the state's assertion of regulatory authority. The Court noted that Section 2 of the Twenty-First Amendment prohibits importation of intoxicating liquors into any state "for delivery or use therein" in violation of that state's laws.⁴ Because the alcoholic beverages were imported for delivery and sale within a national park under the federal government's exclusive jurisdiction—and not for use within California itself—the Court determined that the state could not rely on its Twenty-First Amendment powers to regulate the beverages' import or sale.⁵

Subsequently, the Supreme Court held that the Twenty-First Amendment did not authorize a state to tax wholesale transactions involving the importation of distilled spirits for sale on military bases located in the state but under the federal government's exclusive jurisdiction.⁶ Military officers' clubs and other nonappropriated fund activities had ordered the beverages from out-of-state suppliers for delivery on the bases, and the state had not reserved the power to tax or regulate such sales.⁷ The Court held that the Twenty-First Amendment was inapplicable even if the liquor might ultimately be consumed outside of the bases and within the taxing state.⁸ Two years later, the Court determined that the Twenty-First Amendment did not abrogate the federal govern-

⁸ *Id.* at 329–34. For more on the Supreme Court's Dormant Foreign Commerce Clause jurisprudence, see ArtI.S8.C3.7.10 Foreign Commerce and State Powers. Although the Supreme Court's decision in *Idlewild* appears to rest on Dormant Foreign Commerce Clause principles, the case could also be characterized as a preemption decision. See *Idlewild*, 377 U.S. at 334 ("[T]he State has sought totally to prevent transactions carried on under the aegis of [customs laws] passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations. This, New York cannot constitutionally do.").

¹ *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 536–38 (1938).

² *Id.* at 521–22, 527. A federal contractor serving as a concessionaire sold the beverages to customers in the park. *Id.* at 521–22.

³ *Id.* at 536–38. The Supreme Court has held that a state may convey, and Congress may accept, either exclusive or qualified jurisdiction over property acquired within the geographical limits of a state for various purposes. For more information, see ArtI.S8.C17.2.1 Overview of Places Purchased Clause.

⁴ *Collins*, 304 U.S. at 536–38 (citing U.S. CONST. amend. XXI, § 2).

⁵ *Id.* However, the Supreme Court held that California could impose an excise tax on the contractor's sale of alcoholic beverages to customers in the park because the state had reserved that power when it ceded the land to the federal government. *Id.* at 535–36.

⁶ *United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 373–78 (1973) (citing *Collins*, 304 U.S. at 538).

⁷ *Id.* at 371, 375.

⁸ *Id.* at 373–78.

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ment's immunity from a state tax imposed on wholesale transactions involving liquor imported for consumption on military bases under *concurrent* federal and state jurisdiction.⁹

Despite its holdings in *Collins* and subsequent cases, the Supreme Court has indicated that a state may regulate imports destined for federal areas to the extent necessary to prevent diversion of liquor to local state markets.¹⁰ For example, in *North Dakota v. United States*, the Court upheld state laws that regulated the supply of out-of-state liquor to U.S. Air Force bases under concurrent federal and state jurisdiction.¹¹ The laws required importers or out-of-state suppliers to report the volume of liquor shipped to the bases and affix special labels to the bottles destined for sale thereon.¹² The Court upheld the state's requirements even though the liquor in question was shipped directly to the federal enclaves for sale and consumption.¹³ A plurality of the Court reasoned that the state requirements were necessary to prevent diversion and therefore enjoyed a "strong presumption of validity" under the Twenty-First Amendment.¹⁴

Amdt21.S2.7 State Power over Alcohol and Individual Rights

Much of the Supreme Court's Twenty-First Amendment jurisprudence has addressed the extent to which the dormant aspects of the federal government's power over interstate and foreign commerce limit the states' regulatory authority over imported alcoholic beverages.¹ However, the Court's decisions have also explored the relationship between the states' Section 2 powers and provisions of the Constitution that specifically protect individual rights from state interference. In this vein, the Court has determined that the Twenty-First Amendment does not authorize the states to ignore the First Amendment's protections for freedom of speech and religion² or the Fourteenth Amendment's guarantees of due process and equal protection of the laws.³

⁹ *Id.* at 600–01, 613–14 (1975).

¹⁰ *North Dakota v. United States*, 495 U.S. 423, 426, 431–33 (1990) (plurality opinion). *See also, e.g., State Tax Comm'n of Miss.*, 412 U.S. at 377 (1973) (indicating that, in the absence of contrary federal law, a state retained authority to regulate imported alcoholic beverages as they transited the state on their way to military bases in order to prevent the beverages' diversion to local markets).

¹¹ *North Dakota*, 495 U.S. at 426, 444.

¹² *Id.* at 426–29. The labels were required to state that the liquor was restricted for use only on the bases. *Id.*

¹³ *Id.* at 444.

¹⁴ *Id.* at 431–33 (plurality opinion).

¹ *See* Amdt21.S2.1 Scope of the States' Section 2 Powers over Interstate and Foreign Commerce in Alcoholic Beverages (discussing the relationship between the Twenty-First Amendment and the Dormant Commerce Clause doctrines).

² *See* U.S. CONST. amend. I; Amdt1.1 Overview of First Amendment, Fundamental Freedoms.

³ *See* U.S. CONST. amend. XIV; Amdt21.S2.9 Alcohol Regulation and the Fourteenth Amendment Due Process and Equal Protection Clauses. In addition, under the Supremacy Clause of Article VI, federal law may preempt conflicting state liquor laws when the federal government's regulatory interests outweigh those asserted by the states. For more on the federal government's authority to regulate alcoholic beverages in light of the Twenty-First Amendment, *see* Amdt21.S2.10 State and Federal Regulation of Alcohol Sales and Amdt21.S2.11 State and Federal Regulation of Minimum Drinking Age. The federal government's regulatory authority over alcoholic beverages is also subject to constitutional constraints under provisions such as the First and Fifth Amendments.

Amdt21.S2.8 State Power over Alcohol and First Amendment Free Speech and Religion Clauses

The Supreme Court has held that the Twenty-First Amendment “does not qualify the constitutional prohibition against laws abridging the freedom of speech embodied in the First Amendment” that has been incorporated against the states through the Fourteenth Amendment’s Due Process Clause.¹ The Court’s jurisprudence on the relationship between the First and Twenty-First Amendments evolved during the late twentieth century. Initially, in *California v. LaRue*, the Court held that the states could restrict sexually explicit entertainment in establishments licensed to sell liquor for on-premises consumption, even if such entertainment might otherwise merit First Amendment protection.² The Court suggested that such state restrictions were entitled to a “presumption” of validity under the Twenty-First Amendment.³ Later cases clarified that a state’s Twenty-First Amendment interests in regulating liquor sales could “outweigh” First Amendment interests.⁴

However, in a 1996 decision, *44 Liquormart, Inc. v. Rhode Island*, the Supreme Court partially overruled *LaRue*, determining that states cannot rely on their Twenty-First Amendment powers to infringe on speech protected by the First Amendment.⁵ Nonetheless, the Court suggested that the states could potentially exercise their general police powers to “prohibit the sale of alcoholic beverages in inappropriate locations” even

¹ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 514–16 (1996); see also U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech . . .”); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the First Amendment’s free speech protections against the states). For more on the Court’s First Amendment jurisprudence generally, see Amdt1.1 Overview of First Amendment, Fundamental Freedoms.

² *California v. LaRue*, 409 U.S. 109, 114–19 (1972) (sustaining the facial constitutionality of state liquor control regulations barring a lengthy list of actual or simulated sexual activities, and motion picture portrayals of such activities, in establishments licensed to sell liquor by the drink).

³ *Id.* The Supreme Court suggested that California could restrict the sexually explicit performances at issue in *LaRue* as conduct that lacked a significant communicative element. *Id.* at 118 (stating that “the sort of bacchanalian revelries” the liquor regulations sought to prevent were not “the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater”). Moreover, *LaRue* involved a “facial challenge” to California regulations, which required the litigant challenging the regulations’ constitutionality to show that there were no circumstances in which the law would be constitutional. *United States v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid.”).

⁴ *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932–34 (1975) (describing *LaRue* as holding that “the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-First Amendment, outweighed any First Amendment interest in nude dancing, and that a State could therefore ban such dancing as part of its liquor license control program”). See also *Newport v. Iacobucci*, 479 U.S. 92, 92–93, 96–97 (1986) (upholding a local ordinance banning nude dancing in bars as authorized under a state’s Twenty-First Amendment powers, which the Court found had been delegated, in part, to the local government and stating that “the interest in maintaining order outweighs the interest in free expression by dancing nude”); *N.Y. State Liquor Auth. v. Bellanca*, 452 U.S. 714, 714–15, 718 (1981) (upholding against a First Amendment challenge the application of a New York law to prohibit topless dancing in establishments licensed to sell liquor for on-premises consumption, citing the state’s power under the Twenty-First Amendment to regulate the “times, places, and circumstances under which liquor may be sold” and the New York legislature’s “common sense” notion that “any form of nudity coupled with alcohol in a public place begets undesirable behavior”) (citation omitted).

⁵ *44 Liquormart, Inc.*, 517 U.S. at 515–16, overruling in part *LaRue*, 409 U.S. at 114–19 and *Bellanca*, 452 U.S. at 718.

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if such a ban might incidentally restrict certain First Amendment-protected activity, such as topless dancing, in establishments licensed to sell alcoholic beverages.⁶

The Supreme Court also confirmed in *44 Liquormart* that states must comply with the First Amendment when regulating alcoholic beverage advertising. The Court invalidated Rhode Island laws that completely prohibited public dissemination of accurate information about retail liquor prices.⁷ The Court rejected the state’s attempt to rely on the Twenty-First Amendment to prohibit commercial speech protected by the First Amendment,⁸ writing that Rhode Island had “failed to carry its heavy burden of justifying its complete ban on price advertising.”⁹

In addition to confirming that the Twenty-First Amendment does not qualify First Amendment guarantees of freedom of expression, the Supreme Court has held that a state “may not exercise its power under the Twenty-First Amendment in a way which impinges upon the Establishment Clause of the First Amendment.”¹⁰ In *Larkin v. Grendel’s Den*, the Court struck down, as a violation of the Establishment Clause, a Massachusetts law that gave “churches and schools the power effectively to veto applications for liquor licenses within a 500-foot radius.”¹¹ According to the Court, the law had the impermissible effect of advancing religion: the veto power could be “employed for explicitly religious goals” and the appearance of a “joint exercise of legislative authority by Church and State provide[d] a significant symbolic benefit to religion.”¹² The law also “enmesh[ed] churches in the exercise of substantial governmental powers contrary to [the Court’s] consistent interpretation of the Establishment Clause.”¹³ According to the Court, “few entanglements [between Church and State] could be more offensive” than delegating “discretionary governmental powers” to religious groups.¹⁴

Amdt21.S2.9 Alcohol Regulation and the Fourteenth Amendment
Due Process and Equal Protection Clauses

The Supreme Court has confirmed that a state cannot ignore the Fourteenth Amendment’s Due Process and Equal Protection Clauses when it relies on its Twenty-First Amendment powers to regulate alcoholic beverages.¹ Generally, the Fourteenth Amend-

⁶ *Id.*

⁷ *Id.* at 514–16.

⁸ *Id.*

⁹ *Id.* at 516. For more on the Court’s decision in *44 Liquormart, Inc.*, see Amdt1.7.6.2 Central Hudson Test and Current Doctrine.

¹⁰ *Larkin v. Grendel’s Den*, 459 U.S. 116, 122 n.5 (1982). The Establishment Clause forbids the government from making any law “respecting an establishment of religion.” U.S. CONST. amend. I.

¹¹ *Larkin*, 459 U.S. at 117, 120.

¹² *Id.* at 125–26.

¹³ *Id.* at 126.

¹⁴ *Id.* at 127 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971)). See also Amdt1.3.6.3 Lemon’s Effect Prong and Accommodation of Religion; Amdt1.3.6.5 Lemon’s Entanglement Prong. Although the Supreme Court has not specifically overruled *Larkin*, the Court has “abandoned” the Establishment Clause analysis it applied in *Larkin*, known as the *Lemon* test, in favor of examining “historical practices and understandings” when evaluating the merits of Establishment Clause challenges. *Kennedy v. Bremerton School Dist.*, No. 21-418, slip op. at 22–23 (U.S. June 27, 2022); see generally Amdt1.3.7.1 Abandonment of the Lemon Test. It is unclear whether this analytical approach would have altered *Larkin*’s outcome.

¹ For more on the Fourteenth Amendment’s Due Process and Equal Protection Clauses, see Amdt14 Equal Protection and Other Rights.

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ment's Due Process Clause requires state actors to provide certain procedural protections before they deprive a person of any protected life, liberty, or property interest.² In 1971, the Court held that the Fourteenth Amendment requires a state to provide an individual with due process when a state's liquor law would deprive an individual of a protected liberty interest.³ In *Wisconsin v. Constantineau*, the Hartford police chief, enforcing a Wisconsin statute intended to combat excessive drinking, posted a notice in the city's retail liquor stores forbidding sales or gifts of liquor to a local adult resident for one year.⁴ The Court struck down the Wisconsin statute, determining that the law prevented an individual from buying liquor without adequate notice or the opportunity for an impartial hearing.⁵ The Court determined that the state could not rely on its Twenty-First Amendment authority or its general police powers to enact a statute that lacked such procedural due process safeguards.⁶

In the Fourteenth Amendment equal protection context, the Supreme Court has held that it will closely scrutinize state liquor laws that single someone out based on a suspect classification (e.g., race) or quasi-suspect classification (e.g., gender).⁷ In *Craig v. Boren*, the Court determined that the Twenty-First Amendment did not override Fourteenth Amendment equal protection guarantees that prevent a state from drawing invidious distinctions based on gender.⁸ *Craig* involved a challenge to an Oklahoma law prohibiting the sale of beer with a low alcohol content to males under twenty-one years of age and females under eighteen.⁹ The Court held that this "gender-based differential" in minimum drinking ages amounted to a "denial of the equal protection of the laws to males aged 18–20."¹⁰ Differential treatment of young men was not "substantially related" to achieving the state's asserted objective of traffic safety, and the Twenty-First Amendment could not "save the invidious gender-based discrimination from invalidation."¹¹ Quoting a constitutional law treatise, the Court stated, "Neither the text nor the history of the Twenty-First Amendment suggests that it qualifies individual rights

² Amdt14.S1.5.1 Overview of Procedural Due Process.

³ *Wisconsin v. Constantineau*, 400 U.S. 433, 434–36 (1971).

⁴ *Id.* at 434–35.

⁵ *Id.* at 434–39; *Paul v. Davis*, 424 U.S. 693, 707–09 (1976) (construing the liberty interest in *Constantineau* as the individual's right to obtain liquor rather than her interest in preventing reputational damage "standing alone"). For more information on these cases, see Amdt14.S1.5.2 Liberty Deprivations and Due Process.

⁶ See *Constantineau*, 400 U.S. at 436.

⁷ *Craig v. Boren*, 429 U.S. 190, 207–08 (1976) (addressing gender-based discrimination); *Moose Lodge No. 107 v. Iris*, 407 U.S. 163, 175–79 (1972) (addressing state-sanctioned, private racial discrimination). When the government legislates or acts on the basis of a suspect classification such as race, the Supreme Court sets aside the traditional standard of equal protection review and exercises a heightened standard of review referred to as strict scrutiny. See Amdt14.S1.8.1.1 Overview of Race-Based Classifications. See also *Equal Protection*, BLACK'S LAW DICTIONARY 654 (10th ed. 2014) (referring to "equal protection" as the "14th Amendment guarantee that the government must treat a person or class of persons the same as it treats other persons or classes in like circumstances").

⁸ *Craig*, 429 U.S. at 204–10.

⁹ *Id.* at 191–92.

¹⁰ *Id.* at 192, 210. See also Amdt14.S1.8.8.3 General Approach to Gender Classifications.

¹¹ *Craig*, 429 U.S. at 199, 204–05, 208–210 & n.23 ("[T]he operation of the Twenty-first Amendment does not alter the application of equal protection standards that otherwise govern this case."). In *Craig*, the Supreme Court overruled its earlier decision in *Goesaert v. Cleary*, 335 U.S. 464, 465–67 (1948), which had cited the Twenty-First Amendment when upholding against a Fourteenth Amendment Equal Protection Clause challenge a Michigan law prohibiting women from acting as bartenders unless they were the "wife or daughter" of a male owner of a licensed liquor establishment.

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protected by the Bill of Rights and the Fourteenth Amendment where the sale or use of liquor is concerned.”¹²

By contrast, in several cases decided during the early to mid-twentieth century, the Supreme Court held that the Fourteenth Amendment’s Equal Protection Clause did not prevent states from exercising their Twenty-First Amendment powers to discriminate against out-of-state liquor products.¹³ Although it is unclear whether these rulings reflect the current state of the law,¹⁴ the Court’s jurisprudence from this era suggests that such economic legislation is subject to a lesser form of Fourteenth Amendment scrutiny because it does not differentiate between individuals based on a suspect or quasi-suspect classification.¹⁵

Amdt21.S2.10 State and Federal Regulation of Alcohol Sales

The Twenty-First Amendment recognized that states could regulate or prohibit alcoholic beverages within their jurisdictions for legitimate, nonprotectionist purposes, such as health or safety.¹ However, the Amendment did not completely oust Congress’s Com-

¹² *Craig*, 429 U.S. at 206 (quoting P. BREST, PROCESSES OF CONSTITUTIONAL DECISIONMAKING, CASES AND MATERIALS 258 (1975)) (internal quotation marks omitted).

¹³ See, e.g., *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 402–04 (1938) (upholding against a Fourteenth Amendment equal protection challenge a Minnesota law prohibiting a foreign corporation from importing certain finished liquor products whose brands had not been registered with the U.S. Patent Office even though the law discriminated among competing out-of-state liquor brands and against liquor processed entirely out-of-state). See also *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 46–52 (1966) (upholding against Fourteenth Amendment substantive due process and equal protection challenges New York liquor laws that required liquor brand owners to file monthly schedules of prices at which liquor would be sold to wholesalers and retailers in the state and to affirm that “the bottle and case price of liquor” was “no higher than the lowest price at which sales were made anywhere in the United States during the preceding month” by the brand owner, his agent, or a related person) (internal quotation marks omitted), *overruled on other grounds* by *Healy v. Beer Inst.* 491 U.S. 324, 343 (1989); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 133–34, 138–40 (1939) (rejecting Fourteenth Amendment equal protection and due process challenges to the application of a Kentucky law that required the carriage of alcoholic beverages between Kentucky distillers and another state to occur only by state-licensed common carrier as a reasonable exercise of the state’s Twenty-First Amendment and reserved police powers and noting that interstate commerce was subject to “the same regulations as those applicable to intrastate commerce”); *Indianapolis Brewing Co. v. Liquor Control Comm’n*, 305 U.S. 391, 394 (1939) (determining that a retaliatory Michigan law that banned the sale of imported beer from states that discriminated against Michigan-produced beer did not violate the Fourteenth Amendment’s Due Process or Equal Protection Clauses because “discrimination between domestic and imported intoxicating liquors, or between imported intoxicating liquors, is not prohibited by the equal protection clause” and the “substantive power of the State to prevent the sale of intoxicating liquor is undoubted”); *State Bd. of Equalization v. Young’s Market Co.*, 299 U.S. 59, 63–64 (1936) (upholding a California law that imposed a license fee on wholesale importers of beer and concluding that a “classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth. Moreover, the classification in taxation made by California rests on conditions requiring difference in treatment.”).

¹⁴ See *Craig*, 429 U.S. at 207 & n.21 (1976) (characterizing as nonbinding “dictum” the Supreme Court’s statement in *State Board of Equalization v. Young’s Market Co.*, 299 U.S. 59, 64 (1936), that “a classification recognized by the Twenty-First Amendment cannot be deemed forbidden by the Fourteenth” and distinguishing cases in which a state law governing imports implicates only “purely economic matters” from cases involving “individual rights protected by the Due Process Clause”).

¹⁵ Since rejecting Fourteenth Amendment equal protection challenges to laws that discriminate against out-of-state economic interests, the Court has held that such laws may be invalid under the Dormant Commerce Clause. See Amdt21.S2.2 Overview of State Power over Alcohol and Discrimination Against Interstate Commerce.

¹ U.S. CONST. amend. XXI, § 2; *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, No. 18-96, slip op. at 31–32 (U.S. June 26, 2019). For more information on state liquor control regimes after Prohibition, see Amdt21.S1.2.5 Ratification of the Twenty-First Amendment.

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merce Clause power over the manufacture, sale, and transportation of alcoholic beverages.² After reviewing relevant post-Prohibition cases, the Supreme Court observed that “there is no bright line between federal and state powers over liquor. . . . Although States retain substantial discretion to establish [liquor] regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a ‘concrete case.’”³ Since the Twenty-First Amendment’s ratification, the federal government has continued to tax or regulate activities involving alcoholic beverages, including aspects of beverage production, wholesale distribution, importation, labeling, and advertising.⁴

Under the Supremacy Clause, federal law may preempt conflicting state liquor law when the federal government’s regulatory interests outweigh those asserted by the state, particularly in areas that do not implicate the state’s core Twenty-First Amendment powers.⁵ For example, in its 1984 decision in *Capital Cities Cable, Inc. v. Crisp*, the

² After Prohibition’s repeal, the Supreme Court adopted a more expansive view of the federal commerce power. By 1942, the Court held that Congress’s power under the Commerce Clause and Necessary and Proper Clause extended to intrastate activities that, in the aggregate, substantially affect interstate commerce. *Wickard v. Filburn*, 317 U.S. 111, 124 (1942). See also *Gonzales v. Raich*, 545 U.S. 1, 33 (2005) (considering whether the cultivation, distribution, or possession of marijuana for personal medical purposes pursuant to the California Compassionate Use Act of 1996 could be prosecuted under the federal Controlled Substances Act and holding that the Court would defer to Congress if there was a rational basis to believe that regulation of home-consumed marijuana would affect the market for marijuana generally); Proposed Legislation to Restrict the Sales of Alcoholic Beverages in Interstate Commerce, 8 Op. O.L.C. 53, 57 (1984) (opining that Congress’s Commerce Clause power would authorize enactment of a federal law prohibiting the sale in interstate commerce of alcoholic beverages to persons under 21 years of age, and that such a law would not violate the Twenty-First Amendment). Congress might also rely on other provisions of the Constitution, such as the Fourteenth Amendment’s Enforcement Clause, to regulate matters related to alcoholic beverages. See generally *Amdt14.S5.1 Overview of Enforcement Clause*.

³ *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980) (citation omitted); see also *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) (“Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.”); *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 172–74 (1939) (per curiam) (rejecting the notion that the states’ Twenty-First Amendment powers had rendered the Federal Alcohol Administration Act unconstitutional and finding “no substance” in the argument that Congress lacked constitutional authority to regulate foreign imports of alcoholic beverages).

⁴ See, e.g., 15 U.S.C. § 1 (prohibiting “every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations”); 26 U.S.C. ch. 51 (imposing taxes on various activities related to distilled spirits, wines, and beer); Federal Alcohol Administration Act, 27 U.S.C. §§ 201–212 (requiring producers, importers, and wholesalers of alcoholic beverages to obtain federal permits, obey state law, and comply with federal regulations relating to beverage advertising and labeling); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 480 (1995) (discussing Congress’s enactment of the Federal Alcohol Administration Act, which “establishes national rules governing the distribution, production, and importation of alcohol and established a Federal Alcohol Administration to implement these rules”); *United States v. Rizzo*, 297 U.S. 530, 533 (1936) (noting that the Eighteenth Amendment’s repeal did not extinguish liability for federal taxes on alcohol unless such taxes were imposed as penalties for violating liquor laws); *Ohio v. Helvering*, 292 U.S. 360, 369–70 (1934) (holding that the Eighteenth and Twenty-First Amendments implied that a state could not engage in the liquor trade while claiming sovereign immunity from federal tax laws).

⁵ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 711–16 (1984). Under the doctrine of federal preemption, federal law may displace conflicting state law. See generally U.S. CONST. art. VI (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”); ArtVI.C2.3.4 Modern Doctrine on Supremacy Clause (discussing different forms of federal preemption).

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Supreme Court held that various Federal Communications Commission rulings and regulations preempted Oklahoma statutes that prevented local cable television operators from retransmitting out-of-state alcoholic beverage advertisements to their subscribers.⁶ The Court determined that the Twenty-First Amendment granted the states broad power to regulate the “sale or use of liquor” within their jurisdictions, but that federal law would likely preempt conflicting state regulation outside of that field.⁷ The Court wrote that when the “times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the [clearly conflicting] state statute is barred by the Supremacy Clause.”⁸ In *Capital Cities*, the federal government’s interest in a “uniform national communications policy” aimed at “ensuring widespread availability of diverse cable services throughout the United States” outweighed the state’s unsubstantiated interest in promoting temperance.⁹ The Court thus held the conflicting Oklahoma statute regulating cable signals to be preempted.¹⁰

The Supreme Court has also weighed competing federal and state interests when deciding whether federal antitrust laws preempted conflicting state liquor laws. For example, in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, the Supreme Court held that the Sherman Antitrust Act, which prohibits “every contract, combination[,] or conspiracy, in restraint of trade or commerce among the several states,” preempted a California resale price maintenance law.¹¹ The law required “all wine producers, wholesalers, and rectifiers” to “file fair trade contracts or price schedules with the State” and prohibited wine merchants from selling wine to retailers at a price higher than that in the filings.¹² In holding that the Sherman Act preempted the state law, the Court determined that the federal interests in competition and free markets outweighed the state’s asserted Twenty-First Amendment interests in promoting temperance and protecting small retailers.¹³

⁶ *Capital Cities Cable, Inc.*, 467 U.S. at 694, 698, 716.

⁷ *Id.* at 713 (“In rejecting the claim that the Twenty-First Amendment ousted the Federal Government of all jurisdiction over interstate traffic in liquor, we have held that when a State has not attempted directly to regulate the sale or use of liquor within its borders—the core § 2 power—a conflicting exercise of federal authority may prevail.”).

⁸ *Id.* at 716; *cf.* *Ziffirin, Inc. v. Reeves*, 308 U.S. 132, 140 (1939) (determining that a Kentucky law that, as applied, required the carriage of alcoholic beverages between Kentucky distillers and another state to occur only by state-licensed common carrier did not conflict with the federal Motor Carrier Act of 1935).

⁹ *Capital Cities Cable, Inc.*, 467 U.S. at 712–16. The Supreme Court determined that Oklahoma’s interest in temperance was not substantial in part because the state allowed print and broadcast advertisements for beer. *Id.* at 715.

¹⁰ *Id.* at 712–16.

¹¹ 445 U.S. 97, 99 (1980).

¹² *Id.* “If a wine producer [did] not set prices through a fair trade contract, wholesalers [were required to] post a resale price schedule for that producer’s brands.” *Id.*

¹³ *Id.* at 103–06, 113–14 (determining that the Sherman Act prohibited producers from fixing the prices charged by wholesalers and retailers and rejecting the state’s attempt to rely on the state action immunity doctrine because the state merely enforced the prices set by private parties and did not exercise complete control over the establishment of prices, review “the reasonableness of the price schedules,” or “regulate the terms of fair trade contracts.”). *See also, e.g.*, *Liquor Corp. v. Duffy*, 479 U.S. 335, 337, 342–43, 350–52 (1987) (concluding that the Sherman Antitrust Act preempted New York resale price maintenance laws requiring retailers to “charge at least 112 percent of the ‘posted’ wholesale price for liquor” but allowing “wholesalers to sell to retailers at less than the ‘posted’ price” because the state’s interest in aiding small liquor retailers was “unsubstantiated,” it was outweighed by the federal interest in competition, and “the Twenty-First Amend-

Amdt21.S2.11 State and Federal Regulation of Minimum Drinking Age

The Supreme Court has also upheld a federal law related to the sale of alcoholic beverages in at least one case that did not specifically implicate federal preemption. In 1987, the Court upheld the National Minimum Drinking Age Act as a valid exercise of Congress's spending powers.¹ The Act conditioned each state's receipt of a small percentage of otherwise payable federal highway grant funds on the state's adoption of a minimum drinking age of twenty-one.² The Court held that the Act did not infringe on the states' core Twenty-First Amendment powers to regulate alcoholic beverages because Congress was acting only "indirectly under its spending power to encourage uniformity in the States' drinking ages."³ The Court held that the threat of withholding five percent of highway funding from states that refused to adopt a minimum drinking age of twenty-one was not coercive but only "relatively mild encouragement" to accept Congress's policy condition.⁴

Amdt21.S3 Ratification Deadline

Amdt21.S3.1 Ratification Deadline, State Ratifying Conventions, and the Twenty-First Amendment

Congress proposed the Twenty-First Amendment on February 20, 1933, requiring state ratifying conventions to approve it within seven years in order for it to become part of the Constitution.¹ On December 5, 1933, Acting Secretary of State William Phillips certified that the Amendment had been adopted by the requisite number of state conventions.²

ment provide[d] no immunity for New York's authorization of private, unsupervised price fixing by liquor wholesalers"); *Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. 35, 45–46 (1966) (determining that the Sherman Antitrust Act did not preempt New York laws that required liquor brand owners to file monthly schedules of prices at which liquor would be sold to wholesalers and retailers in the state and to affirm that "the bottle and case price of liquor" was "no higher than the lowest price at which sales were made anywhere in the United States during the preceding month" by the brand owner, his agent, or a related person), *overruled on other grounds* by *Healy v. Beer Inst.* 491 U.S. 324, 343 (1989); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 295, 299 (1945) (upholding the federal government's prosecution of alcoholic beverage producers, wholesalers, and retailers for violating the Sherman Antitrust Act by conspiring to fix and maintain retail prices of alcoholic beverages imported into Colorado and noting the absence of conflicting state law).

¹ See *South Dakota v. Dole*, 483 U.S. 203, 211–12 (1987).

² See *id.*

³ *Id.* at 206. The Court declined to decide whether the Twenty-First Amendment barred Congress from legislating a national minimum drinking age directly. *Id.* See also Proposed Legislation to Restrict the Sales of Alcoholic Beverages in Interstate Commerce, 8 Op. O.L.C. 53, 57 (1984) (opining that Congress's Commerce Clause power would authorize enactment of a federal law prohibiting the sale in interstate commerce of alcoholic beverages to persons under twenty-one years of age, and that such a law would not violate the Twenty-First Amendment). For more on the Court's Spending Clause jurisprudence, see ArtI.S8.C1.2.4 Modern Spending Clause Jurisprudence Generally.

⁴ *Dole*, 483 U.S. at 211–12. As Chief Justice John Roberts would later explain, this sum was "less than half of one percent of South Dakota's budget at the time." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581 (2012) (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

¹ 76 CONG. REC. 4516 (1933); U.S. CONST. amend. XXI, § 3.

² See *Twenty-First Amendment to the Constitution*, 48 Stat. 1749, 1749–50 (1933).

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Ratification Deadline, Ratification Deadline, State Ratifying Conventions, and the
Twenty-First Amendment

The Twenty-First Amendment is the only Amendment to have been approved by state ratifying conventions rather than state legislatures. At the time of its proposal, many politicians believed that only state ratifying conventions should approve constitutional amendments that implicated individual rights and morals.³ In addition to seeking a ratification method deemed to better reflect the popular will, Congress may have also wished to bypass the temperance lobby, which remained powerful in state legislatures.⁴ According to this view, by specifying that specially selected state delegates would ratify the Amendment, rather than state legislators, Congress increased the Amendment's chances of successful ratification.⁵

³ EVERETT S. BROWN, RATIFICATION OF THE TWENTY FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES: STATE CONVENTION RECORDS AND LAWS 3 (2003).

⁴ Robert P. George & David A. J. Richards, *The Twenty-First Amendment*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/amendments/amendment-xxi/interpretations/151> (“[P]olitical prudence pointed in the direction of ratifying conventions as a way of leaving gun-shy legislators with their eyes on re-election out of the process and ‘off the hook.’”).

⁵ See *id.*; Letter from the Women's Committee for Repeal of the 18th Amendment to the United States Congress Regarding the Repeal of Prohibition (Jan. 25, 1930), <https://www.docsteach.org/documents/document/letter-from-womens-committee-for-repeal-of-the-18th-amendment-to-the-united-states-congress-regarding-the-repeal-of-prohibition> (advocating for submission of a repeal amendment to state ratifying conventions and noting that delegates would not be “running for a political office” and would therefore have “no political axe to grind”); OKRENT, *supra* note 5, at 352 (stating that Congress's submission of the Twenty-First Amendment to state ratifying conventions was “mindful of the complications of legislative schedules and the continued domination of state legislatures by rural minorities”).

TWENTY-FIFTH AMENDMENT

PRESIDENTIAL VACANCY

Amdt25.1 Overview of Twenty-Fifth Amendment, Presidential Vacancy and Disability

To ensure that the United States will always possess a functioning President and Vice President, the Twenty-Fifth Amendment provides for the prompt, orderly, and democratic transfer of executive power.¹ The Amendment clarifies and supplements the Presidential Succession Clause² in Article II of the Constitution by: (1) confirming that the Vice President becomes President when the latter dies, resigns, or is removed from office as a result of impeachment proceedings; (2) requiring the President to fill a vice presidential vacancy with Congress's approval; and (3) establishing mechanisms for transferring an incapacitated President's powers and duties to the Vice President.³ The Supreme Court has not definitively interpreted the Twenty-Fifth Amendment,⁴ and legal scholars continue to debate its provisions addressing presidential inability.⁵

Section 1 of the Twenty-Fifth Amendment provides that if the President dies, resigns, or is removed from office as a result of impeachment proceedings, then the Vice President “shall become President.”⁶ Section 1 was intended to clarify, consistent with long-established historical practice, that the Vice President immediately succeeds to the presidency in such circumstances instead of serving as the “Acting President.”⁷ In 1974,

¹ See, e.g., 111 CONG. REC. 3251 (1965) (statement of Sen. Bayh); *id.* at 3275 (statement of Sen. McClellan); *id.* at 7942 (statement of Rep. McCulloch); *id.* at 7959 (statement of Rep. Schmidhauser); 109 CONG. REC. 24420 (1963) (statement of Sen. Bayh).

² See U. S. CONST. art. II, § 1, cl. 6 (“In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by Law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.”); see also ArtII.S1.C6.1 Succession Clause for the Presidency. Congress has exercised its authority under Article II’s Presidential Succession Clause to establish a line of succession to the presidency in the event that both the President and Vice President are unable to discharge the powers and duties of the presidency. See Presidential Succession Act of 1947, Public Law 80-199, 61 Stat. 380; 3 U.S.C. § 19.

³ U.S. CONST. amend. XXV. The introductory text of the joint resolution proposing the Twenty-Fifth Amendment required three-fourths of the state legislatures to ratify the Amendment within seven years of its submission to the states in order for it to become part of the Constitution. S.J. Res. 1, 89th Cong., 79 Stat. 1327, 1327 (1965). The proposed Twenty-Fifth Amendment was submitted to the states for potential ratification on July 6, 1965. The Amendment attained the three-fourths majority of the states necessary for ratification on February 10, 1967. See Intro.6.6 Post-War Amendments (Twenty-Third Through Twenty-Seventh Amendments).

⁴ See *Clinton v. Jones*, 520 U.S. 681, 698 (1997) (stating, in nonbinding dicta, that the Twenty-Fifth Amendment’s drafters wanted to “ensure continuity in the performance of the powers and duties of the [presidency]” (citation omitted); *Freytag v. Comm’r*, 501 U.S. 868, 887 & n.4 (1991) (stating in dicta that the term “principal officers of the executive departments” in Section 4 of the Twenty-Fifth Amendment refers to the heads of the Cabinet departments listed in 5 U.S.C. § 101).

⁵ See, e.g., Second Fordham Univ. Sch. of Law Clinic on Presidential Succession, *Fifty Years After the Twenty-Fifth Amendment: Recommendations for Improving the Presidential Succession System*, 86 FORDHAM L. REV. 917 (2017). This group of essays uses the terms “disability,” “inability” and “incapacity” interchangeably. For more on debates over the meaning of “inability” in the Twenty-Fifth Amendment, see *id.*

⁶ U.S. CONST. amend. XXV, § 1. In a 1985 opinion, the Department of Justice’s Office of Legal Counsel advised that the Vice President would immediately relinquish “all duties and responsibilities as Vice President” when he succeeds to the presidency. See *Operation of the Twenty-Fifth Amendment Respecting Presidential Succession*, 9 Op. O.L.C. 65, 67 (1985) (recommending that the Vice President promptly take the oath of office upon succeeding to the presidency).

⁷ For more on the historical succession practices that informed Section 1 of the Twenty-Fifth Amendment, see Amdt25.2.6 Presidential and Vice-Presidential Vacancies Before the Twenty-Fifth Amendment’s Ratification. The Vice President would ordinarily serve for the remainder of the President’s term.

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Section 1 resulted in Vice President Gerald Ford's succession to the presidency when President Richard Nixon resigned under threat of impeachment for his role in the Watergate scandal.⁸

Section 2 of the Twenty-Fifth Amendment provides for filling a vice-presidential vacancy that occurs during a President's term of office.⁹ From the beginning of President George Washington's first term in 1789 to the Twenty-Fifth Amendment's ratification in 1967, the vice presidency was vacant for more than thirty-seven years cumulatively because of the officeholder's death, resignation, or succession to the presidency.¹⁰ In the event of a vacancy, Section 2 requires the President to nominate a new Vice President to take office for the remainder of the President's term after confirmation by a majority vote in each chamber of Congress.¹¹ Section 2 of the Twenty-Fifth Amendment was invoked twice during the 1970s to fill vice-presidential vacancies resulting from Vice President Spiro Agnew's and President Nixon's resignations.¹²

Sections 3 and 4 of the Twenty-Fifth Amendment address circumstances in which the President is unable to discharge his powers and responsibilities under the Constitution.¹³ Prior to the Amendment's ratification, at least two Vice Presidents declined to assume an incapacitated President's powers and duties because of legal uncertainty as to whether the President could reclaim them upon recovery.¹⁴ Section 3 allows an incapacitated President—or a President who anticipates becoming incapacitated¹⁵—to relinquish his powers and duties voluntarily by sending a written declaration to the President pro tempore of the Senate¹⁶ and the Speaker of the House of Representatives¹⁷ stating that he is unable to discharge them.¹⁸ Thereafter, until the President communicates that he is again able to discharge his responsibilities, the Vice President

⁸ For more on Watergate and Nixon's resignation, see Amdt25.S2.1 Implementation of the Twenty-Fifth Amendment.

⁹ U.S. CONST. amend. XXV, § 2. The original Presidential Succession Clause did not address vice presidential vacancies. See U.S. CONST. art. II, § 1, cl. 6.

¹⁰ See *About the Vice President: Vice Presidents of the United States*, U.S. SENATE, <https://www.senate.gov/about/officers-staff/vice-president/vice-presidents.htm> (last visited Feb. 26, 2024).

¹¹ U.S. CONST. amend. XXV, § 2. See also 111 CONG. REC. 7944, 7946 (1965) (statement of Rep. Celler) (suggesting that Section 2 requires a separate vote in each chamber of Congress).

¹² President Nixon's resignation occasioned the use of Section 2 because Vice President Gerald Ford succeeded Nixon, resulting in a vice presidential vacancy. See Amdt25.S2.1 Implementation of the Twenty-Fifth Amendment.

¹³ U.S. CONST. amend. XXV, §§ 3–4.

¹⁴ See Amdt25.2.7 Presidential Inability Before the Twenty-Fifth Amendment's Ratification.

¹⁵ A few Presidents have voluntarily relinquished their powers and duties under Section 3 when they anticipated that they would become temporarily unable to fulfill their responsibilities as a result of a medical procedure. See Amdt25.S2.1 Implementation of the Twenty-Fifth Amendment; 111 CONG. REC. 7941 (1965) (statement of Rep. Poff) (contending that Section 3 encompasses situations “in which the President recognizes his inability—or the imminence of his inability—and wishes voluntarily to vacate his office for a temporary period”); John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 FORDHAM L. REV. 173, 199 (1965) (arguing, based on the Amendment's legislative history, that Section 3 permits the President “to declare himself disabled either for an indefinite or a specified period of time, and to name the hour when the Vice President is to begin as Acting President.”).

¹⁶ In addition to fulfilling other roles, the president pro tempore “preside[s] over the Senate in the absence of the Vice President.” Traditionally, the Senate has elected the senior Member of the majority party to this position. *About the President Pro Tempore*, U.S. SENATE, <https://www.senate.gov/about/officers-staff/president-pro-tempore.htm> (last visited Feb. 7, 2024).

¹⁷ The Speaker of the House is elected by all House Members. In addition to fulfilling other roles, the House Speaker presides over the House. *Leadership*, U.S. HOUSE OF REPRESENTATIVES, <https://www.house.gov/leadership> (last visited Feb. 7, 2024).

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serves as Acting President.¹⁹ Since the Twenty-Fifth Amendment's ratification, a few presidents have invoked Section 3 to transfer their powers and duties to the Vice President temporarily while undergoing medical procedures.²⁰

Section 4, which has never been invoked, is perhaps the most controversial of the Twenty-Fifth Amendment's provisions. This section allows the Vice President and a majority of the Cabinet²¹ or, alternatively, the Vice President and a majority of another body that Congress designates by law in place of the Cabinet, to initiate the transfer of an incapacitated President's powers and duties to the Vice President.²² Section 4 might be invoked when the President is unable or unwilling to declare that he is incapacitated.²³ To invoke Section 4, the Vice President and a majority of the relevant body must send a written declaration to the President pro tempore of the Senate and the Speaker of the House of Representatives stating that the President is unable to discharge his office's powers and duties.²⁴ Following this declaration, the Vice President immediately assumes such powers and duties as Acting President.²⁵

¹⁸ U.S. CONST. amend. XXV, § 3. *See also* Operation of the Twenty-Fifth Amendment Respecting Presidential Succession, 9 Op. O.L.C. 65, 69–70 (1985) (advising that the transfer of power takes effect “immediately” upon the President's communication of the written declaration “and is not delayed until receipt of the document” by congressional leadership) (citing S. REP. NO. 89-66, at 12 (1965); H.R. REP. NO. 89-203, at 13 (1965)). For a discussion of when the President may temporarily transfer certain of his powers and duties to subordinate officials without relying on the Twenty-Fifth Amendment, see Presidential Succession and Delegation in Case of Disability, 5 Op. O.L.C. 91, 93 (1981) (discussing 3 U.S.C. § 301 and other provisions of federal law).

¹⁹ U.S. CONST. amend. XXV, § 3. The vice presidency does not become vacant while the Vice President serves as Acting President. However, the President pro tempore of the Senate would presumably serve as President of the Senate during that time. *See* U.S. CONST. art. I, § 3, cl. 5 (“The Senate shall choose their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.”); 111 CONG. REC. 3270 (1965) (remarks of Sens. Bayh and Saltonstall); Operation of the Twenty-Fifth Amendment Respecting Presidential Succession, 9 Op. O.L.C. 65, 70 (1985) (citations omitted).

²⁰ *See* Amdt25.S2.1 Implementation of the Twenty-Fifth Amendment.

²¹ According to the House Judiciary Committee report on the joint resolution proposing the Twenty-Fifth Amendment, the phrase “principal officers of the executive departments” in Section 4 refers to “Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1 [now codified as § 101], or any executive department established in the future, generally considered to comprise the President's Cabinet.” H.R. REP. NO. 89-203, at 3 (1965); *accord* Freytag v. Comm'r, 501 U.S. 868, 887 & n.4 (1991) (stating in dicta that the term “principal officers of the executive departments” in Section 4 of the Twenty-Fifth Amendment refers to the heads of the Cabinet departments listed in 5 U.S.C. § 101); S. REP. NO. 89-66, at 2 (1965) (stating that “principal officers” are “members of the President's official Cabinet”); 111 CONG. REC. 3283, 15383 (1965) (statements of Sen. Bayh); *id.* at 7938 (statement of Rep. Celler) (stating that the “principal officers” are the Cabinet secretaries). Consistent with Supreme Court dicta and the Amendment's legislative history, this essay uses the term “Cabinet” to refer to the “principal officers of the executive departments” designated in 5 U.S.C. § 101.

For various views as to whether acting Cabinet Secretaries may participate in presidential inability determinations, see H. REP. NO. 89-203, at 3 (1965); 111 CONG. REC. 3284 (1965) (statement of Sens. Bayh and Hart); *id.* at 15380 (statement of Sen. Robert F. Kennedy); *id.* at 15382 (statement of Sen. McCarthy); *id.* at 15385 (statement of Sen. Bayh); James A. Heilpern, *Acting Cabinet Secretaries and the Twenty-Fifth Amendment*, 57 U. RICH. L. REV. 1169, 1174 (2023).

²² U.S. CONST. amend. XXV, § 4.

²³ *See, e.g.*, 111 CONG. REC. 3254 (1965) (statement of Sen. Bayh); *id.* at 7938 (statement of Rep. Celler).

²⁴ U.S. CONST. amend. XXV, § 4; *see also* Operation of the Twenty-Fifth Amendment Respecting Presidential Succession, 9 Op. O.L.C. 65, 69 (1985) (advising that the “written declaration of disability” can take the form of multiple, separate declarations and does not require the signature of the Vice President or a majority of the relevant officials to be effective if their “assent” is otherwise established “in a reliable fashion [and] they direct their names to be added to the document”).

²⁵ U.S. CONST. amend. XXV, § 4.

If the President subsequently declares in writing to the relevant congressional presiding officers that he is again able to fulfill his responsibilities, then he “shall resume the powers and duties of his office” unless the Vice President (as Acting President) and a majority of the appropriate body transmit a contrary written notice within four days.²⁶ In that event, Congress must assemble within forty-eight hours to determine who will discharge the President’s duties.²⁷ Unless Congress determines within twenty-one days of receiving the Vice President and relevant body’s declaration²⁸ “by two-thirds vote of both Houses that the President is unable to discharge the powers and duties of his office,”²⁹ the President resumes his responsibilities.³⁰ On the other hand, if Congress determines that the President is unable to fulfill his duties, then the Vice President continues to discharge them as Acting President.³¹

Amdt25.2. Historical Background

Amdt25.2.1 Executive Succession in the Founding Era

When declaring independence from Great Britain in 1776, the United States rejected the rule of King George III and the British Parliament.¹ The Constitution’s Framers departed from the British tradition of constitutional monarchy by vesting the federal executive power in an elected President who would serve a four-year term and was subject to impeachment and removal from office.² When designing the American pres-

²⁶ *Id.* The Twenty-Fifth Amendment’s framers appear to have understood that the Vice President would continue to serve as Acting President during these four days. *See, e.g.*, 111 CONG. REC. 3284–85 (1965) (statements of Sens. Bayh and Allott); *id.* at 7939 (statement of Rep. Celler); *id.* at 7963–66 (rejecting an amendment by Sen. Moore providing that the President would immediately resume his powers and duties upon declaring that he had recovered). *See also* Joel K. Goldstein, *Talking Trump and the Twenty-Fifth Amendment: Correcting the Record on Section 4*, 21 U. PA. J. CONST. L. 73, 125 (2018) (arguing that “[t]he text of Section 4, its history, structure, and logic clearly provide that the Vice President retains presidential power during this period (unless he acquiesces in the President’s position).”). During floor debates on Section 4, some Members of Congress suggested that the President could resume his office before the end of the four-day period following his declaration of recovery, provided that he obtained the Vice President’s support. 111 CONG. REC. 3285 (1965) (statement of Sen. Bayh); *id.* at 7939, 15214 (statements of Rep. Celler).

²⁷ U.S. CONST. amend. XXV, § 4.

²⁸ Congress must decide whether the President will resume his duties within twenty-one days after receiving the written declaration from the Vice President and other relevant officials. If Congress is not in session, then it must decide the issue “within twenty-one days after [it] is required to assemble.” *Id.*

²⁹ Legislative history suggests that each chamber of Congress would vote separately on whether the President could resume his powers and duties. *See* H. REP. NO. 89-564, at 4 (1965) (Conf. Rep.); 111 CONG. REC. 7944, 7946 (1965) (statements of Rep. Celler). If either chamber of Congress voted on the issue of the President’s inability but failed to obtain a two-thirds majority in favor of the Vice President (and relevant body’s) challenge to the President’s recovery declaration, then, according to some of the Amendment’s framers, the President would immediately resume his powers and duties. 111 CONG. REC. 15215 (statement of Rep. Poff); *id.* at 15379 (statement of Sen. Bayh).

³⁰ U.S. CONST. amend. XXV, § 4. The Twenty-Fifth Amendment’s framers appear to have understood that the Vice President would continue to serve as Acting President while Congress decides the issue of presidential inability. *See, e.g.*, S. REP. NO. 89-66, at 3 (1965); H.R. REP. NO. 89-203, at 3 (1965); 111 CONG. REC. 7939–40 (1965) (statements of Reps. Celler and Duncan).

³¹ U.S. CONST. amend. XXV, § 4. Some of the Twenty-Fifth Amendment’s framers suggested that the President can submit additional notices of recovery, triggering the congressional decision-making process an indefinite number of times. *See Presidential Inability: Hearings on H.R. 836 et al. Before the H. Comm. on the Judiciary*, 89th Cong. 94, 101 (1965) (statements of Sen. Bayh and Nicholas de B. Katzenbach, Att’y Gen. of the United States).

¹ THE DECLARATION OF INDEPENDENCE (1776).

² *See* THE FEDERALIST NO. 69 (Alexander Hamilton); *see also* U.S. CONST. art. II, §§ 1, 4. At the time of the Federal Convention in 1787, various laws and practices determined succession to the British throne. These included the common law, constitutional customs, and Acts of Parliament. 1 WILLIAM BLACKSTONE, COMMENT-

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idency, the Framers confronted questions about who would discharge the President's duties if the President died, resigned, became unable to fulfill his responsibilities, or was removed from office.³

The Articles of Confederation that preceded the Constitution did not create an independent executive branch, contemplate executive succession, or address presidential inability.⁴ However, several Founding-era state constitutions addressed gubernatorial vacancies or inabilities.⁵ Typically, these state constitutions provided that a subordinate officer (e.g., lieutenant governor) would temporarily assume the executive's powers and duties during a vacancy, absence, or inability.⁶ A few state constitutions established procedures for permanently filling vacancies in the governor's or lieutenant-governor's office until the next election.⁷ The Framers were likely aware of such executive succession laws when they drafted the Constitution.⁸

Amdt25.2.2 Presidential Succession and Initial Debates at the Federal Convention

The delegates to the Constitutional Convention of 1787 discussed presidential succession and inability briefly during recorded debates. The two major blueprints for the national government offered at the Convention—the Virginia Plan and the New Jersey

TARIES *183–211. If the British King or Queen died, the order of succession depended on such factors as hereditary descent, gender, birth order, and religious affiliation. *See id.* A Convention Parliament, which assembled without a royal summons, could enact laws filling vacancies when a King abdicated the throne. *Id.* at 204–07.

³ *See* Amdt25.2.2 Presidential Succession and Initial Debates at the Federal Convention.

⁴ *See* ARTICLES OF CONFEDERATION OF 1781. The Articles created the ceremonial position of “President of the Congress of the United States,” but the incumbent did not exercise executive power. *Id.* art. IX. The state legislatures appointed delegates to the Confederation Congress for one-year terms and could recall them at any time. *Id.* art. V, para. 1.

⁵ *See, e.g.,* MASS CONST. OF 1780, pt. 2, ch. 2, § 2, art. III (“Whenever the chair of the governor shall be vacant, by reason of his death, or absence from the commonwealth, or otherwise, the lieutenant-governor, for the time being, shall, during such vacancy, perform all the duties incumbent upon the governor, and shall have and exercise all the powers and authorities, which by this constitution, the governor is vested with, when personally present.”); MD. CONST. OF 1776, THE CONSTITUTION, OR FORM OF GOVERNMENT, cl. XXXII (“That upon the death, resignation, or removal out of this State, of the Governor, the first named of the Council [to the Governor elected by the General Assembly], for the time being shall act as Governor, and qualify in the same manner; and shall immediately call a meeting of the General Assembly, giving not less than fourteen days’ notice of the meeting, at which meeting a Governor shall be appointed, in manner aforesaid, for the residue of the year.”); VA. CONST. OF 1776 (“[The Privy Council] shall annually choose, out of their own members, a President, who, in case of death, inability, or absence of the Governor from the government, shall act as Lieutenant-Governor.”).

⁶ *See* MASS CONST. OF 1780, pt. 2, ch. 2, § 2, art. III; MD. CONST. OF 1776, THE CONSTITUTION, OR FORM OF GOVERNMENT, cl. XXXII; VA. CONST. OF 1776. Some state constitutions addressed dual executive branch vacancies. For example, Massachusetts’s Constitution of 1780 authorized the Council to the Governor to exercise executive powers “[w]hensoever the office of the governor and lieutenant-governor shall be vacant by reason of death, absence, or otherwise.” MASS CONST. OF 1780, pt. 2, ch. 2, § 3, art. VI; *see also* N.Y. CONST. OF 1777, art. XXI (providing that the president of the state senate would exercise the governor’s powers until the next election if dual vacancies arose in the governor and lieutenant-governor’s offices).

⁷ *E.g.,* MD. CONST. OF 1776, THE CONSTITUTION, OR FORM OF GOVERNMENT, cl. XXXII (requiring the state’s General Assembly to appoint a new governor to serve until the next election); S.C. CONST. OF 1778, art. VIII (establishing procedures for filling vacancies in the governor’s and lieutenant-governor’s offices).

⁸ *E.g.,* John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 FORDHAM L. REV. 73, 81 (1963) (observing that many of the Framers had played a role in drafting state constitutions).

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Plan—did not address either issue.¹ However, New York delegate Alexander Hamilton’s plan for the national government addressed vacancies in its highest executive office. The Hamiltonian Plan, which did not receive serious consideration at the Convention, would have established a strong and centralized government headed by a national “governor” who would have served for life unless impeached and removed from office.² Upon the national governor’s death, resignation, or removal from office, his authorities would have been “exercised by the President of the Senate till a Successor be appointed.”³

Despite a lack of recorded debate on executive succession in the Convention’s early months, on August 6, 1787, the Committee of Detail, which produced the Constitution’s first draft, reported an initial version of the Presidential Succession Clause. The draft Clause provided that

[i]n case of [the President’s] removal as aforesaid, death, resignation, or disability to discharge the powers and duties of his office, the President of the Senate shall exercise those powers and duties, until another President of the United States be chosen, or until the disability of the President be removed.⁴

The Succession Clause’s first draft thus designated the President of the Senate as the President’s “provisional successor”⁵ but did not specify whether a new President would be chosen before the next scheduled presidential election, explain how a new President would be chosen, or define presidential “disability.”

On August 27, a few weeks after the Committee of Detail reported its draft, the Federal Convention delegates briefly debated the issues of presidential vacancy and inability. Delegate Gouverneur Morris of Pennsylvania objected to designating the “President of the Senate” as the President’s provisional successor, suggesting the Supreme Court’s Chief Justice should assume that responsibility.⁶ In a similar vein, Delegate James Madison of Virginia argued that the President of the Senate’s exercise of presidential power might undermine the Constitution’s checks and balances by allowing Congress to enact legislation without the serious threat of a presidential veto.⁷ However, Madison suggested that a “Council to the President” should discharge the President’s powers and duties during a vacancy.⁸ Delegate Hugh Williamson of North Carolina contended that

¹ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 20–23 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS] (Madison’s notes, May 29, 1787) (Virginia Plan); *id.* at 242–45 (Madison’s notes, June 15, 1787) (New Jersey Plan).

² *Id.* at 292 (Madison’s notes, June 18, 1787).

³ *Id.* Delegate Charles Pinckney of South Carolina submitted his own plan of government to the Federal Convention in May 1787. No comprehensive record of the original Pinckney Plan exists. An 1818 document purporting to reflect Pinckney’s plan, which included provisions on presidential succession, appears to be a forgery. For more on this controversy, see 3 FARRAND’S RECORDS, *supra* note 40, at 601–04.

⁴ 2 FARRAND’S RECORDS, *supra* note 40, at 186 (Madison’s notes, Aug. 6, 1787).

⁵ See *id.* at 427 (Madison’s notes, Aug. 27, 1787).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* As ratified in 1788, the Constitution did not formally establish a Council to the President but merely authorized the President to “require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices.” U.S. CONST. art. II, § 2, cl. 1. President George Washington established the historical precedent of creating a Cabinet composed of the

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the Constitution should authorize Congress to enact laws specifying who would succeed to the presidency.⁹

Finally, Delegate John Dickinson of Delaware, referring to the Succession Clause's "vague" designation of presidential "disability" as a circumstance that could result in the transfer of the President's powers to another individual, asked, "What is the extent of the term 'disability' and who is to be the judge of it?"¹⁰ None of the delegates offered a recorded response. Thereafter, the delegates unanimously agreed to postpone the Clause's consideration.¹¹

Amdt25.2.3 Finalization of the Presidential Succession Clause at the Federal Convention

The delegates to the Federal Convention reconsidered the draft Presidential Succession Clause less than two weeks before the Convention's end. The Brearley Committee on Leftovers, a group of eleven delegates who met separately to work out the details of the presidency and other thorny issues,¹ reported a revised Succession Clause to the Convention on September 4.² This draft, which designated the newly created office of the Vice President as the President's successor,³ provided that

in case of [the President's] removal as aforesaid, death, absence, resignation or inability to discharge the powers or duties of his office the Vice President shall exercise those powers and duties until another President be chosen, or until the inability of the President be removed.⁴

On September 7, 1787, the delegates approved language authorizing Congress to determine by law who would act as President if both the President and Vice President were unable to discharge the powers and duties of the presidency.⁵ The Committee of Style, which prepared the Constitution's final draft, combined this newly approved language on simultaneous vacancy or inability with the Brearley Committee's language on presidential succession.⁶ As revised, the final draft of the Succession Clause in Article II, Section 1, Clause 6 of the original Constitution provided that:

Attorney General and executive department heads. *Cabinet Members*, GEORGE WASHINGTON'S MOUNT VERNON, <https://www.mountvernon.org/library/digitalhistory/digital-encyclopedia/article/cabinet-members/>.

⁹ 2 FARRAND'S RECORDS, *supra* note 40, at 427 (Madison's notes, Aug. 27, 1787).

¹⁰ *Id.*

¹¹ *Id.*

¹ See *id.* at 481, 493 (Madison's notes, Aug. 27 and Sept. 4, 1787). The Brearley Committee was also known as the "Committee on Postponed Parts."

² *Id.* at 495 (Madison's note's Sept. 4, 1787).

³ During its deliberations, the Brearley Committee created the office of Vice President to assume the President's powers and duties in the event of the President's removal, death, absence, resignation, or inability. *Id.* at 495.

⁴ *Id.*

⁵ *Id.* at 532 (Madison's notes, Sept. 7, 1787) ("The Legislature may declare by law what officer of the United States shall act as President in case of the death, resignation, or disability of the President and Vice President; and such Officer shall act accordingly, until such disability be removed, or a President shall be elected."). This language reflected revisions suggested by James Madison, who wanted to ensure that Congress could call a special election to fill a presidential vacancy before the next scheduled election. *Id.* at 535.

⁶ See *id.* at 495, 573, 575, 598–99 (Report of the Committee of Style, Sep. 10–12, 1787).

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Historical Background, Presidential Succession and Debates over the Constitution’s
Ratification

In Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President, and the Congress may by law provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer shall act accordingly, until the Disability be removed, or a President shall be elected.⁷

The original Constitution thus provided for the Vice President to assume the President’s powers and duties upon the President’s removal, death, resignation, or inability. Congress was empowered to establish the line of succession to the presidency if both the President and Vice President were unable to discharge the powers and duties of the presidency. However, the original Succession Clause left many issues unresolved, including how to define presidential inability, who would determine such inability, and how such determinations would be made. As revised by the Committee of Style, the Clause did not definitively resolve the question of whether the Vice President would become President or merely exercise the President’s powers and duties as “Acting President” during a presidential vacancy or inability. This omission later resulted in debates about whether the President could resume his office upon recovering from an inability if the Vice President had assumed the President’s powers and duties.⁸

Amdt25.2.4 Presidential Succession and Debates over the
Constitution’s Ratification

Delegates to the state conventions that met to consider the Constitution’s ratification discussed the Presidential Succession Clause only briefly as part of broader debates over the vice presidency.¹ At the Virginia Convention, George Mason, who had declined to sign the Constitution at the Federal Convention, argued that the Vice President was an “unnecessary” and “dangerous officer.”² Mason recited the Presidential Succession Clause before expressing concerns that the Vice President, while serving as Acting President, might prevent the prompt holding of a special election to choose another President.³ Nonetheless, Mason stated that the Constitution properly gave Congress the authority “to provide what officer shall act, in case both the President and Vice President be dead or disabled.”⁴

Although James Madison did not respond directly to Mason’s concerns, he defended the Presidential Succession Clause at the Virginia Convention.⁵ Addressing the Clause’s provision on dual vacancies, Madison contended that in the rare circumstance in which

⁷ *Id.* at 659 (reproducing the Constitution’s final text). *See also* U.S. CONST. art. II, § 1, cl. 6. For more information on presidential succession under the original Constitution, see ArtII.S1.C6.1 Succession Clause for the Presidency.

⁸ *See* Amdt25.2.6 Presidential and Vice-Presidential Vacancies Before the Twenty-Fifth Amendment’s Ratification.

¹ 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 486–90 (2d ed. 1836) [hereinafter ELLIOT’S DEBATES].

² *Id.* at 486.

³ *Id.* at 487.

⁴ *Id.*

⁵ *Id.* at 487–88.

both the President and Vice President died, “the election of another President [would] immediately take place.”⁶ If Congress had not called for a special election to take place immediately, then Congress would merely “continue the government in motion” by appointing an “officer” to exercise the President’s powers and duties until the next scheduled presidential election.⁷

Writing in the *Federalist Papers* supporting the Constitution’s ratification, Alexander Hamilton briefly alluded to the Presidential Succession Clause. Hamilton argued that the office of the vice presidency would not be “superfluous” or “mischievous.”⁸ Rather, in Hamilton’s view, a Vice President could beneficially and “occasionally” serve as “a substitute for the President” and in such circumstances “exercise the authorities and discharge the duties of the President.”⁹

Article II’s Presidential Succession Clause was ratified as part of the original Constitution in 1788. The Clause supplied rules on presidential succession and inability until the Twenty-Fifth Amendment modified these rules in 1967.

Amdt25.2.5 Presidential Succession Laws

Article II’s Presidential Succession Clause, ratified in 1788, empowers Congress to establish the line of succession to the presidency in the event that the President and Vice President are unable to discharge the powers and duties of the presidency.¹ Congress first exercised this power in the Presidential Succession Act of 1792.² The Act provided that the President pro tempore of the Senate would serve as Acting President until a new President was elected or the President’s inability ended.³ If the President pro tempore’s office was vacant, then the Speaker of the House would serve as Acting President.⁴

Congress modified the line of presidential successors after the Vice President in the Presidential Succession Act of 1886 by replacing congressional leaders with the heads of the Cabinet departments in the order of each department’s creation.⁵ Several decades later, in the Presidential Succession Act of 1947, Congress designated a new line of

⁶ *Id.*

⁷ *Id.* at 488. For a discussion of brief and contradictory remarks on succession at other state ratifying conventions, see John D. Feerick, *The Problem of Presidential Inability—Will Congress Ever Solve It?*, 32 *FORDHAM L. REV.* 73, 87–88 (1963).

⁸ *THE FEDERALIST* No. 68 (Alexander Hamilton), https://avalon.law.yale.edu/18th_century/fed68.asp.

⁹ *Id.*

¹ U.S. CONST. art. II, § 1, cl. 6.

² Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240 (repealed 1886).

³ *Id.* Presumably, any successor would have to meet the Constitution’s qualifications for the presidency—that is, the President must be a natural-born citizen, at least 35 years of age, and a resident of the United States for at least fourteen years. See U.S. CONST. art. II, § 1, cl. 5; ArtII.S1.C5.1 Qualifications for the Presidency.

⁴ Act of Mar. 1, 1792, ch. 8, § 9, 1 Stat. 239, 240–41 (repealed 1886). Section 10 of the Act provided for a special election to fill a presidential vacancy before the next scheduled presidential election when both the presidency and vice presidency were vacant (and a statutory successor was serving as Acting President) unless the vacancies occurred late in the presidential term. This section was never used before its repeal.

⁵ Act of Jan. 19, 1886, ch. 4, §§ 1–3, Pub. L. No. 49-4, 24 Stat. 1, 1–2 (Succession Act of 1886) (repealed 1947) (requiring any presidential successor to have been confirmed by the Senate as the Cabinet department head, eligible to assume the office of the presidency, and not under threat of impeachment in the House of Representatives).

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successors composed of (1) the Speaker of the House; (2) President pro tempore of the Senate; and (3) Cabinet secretaries in the order of each executive department's creation.⁶ Despite these legislative efforts⁷—and various amendments to the Constitution that touched upon presidential succession⁸—the nation often grappled with difficult questions about presidential vacancy and inability before the Twenty-Fifth Amendment's ratification.⁹

Amdt25.2.6 Presidential and Vice-Presidential Vacancies Before the
Twenty-Fifth Amendment's Ratification

From President George Washington's 1789 inauguration to the Twenty-Fifth Amendment's 1967 ratification, eight Presidents died while in office.¹ In 1841, President William Henry Harrison became the first President to die in office when he succumbed to illness shortly after his inauguration.² Vice President John Tyler took the presidential oath of office and claimed that he had succeeded to the presidency automatically for the remainder of Harrison's term by operation of Article II, Section 1, Clause 6.³ However, some of Tyler's contemporaries questioned whether Tyler had actually become the President or would merely exercise the President's power and duties as "Acting President" until a special election could fill the vacancy.⁴ After debating the issue, the House

⁶ Presidential Succession Act of 1947, ch. 264, § 1, Pub. L. No. 80-199, 61 Stat. 380 (codified, as amended, at 3 U.S.C. § 19) (requiring an official to resign before succeeding to the presidency; establishing rules for terminating an official's service as Acting President when another eligible individual higher in the line of succession qualifies or becomes able to fulfill the duties of President; and addressing eligibility to succeed to the presidency). The Cabinet secretaries who may be eligible to succeed to the presidency are the Secretary of State, Secretary of the Treasury, Secretary of Defense, Attorney General, Secretary of the Interior, Secretary of Agriculture, Secretary of Commerce, Secretary of Labor, Secretary of Health and Human Services, Secretary of Housing and Urban Development, Secretary of Transportation, Secretary of Energy, Secretary of Education, Secretary of Veterans Affairs, and Secretary of Homeland Security. 3 U.S.C. § 19(d)(1). *See also* Operation of the Twenty-Fifth Amendment Respecting Presidential Succession, 9 Op. O.L.C. 65, 69 (1985) (citing 3 U.S.C. § 19(e) and opining that "acting heads of departments and recess appointees are not Presidential successors" under the Presidential Succession Act).

⁷ The presidential succession laws addressed only the line of presidential successors after the Vice President. They did not address vice presidential succession or presidential inability.

⁸ Prior to the Twenty-Fifth Amendment's ratification, several constitutional amendments had addressed issues of presidential succession that might arise between the holding of a presidential election and the beginning of the new President's term. *See, e.g.*, U.S. CONST. amends. XII, XX. For additional information on succession procedures that apply during the presidential election campaign and transition period, see generally THOMAS H. NEALE, CONG. RSCH. SERV. NO. R44648, *Presidential Elections: Vacancies in Major-Party Candidacies and the Position of President-Elect* (2020), <https://crsreports.congress.gov/product/pdf/R/R44648>; John Rogan, *Reforms for Presidential Candidate Death and Inability: From the Conventions to Inauguration Day*, 90 FORDHAM L. REV. 583 (2021) (addressing pre-inaugural succession and disability scenarios).

⁹ *See* Amdt25.2.6 Presidential and Vice-Presidential Vacancies Before the Twenty-Fifth Amendment's Ratification and Amdt25.2.7 Presidential Inability Before the Twenty-Fifth Amendment's Ratification.

¹ During this time, no President resigned or was removed from office as a result of impeachment proceedings.

² *See* S. REP. NO. 89-66, at 5 (1965); President John Tyler, Address Upon Assuming the Office of President of the United States (Apr. 9, 1841), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/address-upon-assuming-the-office-president-the-united-states>.

³ *See* S. REP. NO. 89-66, at 5 (1965).

⁴ *E.g.*, CONG. GLOBE, 27th Cong., 1st Sess., 4–5 (1841). The original Presidential Succession Clause provided that "[i]n Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, *the Same* shall devolve on the Vice President . . ." U.S. CONST. art. II, § 1, cl. 6 (emphasis added). Debate centered on whether "the Same" referred to the full office of the presidency or merely the President's "powers and duties."

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and Senate enacted a joint resolution addressing Tyler as the President.⁵ Tyler's actions established a historical precedent that subsequent vice presidents would follow for more than a century until the Twenty-Fifth Amendment formally incorporated this succession rule into the Constitution.⁶

After Tyler succeeded to the presidency following Harrison's demise, seven other presidents died in office before the Twenty-Fifth Amendment's ratification:

- 1850: President Zachary Taylor died of illness. Vice President Millard Fillmore, following Tyler's precedent, succeeded to the presidency.⁷
- 1865: Less than a week after the Civil War's end, President Abraham Lincoln was assassinated at Ford's Theatre in Washington, D.C. Vice President Andrew Johnson assumed the presidency.⁸
- 1881: President James Garfield died 80 days after he was wounded by an assassin's bullet. Vice President Chester A. Arthur became President.⁹
- 1901: President William McKinley died eight days after he was shot by an assassin. Vice President Theodore Roosevelt became President.¹⁰
- 1923: President William G. Harding died of a heart attack. Vice President Calvin Coolidge became President.¹¹
- 1945: President Franklin D. Roosevelt died of a cerebral hemorrhage during his fourth term in office. Vice President Harry Truman became President.¹²

⁵ Cong. Globe, 27th Cong., 1st Sess., 4–5 (1841). The joint resolution contained traditional language creating a committee to inform the President that Congress was assembled and able to receive communications from him. The Senate rejected an amendment to the joint resolution that would have addressed Tyler as “the Vice President, on whom, by the death of the late President, the powers and duties of the office of President have devolved.” *Id.* See also *id.* at 3–4 (House's rejection of an amendment offered by Rep. McKeon that would have addressed the President as “Vice-President, now exercising the office of President”).

⁶ See U.S. CONST. amend. XXV, § 1.

⁷ *Millard Fillmore Event Timeline*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/millard-fillmore-event-timeline>.

⁸ See *Assassination of President Abraham Lincoln*, LIBR. OF CONG., <https://www.loc.gov/collections/abraham-lincoln-papers/articles-and-essays/assassination-of-president-abraham-lincoln/>; *Andrew Johnson*, THE WHITE HOUSE, <https://www.whitehouse.gov/about-the-white-house/presidents/andrew-johnson/>.

⁹ *James Garfield Assassination: Topics in Chronicling America*, LIBR. OF CONG., <https://guides.loc.gov/chronicling-america-james-garfield-assassination>. In 1886, after Vice President Thomas Hendricks's death, Congress modified the line of presidential successors after the Vice President by replacing congressional leaders with the heads of the Cabinet departments in the order of each department's creation. Act of Jan. 19, 1886, ch. 4, §§ 1–3, Pub. L. No. 49–4, 24 Stat. 1, 1–2 (Succession Act of 1886) (repealed 1947).

¹⁰ *William McKinley Assassination: Topics in Chronicling America*, LIBR. OF CONG., <https://guides.loc.gov/chronicling-america-william-mckinley-assassination>.

¹¹ See President Calvin Coolidge, Statement on the Death of Warren G. Harding (Aug. 3, 1923), COOLIDGE FOUND., <https://coolidgefoundation.org/resources/statement-on-the-death-of-warren-g-harding/>.

¹² *Franklin D. Roosevelt: Death of the President*, UVA MILLER CTR., <https://millercenter.org/president/fdroosevelt/death-of-the-president>. At President Harry Truman's urging, Congress restored congressional leaders to the front of the line of presidential succession after the Vice President. Presidential Succession Act of 1947, ch. 264, § 1, Pub. L. No. 80–199, 61 Stat. 380 (codified, as amended, at 3 U.S.C. § 19); Harry S. Truman, Special Message to the Congress on the Succession to the Presidency (June 19, 1945), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/special-message-the-congress-the-succession-the-presidency> (ar-

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- 1963: President John F. Kennedy was assassinated while on a campaign trip to Dallas, Texas. Vice President Lyndon B. Johnson became President.¹³

In addition to the eight presidential vacancies that resulted from the incumbent's death, the vice presidency was vacant 16 times for a total of more than 37 years before the Twenty-Fifth Amendment's ratification.¹⁴ These vacancies resulted from the Vice President's death, resignation, or succession to the presidency.¹⁵ Because the Presidential Succession Clause empowered Congress to provide by law only for *simultaneous* presidential and vice presidential vacancies, it was unclear whether Congress could address sole vice presidential vacancies by enacting ordinary legislation.¹⁶

Amdt25.2.7 Presidential Inability Before the Twenty-Fifth Amendment's Ratification

Prior to the Twenty-Fifth Amendment's ratification, several Presidents became incapacitated for more than a few days while leading the nation.¹ These include James Madison, who "suffered from a severe fever in the summer of 1813"; James Garfield, who survived for 80 days after an assassin shot him; Woodrow Wilson, who suffered a stroke and was incapacitated for a significant part of his second term; and Dwight Eisenhower, who "suffered three major illnesses while in office."² During these episodes of presidential inability, the Constitution lacked a clear mechanism by which the Vice President could declare the President disabled.³ Moreover, some commentators argued that if the Vice President assumed the President's powers and duties, then the President could not legally resume them upon recovery.⁴

Significant uncertainty over the Presidential Succession Clause's operation surfaced in 1881 when President James Garfield was shot by an assassin but survived for 80 days before dying.⁵ Although many important national issues required attention during Garfield's inability, Vice President Chester Arthur declined to assume the presidency

going that the President should not have the power to nominate his immediate successor and that "[i]n so far as possible, the office of the President should be filled by an elective officer.").

¹³ November 22, 1963: *Death of the President*, JOHN F. KENNEDY PRES. LIBR. & MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/november-22-1963-death-of-the-president>.

¹⁴ *About the Vice President: Vice Presidents of the United States*, SENATE.GOV, <https://www.senate.gov/about/officers-staff/vice-president/vice-presidents.htm>.

¹⁵ *Id.*

¹⁶ See U.S. CONST. art. II, § 1, cl. 6.

¹ Presidential Succession and Delegation in Case of Disability, 5 Op. O.L.C. 91, 100–03 (1981) (citations omitted) (collecting examples of presidential inability).

² *Id.* Several Presidents have become briefly incapacitated while undergoing medical procedures. See *id.*

³ See S. REP. NO. 89-66, at 5–6 (1965).

⁴ See *id.* The original Presidential Succession Clause provided, in relevant part, that "[i]n Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, the Same shall devolve on the Vice President . . ." U.S. CONST. art. II, § 1, cl. 6 (emphasis added). President John Tyler had established, as a matter of historical precedent, that the full office of the President, rather than only the President's "powers and duties," would devolve upon the Vice President in the event of the President's death. See Amdt25.2.6 Presidential and Vice-Presidential Vacancies Before the Twenty-Fifth Amendment's Ratification. Some Members of Congress and commentators thus believed that the full office of the President might also devolve upon the Vice President in the event of presidential inability. See, e.g., CONG. GLOBE, 27th Cong., 1st Sess., 4–5 (1841).

⁵ *James Garfield Assassination: Topics in Chronicling America*, LIBR. OF CONG., <https://guides.loc.gov/chronicling-america-james-garfield-assassination>.

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before Garfield's death in part because he and a majority of the Cabinet believed that such an action would permanently oust Garfield.⁶ For similar reasons, after President Woodrow Wilson suffered a stroke in 1919, Vice President Thomas Marshall refused to declare Wilson disabled and assume the powers and duties of the presidency.⁷ Instead, important national business went unaddressed.⁸ Wilson's wife, physician, and private secretary reportedly limited officials' access to the President during his illness, which was hidden from the public and lasted for many months of his second term.⁹

Beginning in the 1950s, some presidents developed public, informal protocols for addressing presidential inability. For example, in 1958, citing Article II's Presidential Succession Clause, President Eisenhower and then-Vice President Richard Nixon agreed to procedures for temporarily transferring Eisenhower's presidential powers to Nixon if Eisenhower became disabled as a result of ongoing health issues.¹⁰ These procedures allowed the President to transfer his power voluntarily.¹¹ However, if the President were unable to communicate with the Vice President, then the Vice President could assume the President's powers and duties as Acting President "after such consultation as seem[ed] to him appropriate under the circumstances."¹² In either event, the President could resume his powers and duties at any time when he determined that he was able to do so.¹³ Presidents John F. Kennedy and Lyndon B. Johnson reached similar agreements with their potential successors before the Twenty-Fifth Amendment's ratification.¹⁴

Questions about the legality and workability of such informal agreements prompted significant congressional interest in establishing formal procedures to address presidential inability.¹⁵ President John F. Kennedy's 1963 assassination added urgency to

⁶ S. REP. NO. 88-1382, at 5 (1964); 111 CONG. REC. 3254 (1965) (statement of Sen. Bayh). *See also* Chester A. Arthur, First Annual Message, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/first-annual-message-13> (posing a series of questions about Article II's Presidential Succession Clause).

⁷ *See* 111 CONG. REC. 3250–51, 3254 (1965) (statements of Sen. Bayh) (discussing President Wilson's disability).

⁸ S. REP. NO. 88-1382, at 5 (1964); John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 FORDHAM L. REV. 173, 177 (1965) ("As a result of the absence of presidential leadership by Wilson or a legitimate Acting President, United States participation in the League of Nations was defeated in the Senate, numerous governmental vacancies went unfilled, twenty-eight bills became law by default of any action by the President, foreign diplomats were unable to submit their credentials to the President as required, and, in many other respects, the operation of government was suspended.").

⁹ *See* sources cited *supra* notes 99–100. After recovering, President Wilson dismissed Secretary of State Robert Lansing for encouraging Vice President Marshall to serve as Acting President and for calling Cabinet meetings to address some executive branch business in Wilson's absence. *See* sources cited *supra* notes 99–100.

¹⁰ Agreement Between the President and the Vice President as to Procedures in the Event of Presidential Disability, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/agreement-between-the-president-and-the-vice-president-procedures-the-event-presidential>.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ *See, e.g.*, White House Statement and Text of Agreement Between the President and the Vice President on Procedures in the Event of Presidential Inability (Aug. 10, 1961), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/white-house-statement-and-text-agreement-between-the-president-and-the-vice-president>; Lyndon B. Johnson-John W. McCormack Letter Agreement (Dec. 23, 1963), FORDHAM LAW ARCHIVE OF SCHOLARSHIP & HISTORY, https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1007&context=twentyfifth_amendment_executive_materials.

¹⁵ *See* S. REP. NO. 88-1382, at 5–6, 9 (1964); 110 CONG. REC. 22987 (1964) (statement of Sen. Bayh).

these efforts, helping to motivate the Twenty-Fifth Amendment's proposal and ratification in the 1960s.¹⁶

Amdt25.S1 Presidential Vacancy

Amdt25.S1.1 Proposal and Ratification of the Twenty-Fifth Amendment

Amdt25.S1.1.1 Early Congressional Debates on Presidential Inability

For more than a century before the Twenty-Fifth Amendment's ratification, Members of Congress raised concerns about ambiguities in the Constitution's Presidential Succession Clause.¹ For instance, after President William Henry Harrison's 1841 death, Senator William Allen of Ohio questioned whether Congress should recognize Vice President John Tyler as the President instead of addressing him as the Acting President.² Reciting the Succession Clause, Senator Allen argued that recognizing Tyler as President after Harrison's death would imply that a future President could not reclaim his powers and duties from the Vice President upon recovering from an inability.³ Nonetheless, after debating the issue, the Senate concurred in a joint resolution addressing Tyler as the President.⁴

Congress again debated presidential inability in the 1880s after President James Garfield's assassination and in the 1920s after President Woodrow Wilson suffered a stroke.⁵ Various bills introduced in Congress in the 1920s would have empowered the President's Cabinet, Vice President, or Supreme Court to participate in evaluating presidential disability.⁶

Congressional action on presidential inability acquired new urgency after President Dwight Eisenhower suffered a heart attack in 1955.⁷ Representative Emanuel Celler of New York, chairman of the House Judiciary Committee, and Senator Estes Kefauver of

¹⁶ See sources cited *supra* note 107.

¹ U.S. CONST. art. II, § 1, cl. 6.

² Cong. Globe, 27th Cong., 1st Sess., 4–5 (1841).

³ *Id.* The original Presidential Succession Clause provided, in relevant part, that “[i]n Case of the Removal of the President from Office, or of his Death, Resignation, or Inability to discharge the Powers and Duties of the said Office, *the Same* shall devolve on the Vice President . . .” U.S. CONST. art. II, § 1, cl. 6 (emphasis added). If Congress acquiesced in Tyler's succession to the presidency after the President's death, then the Succession Clause potentially implied that the full presidential office would devolve upon the Vice President in the event of presidential inability.

⁴ Cong. Globe, 27th Cong., 1st Sess., 4–5 (1841). The joint resolution contained traditional language creating a committee to inform the President that Congress was assembled and able to receive communications from him. The Senate rejected an amendment to the joint resolution that would have addressed Tyler as “the Vice President, on whom, by the death of the late President, the powers and duties of the office of President have devolved.” *Id.* See also *id.* at 3–4 (House's rejection of an amendment offered by Rep. McKeon that would have addressed the President as “Vice-President, now exercising the office of President”).

⁵ *E.g.*, 13 CONG. REC. 191–93 (1881); *Defining Article II, Section 1, Clause 5 of the Constitution, Relative to Disability, Removal from Office, Etc., of the President of the United States: Hearings Before the H. Comm. on the Judiciary*, 66th Cong. 3–5 (1920).

⁶ *E.g.*, H.R. 12609, 66th Cong., 2d. Sess. (1920) (Supreme Court); H.J. Res. 297, 66th Cong., 2d. Sess (1920) (Supreme Court when authorized by Congress upon the Cabinet's recommendation).

⁷ Presidential Succession and Delegation in Case of Disability, 5 Op. O.L.C. 91, 100–03 (1981) (citations omitted).

Tennessee, chairman of the Senate Judiciary Committee's Subcommittee on Constitutional Amendments, held hearings in the House and Senate, respectively, on legislation to address presidential inability.⁸ The hearings explored several issues, including: (1) how, if at all, to define presidential inability; (2) who should initiate the transfer of an incapacitated President's powers and duties to an Acting President; (3) who should determine presidential inability and its termination; and (4) whether an amendment to the Constitution on the subject was necessary or desirable.⁹

By early 1958, after President Eisenhower suffered a third illness in office, many Senators had concluded that a constitutional amendment was necessary.¹⁰ However, no proposal was considered on the House or Senate floors.

Amdt25.S1.1.2 Presidential Inability and the 88th Congress: Reaction to the Kennedy Assassination

President John F. Kennedy's assassination in November 1963 prompted renewed congressional interest in a constitutional amendment addressing presidential succession and inability.¹ Lyndon B. Johnson's succession to the presidency, which left the vice presidency vacant for fourteen months,² also highlighted the Constitution's lack of a mechanism for filling vice presidential vacancies.³ At the time, Johnson's potential successors under the Presidential Succession Act, House Speaker John McCormack and Senate President pro tempore Carl Hayden, were 71 and 86 years of age, respectively.⁴

In the 88th Congress, Senator Birch Bayh of Indiana became Chair of the Senate Judiciary Committee's Subcommittee on Constitutional Amendments after Senator Estes Kefauver's death.⁵ On December 12, 1963, Senator Bayh introduced S.J. Res 139, a joint resolution proposing a constitutional amendment addressing presidential vacancy, vice presidential vacancy, and presidential inability.⁶ In statements on the Senate

⁸ E.g., *The Inability of the President to Discharge the Powers and Duties of His Office: Hearings Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 85th Cong. (1958); *Problem of Presidential Inability: Hearings Before the Special Subcomm. on Study of Presidential Inability of the H. Comm. on the Judiciary*, 85th Cong. (1957); *Problem of Presidential Inability: Hearings Before the Special Subcomm. to Study Presidential Inability of the H. Comm. on the Judiciary*, 84th Cong. (1956).

⁹ See sources cited *supra* note 116.

¹⁰ See *The Inability of the President to Discharge the Powers and Duties of His Office: Hearing Before the Subcomm. on Constitutional Amendments of the S. Judiciary Comm.*, 85th Cong. 1 (1958). See also S.J. Res. 40, 86th Cong. (1958) (proposing a constitutional amendment addressing presidential inability).

¹ E.g., S. REP. NO. 88-1382, at 9 (1964).

² *Id.* Hubert Humphrey's election as vice president filled this vacancy in January 1965.

³ See *id.* Enacted under the authority of Article II's Presidential Succession Clause, the Presidential Succession Act of 1947 addresses the line of presidential succession in the event of *dual* vacancies or incapacities in the presidency and vice presidency. 3 U.S.C. § 19(a)(1).

⁴ Ryan T. Harding, *Preventing Presidential Disability Within the Existing Framework of the Twenty-Fifth Amendment*, 40 U. ARK. LITTLE ROCK L. REV. 1, 9 (2017).

⁵ John D. Feerick, *The Twenty-Fifth Amendment—In the Words of Birch Bayh, Its Principal Author*, 89 FORDHAM L. REV. 31, 31 (2020).

⁶ 109 CONG. REC. 24420 (1963) (statement of Sen. Bayh) ("The accelerated pace of international affairs, plus the overwhelming problems of modern military security, make it almost imperative that we change our system to provide for not only a President but a Vice President at all times."). In January 1963, Senators Estes Kefauver and Kenneth Keating, chair and ranking minority member of the Senate Judiciary Committee's Subcommittee on Constitutional Amendments, had sponsored a proposed constitutional amendment that would have incorporated the Tyler precedent on presidential succession into the Constitution, distinguished presidential

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floor, Bayh emphasized the importance of ensuring that the nation would always possess a President “capable of making rational decisions and rational determinations” in an age of nuclear weapons.⁷ S.J. Res. 139 was referred to the Senate Judiciary Committee.

In August 1964, the Senate Judiciary Committee favorably reported a revised version of the joint resolution.⁸ According to the committee’s report, the draft amendment was intended to: (1) separate constitutional rules on presidential succession, which involves a permanent vacancy, from rules on inability, which may be temporary; (2) specify who should determine presidential inability so that the President’s powers and duties could be transferred promptly to the Vice President; (3) clarify that an incapacitated President may “resume the functions of his office upon recovery” if he had self-certified his inability; (4) provide that the Vice President serves only as Acting President during periods of presidential inability; and (5) provide rules for vice presidential succession.⁹ The Senate approved the joint resolution unanimously on September 29, 1964.¹⁰ However, the 88th Congress adjourned *sine die*—without a date to reconvene—without the House taking action on the proposed amendment.

Amdt25.S1.1.3 Presidential Inability and the 89th Congress: Committee Action and Initial Passage

On January 4, 1965, one day after the 89th Congress convened, President Lyndon B. Johnson referenced presidential succession and inability in his State of the Union Speech.¹ Johnson noted that “[e]ven the best of government is subject to the worst of hazards.”² He promised to “propose laws to insure the necessary continuity of leadership should the President become disabled or die.”³ On January 6, Senator Birch Bayh of Indiana reintroduced his presidential succession and inability amendment from the 88th Congress as S.J. Res. 1, and it was referred to the Senate Judiciary Committee.⁴ Representative Emanuel Celler, Chairman of the House Judiciary Committee, introduced identical legislation in the House as H.J. Res. 1.⁵

disability from vacancy, and authorized Congress to provide by law a method for ascertaining the commencement and termination of presidential inability. S.J. Res. 35, 88th Congress, 1st Sess. (1963). The bill was not considered on the Senate floor.

⁷ 110 CONG. REC. 22990 (statement of Sen. Bayh). Senator Bayh’s resolution drew in part upon earlier proposals and protocols developed by the Eisenhower Administration on the issue of presidential inability. See Herbert Brownell Jr., *Presidential Disability: The Need for a Constitutional Amendment*, 68 YALE L.J. 189, 196–97, 201–03 (1958).

⁸ S. REP. NO. 88-1382, at 1 (1964).

⁹ *Id.* at 4, 6, 11, 13.

¹⁰ 110 CONG. REC. 23061 (1964) (recording a roll call vote of 65 to 0 in favor of the joint resolution one day after the Senate had unanimously approved the resolution by voice vote). See also *id.* at 23002 (voice vote).

¹ Annual Message to the Congress on the State of the Union, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-26>.

² *Id.*

³ *Id.*

⁴ 111 CONG. REC. 290 (1965).

⁵ *Id.* at 89.

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On January 28, President Johnson wrote a special message to Congress on presidential inability.⁶ Invoking national security concerns, Johnson called for Congress to propose an amendment to the Constitution providing for “orderly continuity” in the presidency to address “long-recognized defects.”⁷ In Johnson’s view, these defects included gaps in the Constitution on the issues of presidential inability and vice-presidential succession.⁸

The next month, the Senate Judiciary Committee reported S.J. Res. 1 favorably with amendments.⁹ The revised resolution proposed an amendment to the Constitution on presidential vacancy, vice presidential vacancy, and presidential inability.¹⁰ According to the committee’s report, one of the amendment’s key purposes was to encourage the President to relinquish his powers and duties voluntarily in the event of inability by assuring that he could resume his office upon recovery in such circumstances.¹¹ The committee wrote that a constitutional amendment was necessary because of uncertainty over whether Congress could achieve the committee’s goals by legislation and a need to ensure presidential successors’ legal and political legitimacy.¹²

The House Judiciary Committee favorably reported H.J. Res. 1 with amendments that designated specific congressional officers to receive presidential inability determinations and specifically allowed the President to resume office upon recovery from a self-declared inability without challenge.¹³ The committee also clarified that only certain Cabinet-level officers should participate in presidential inability determinations unless Congress provided by law for a different body to exercise that function jointly with the Vice President.¹⁴ The committee specified a ten-day deadline for Congress to assemble and decide disputes between the President and other relevant officials on the issue of presidential inability.¹⁵

⁶ Special Message to the Congress on Presidential Disability and Related Matters, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/special-message-the-congress-presidential-disability-and-related-matters>.

⁷ *Id.*

⁸ *Id.* Johnson also advocated for electoral college reform and measures to address the death or inability of a President- or Vice President-elect between Election Day and the President’s inauguration. *Id.*

⁹ S. REP. NO. 89-66, at 1–2 (1965). The Judiciary Committee’s amendments to the joint resolution required public notice of presidential inability determinations, even when Congress was not in session, by transmission to congressional presiding officers. *Id.* at 2. The amendments also replaced the phrase “heads of the executive departments” with “principal officers of the executive departments” in Section 4 in an effort to ensure “that only those members of the President’s official Cabinet were to participate in any decision of disability.” *Id.*

¹⁰ *Id.* at 1–2.

¹¹ S. REP. NO. 89-66, at 3 (1965).

¹² *Id.* at 11.

¹³ H. REP. NO. 89-203, at 1–3 (1965).

¹⁴ *Id.* at 3 (“The intent of the committee is that the Presidential appointees who direct the 10 executive departments named in 5 U.S.C. 1 [now § 101], or any executive department established in the future, generally considered to comprise the President’s Cabinet, would participate, with the Vice President, in determining inability. In case of the death, resignation, absence, or sickness of the head of any executive department, the acting head of the department would be authorized to participate in a presidential inability determination.”).

¹⁵ *See id.*; 111 CONG. REC. 7941 (1965) (statement of Rep. Poff); *id.* at 7956 (statement of Rep. Randall) (arguing that the deadline for Congress to decide presidential inability would help to prevent “an uncooperative and hostile Congress [from prolonging] inability proceedings indefinitely and through inaction [keep] an otherwise fit and healthy President from resuming office”).

On February 19, 1965, the Senate unanimously approved the revised S.J. Res. 1.¹⁶ The House approved the revised H.J. Res. 1 as a substitute for the Senate joint resolution on April 13, 1965 by a vote of 368 to 29.¹⁷

Amdt25.S1.1.4 Presidential Inability and the 89th Congress: Floor Debates

House and Senate floor debates on the joint resolutions proposing the Twenty-Fifth Amendment centered on the language that would become Section 4, which addresses the involuntary transfer of the President's powers and duties to the Vice President during episodes of presidential inability. By contrast, Sections 1, 2, and 3 were not as controversial. Section 1 merely codifies the Tyler Precedent,¹ providing that if the President dies, resigns, or is removed from office as a result of impeachment proceedings, then the Vice President "shall become President."² Section 2, which establishes the process for filling a vice-presidential vacancy,³ was intended to ensure that the nation would "always possess a Vice President" who would be "compatible with the President," could serve as President if called upon, and would likely continue the President's policies.⁴ To promote accountability to the electorate, the Twenty-Fifth Amendment's framers required that Congress confirm any vice presidential nominee before the individual could take office.⁵

Section 3 allows an incapacitated President—or a President that anticipates inability—to relinquish his constitutional responsibilities voluntarily to the Vice President, who serves as Acting President for the duration of the President's inability.⁶ During House floor debates, Representative Emanuel Celler of New York observed that Section 3 "removes the reluctance of both the President and Vice President to move when necessity so dictates. The President is assured of his return to office. The Vice President, as Acting President, will not face the charge that he is usurping the office of President."⁷

¹⁶ 111 CONG. REC. 3286 (1965).

¹⁷ 111 CONG. REC. 7968–69 (1965).

¹ Upon President William Henry Harrison's 1841 death, Vice President John Tyler established the historical precedent that the Vice President succeeds to the presidency automatically for the remainder of the President's term. For more on the Tyler Precedent and historical succession practices that informed Section 1 of the Twenty-Fifth Amendment, see Amdt25.2.6 Presidential and Vice-Presidential Vacancies Before the Twenty-Fifth Amendment's Ratification.

² See U.S. CONST. amend. XXV, § 1 (text as ratified).

³ See U.S. CONST. amend. XXV, § 2 (text as ratified).

⁴ See S. REP. NO. 89-66, at 13 (1965). Section 2 recognized that the vice presidency had become an important office during the twentieth century that should not remain vacant. See, e.g., 111 CONG. REC. 7949 (1965) (statement of Rep. Cohelan); 110 CONG. REC. 22987 (1964) (statement of Sen. Bayh).

⁵ See S. REP. NO. 89-66, at 14–15 (1965); 110 CONG. REC. 22994 (1965) (statement of Sen. Bible). The House participates with the Senate in considering the nomination of a new Vice President because the vice presidency is an elected office rather than an appointed one. *Id.*

The Senate rejected an amendment that would have required Congress to vote on a President's nominee for a vice presidential vacancy "immediately." 111 CONG. REC. 3281–82 (1965) (rejecting substitute amendment of Sen. Bass). The Senate also rejected an amendment that would have reconvened the Electoral College to choose a Vice President in the event of a vacancy. *Id.* at 3272–74 (rejecting amendment of Sen. Thurmond).

⁶ U.S. CONST. amend. XXV, § 3 (text as ratified); 111 CONG. REC. 7941 (1965) (statement of Rep. Poff) (contending that Section 3 encompasses situations "in which the President recognizes his inability—or the imminence of his inability—and wishes voluntarily to vacate his office for a temporary period").

⁷ 111 CONG. REC. 7938 (statement of Rep. Celler).

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Section 4, which prompted the most congressional debate, allows the Vice President and a majority of the Cabinet—or, alternatively, the Vice President and a majority of another body that Congress designates by law—to initiate the transfer of an incapacitated President’s powers and duties to the Vice President.⁸ Section 4 also provides mechanisms for (1) the President to declare that he has recovered; (2) the Vice President and a majority of the Cabinet, or, alternatively, the Vice President and a majority of a congressionally established body, to challenge the President’s declaration; and (3) Congress to decide disputes between the President and relevant officials over the issue.⁹

One significant debate over Section 4 was whether the Constitution should contain detailed mechanisms on presidential inability instead of authorizing Congress to address pertinent issues through legislation.¹⁰ Some Members of Congress argued that authorizing Congress to address presidential inability by legislation would preserve flexibility for future policymakers,¹¹ while opponents of this approach argued that it would grant Congress too much power over the presidency.¹² Some Members of Congress also observed that Congress might fail to resolve uncertainty over presidential inability and succession by declining to adopt the necessary legislation.¹³ Congress ultimately decided to retain Section 4’s detailed mechanisms for addressing presidential inability.¹⁴

The Twenty-Fifth Amendment’s framers also addressed concerns that the Vice President, Cabinet, or Congress would abuse Section 4’s inability mechanisms for political purposes, thereby displacing an elected President and undermining the government’s stability.¹⁵ To address such concerns, the Amendment’s framers included various “checks and balances” and accountability mechanisms intended to preserve the “institutional integrity” of the executive branch and presidency.¹⁶ For example, the framers (1) required both the Vice President and executive branch officials close to the President—all of whom could monitor the President’s condition and would presumably be loyal to him—to initiate presidential inability determinations unless Congress established a different body to act with the Vice President;¹⁷ (2) required Congress to weigh in on presidential inability, within 21 days of assembling, in the event of a dispute between the President and relevant officials; (3) required a two-thirds majority vote in both

⁸ U.S. CONST. amend. XXV, § 4 (text as ratified). Consistent with Supreme Court dicta and the Amendment’s legislative history, this essay uses the term “Cabinet” to refer to the “principal officers of the executive departments” designated in 5 U.S.C. § 101.

⁹ U.S. CONST. amend. XXV, § 4 (text as ratified).

¹⁰ *E.g.*, S. REP. NO. 89-66, at 17–18 (1965) (statement of Sen. Dirksen).

¹¹ *See id.*; 111 CONG. REC. 3257, 3272 (1965) (rejecting Dirksen amendment).

¹² 111 CONG. REC. 3269 (1965) (statement of Sen. Ervin); *id.* at 7940 (statement of Rep. Poff). *See also* John D. Feerick, *The Proposed Twenty-Fifth Amendment to the Constitution*, 34 FORDHAM L. REV. 173, 188 (1965) (citing congressional debates).

¹³ *See, e.g.*, 111 CONG. REC. 3271 (1965) (statements of Sens. Bayh and Saltonstall). At least one Representative argued that Congress might change rules on presidential inability frequently, adding to uncertainty and instability in the law. *See id.* at 7940 (statement of Rep. Poff).

¹⁴ *See* U.S. CONST. amend. XXV, § 4 (text as ratified).

¹⁵ H.R. REP. NO. 89-203, at 19–20 (1965) (statement of Rep. Hutchinson). For further discussion of such concerns, see 111 CONG. REC. 7958 (1965) (statement of Rep. White).

¹⁶ Joel K. Goldstein, *Taking From the Twenty-Fifth Amendment: Lessons in Ensuring Presidential Continuity*, 79 FORDHAM L. REV. 959, 987–93 (2010) (explaining how the Twenty-Fifth Amendment embodies the principles of “separation-of-powers,” “checks and balances,” “democratic pedigree,” and “accountable decisionmaking,” among others).

¹⁷ *See* H.R. REP. NO. 89-203, at 13 (1965); 111 CONG. REC. 7941 (1965) (statement of Rep. Poff).

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chambers of Congress to sustain a finding of presidential inability over the President's objection;¹⁸ and (4) clarified that the Vice President acts as President until the President declares that he has recovered.¹⁹ Nonetheless, the Twenty-Fifth Amendment's framers observed that the Amendment's successful operation would depend on the good faith actions of the officials charged with implementing it.²⁰

Congressional debates on Section 4 also focused on whether Congress should create a "disability review body" to replace the Cabinet's role in evaluating presidential inability in conjunction with the Vice President.²¹ Such a panel, which could be of limited duration,²² would displace the Cabinet's default role in making that determination.²³ At least some of the Twenty-Fifth amendment's framers wanted to give Congress the flexibility to provide for another group of officials—which might include Cabinet members—to participate with the Vice President in determining presidential inability if experience had shown this to be "desirable."²⁴ For example, some framers believed that a disability review body might prove useful if the President fired (or threatened to fire) Cabinet secretaries who voted to transfer his powers to the Vice President under Section 4.²⁵

Some congressional debates also explored whether the Twenty-Fifth Amendment should define "presidential inability." Legislative history materials suggest that the Amendment's framers intentionally left the terms "inability" and "unable" ambiguous so that future decisionmakers would retain flexibility to address unforeseen contingencies that prevent the President from fulfilling his constitutional responsibilities.²⁶ The Amendment's legislative history suggests that physical or mental inability, whether temporary

¹⁸ The Twenty-Fifth Amendment's framers required a two-thirds vote of both Houses of Congress to prevent the President from resuming his powers and duties so that it would be more difficult to remove a President for inability than it would to impeach and remove him from office for misconduct. H.R. REP. NO. 89-203, at 14 (1965); 111 CONG. REC. 7938 (1965) (statement of Rep. Celler) (observing that the procedures of Sections 3 and 4 were intended to favor the President because he is the "elected representative of the people"); *id.* at 7943 (statement of Rep. McCulloch) ("The burden, it will be seen, is placed upon the Vice President and the Cabinet to prove the continuance of the disability and not on the President who has the primary claim to the office. The Congress is designated as the ultimate arbiter because it is believed that, as the elected representative of the people, they share the greatest trust of the people.").

¹⁹ H.R. REP. NO. 89-203, at 13–14 (1965).

²⁰ *Id.* at 13.

²¹ For more on congressional debates over Section 4's intended operation, see the footnotes accompanying the discussion of that section in Amdt25.1 Overview of Twenty-Fifth Amendment, Presidential Vacancy and Disability.

²² According to at least one of the Twenty-Fifth Amendment's framers, Congress would possess significant flexibility to determine the disability review body's duration, rules of procedure, and other characteristics. 111 CONG. REC. 15386 (1965) (statement of Sen. Javits).

²³ U.S. CONST. amend. XXV, § 4 (stating that "a majority" of principal officers or "such other body" as Congress creates by law may trigger Section 4 along with the Vice President by determining that the President is disabled); *see also* 111 CONG. REC. 15382–83 (1965) (statement of Sen. Bayh) (attempting to assuage concerns that the Amendment would allow the Vice President to choose between the Cabinet and an "other body" when seeking to declare presidential inability). Bayh stated that the "other body" would replace the Cabinet for purposes of determining presidential inability. *Id.*

²⁴ 111 CONG. REC. 7941 (1965) (statement of Rep. Poff); *see also id.* at 7942 (statement of Rep. McCulloch) *id.* at 3257, 15380 (statements of Sen. Bayh); *id.* at 15590 (statement of Sen. Ervin).

²⁵ *See* 111 CONG. REC. 15382 (1965) (statement of Sen. Robert F. Kennedy).

²⁶ *E.g.*, 111 CONG. REC. 7941 (1965) (statement of Rep. Poff) ("It was decided that it would be unwise to attempt such a definition within the framework of the Constitution. To do so would give the definition adopted a rigidity which, in application, might sometimes be unrealistic.").

or permanent, could qualify as an “inability” under either section.²⁷ Congress has never created a disability review body or enacted a specific definition of presidential inability.²⁸

Amdt25.S1.1.5 Final Congressional Approval and State Ratification of the Twenty-Fifth Amendment

On February 19, 1965, the Senate unanimously approved the revised S. J. Res. 1, which proposed an amendment to the Constitution on presidential vacancy, vice presidential vacancy, and presidential inability.¹ The House approved the revised H.J. Res. 1 as a substitute for the Senate joint resolution on April 13, 1965 by a vote of 368 to 29.² A Conference Committee was convened to reconcile differences in the House and Senate versions of the joint resolution.³ As compared to the House resolution, the Senate version featured a longer, seven-day time frame for the Vice President and a majority of the Cabinet (or other body) to challenge a President’s assertion that he had recovered from an inability under Section 4.⁴ The Senate version also lacked the House version’s specific deadlines for Congress to assemble and resolve disputes between the President and the officials challenging the President’s recovery declaration.⁵

As a compromise, the conferees recommended adopting (1) a four-day deadline for the Vice President (as Acting President) and Cabinet (or other body) to challenge a President’s recovery declaration under Section 4; (2) a 48-hour deadline for Congress to assemble (if not in session) after the relevant officials challenge the President’s recovery declaration; and (3) a 21-day deadline for Congress to decide the issue of presidential inability once it has convened, after which the President would automatically resume the powers and duties of his office in the absence of a two-thirds vote in each chamber

²⁷ *E.g., Presidential Inability and Vacancies in the Office of Vice President: Hearing Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 89th Cong. 20 (1965) (statement of Sen. Bayh) (“[T]he intention of this legislation is to deal with any type of inability, whether it is from traveling from one nation to another, a breakdown of communications, capture by the enemy or anything that is imaginable. The inability to perform the powers and duties of the office for any reason is inability under the terms that we are discussing.”); 111 CONG. REC. 3257 (1965) (statement of Sen. Bayh); *id.* at 3278 (statement of Sen. Ervin); *id.* at 3282 (statement of Sen. Bayh) (stating that Section 4 addresses circumstances in which the President is “[e]ither unable to make or communicate his decisions as to his own competency to execute the powers and duties of his office.”); *id.* at 7941 (statement of Rep. Poff); *id.* at 15381 (statements of Sen. Bayh and Sen. Robert F. Kennedy) (suggesting that Section 4 inability meant “total disability to perform the powers and duties of [the President’s] office” or, perhaps, “physical or mental inability to make or communicate his decision regarding his capacity and physical or mental inability to exercise the powers and duties of his office”); *id.* (statement of Sen. Bayh) (suggesting even a presidential inability of short duration could become dangerous in the event of a national crisis).

²⁸ For a discussion of legislation that would create a disability review body, see THOMAS H. NEALE, CONG. RSCH. SERV. NO. R45394, PRESIDENTIAL DISABILITY UNDER THE TWENTY-FIFTH AMENDMENT: CONSTITUTIONAL PROVISIONS AND PERSPECTIVES FOR CONGRESS (2018), <https://crsreports.congress.gov/product/pdf/R/R45394>.

¹ 111 CONG. REC. 3286 (1965).

² *Id.* at 7968–69.

³ See H. REP. NO. 89-564, at 1 (1965) (Conf. Rep.).

⁴ See 111 CONG. REC. 15378 (statement of Sen. Bayh). Consistent with Supreme Court dicta and the AMENDMENT’s legislative history, this essay uses the term “Cabinet” to refer to the “principal officers of the executive departments” designated in 5 U.S.C. § 101.

⁵ 111 CONG. REC. 15379 (statement of Sen. Bayh).

declaring him unable to serve.⁶ The House agreed to the Conference Report on June 30, 1965 by voice vote.⁷ The Senate concurred on July 6, 1965 by a vote of 68 to 5.⁸ The amendment was then submitted to the states for potential ratification.

Just over eighteen months later, on February 23, 1967, the Administrator of General Services certified that the requisite three-fourths of the states had ratified the Twenty-Fifth Amendment on February 10.⁹ At a White House ceremony, President Lyndon B. Johnson remarked that “in this crisis-ridden era there is no margin for delay, no possible justification for ever permitting a vacuum in our national leadership.”¹⁰ He stated that the Twenty-Fifth Amendment had clarified “the crucial clause that provides for succession to the Presidency and for filling a Vice Presidential vacancy.”¹¹

Amdt25.S2 Vice President Vacancy

Amdt25.S2.1 Implementation of the Twenty-Fifth Amendment

Since the Twenty-Fifth Amendment’s ratification in 1967, each of its first three sections has been invoked at least once. However, Section 4, which allows the Vice President and a majority of either the Cabinet or other congressionally established body to initiate the transfer of the President’s powers and duties to the Vice President in the event of presidential inability, has never been used.¹

Sections 1 and 2 of the Twenty-Fifth Amendment were invoked during the 1970s as a result of various congressional and criminal investigations into President Richard Nixon’s White House. In 1973, President Nixon invoked Section 2 to fill a vacancy arising from Vice President Spiro Agnew’s resignation during a bribery and corruption investigation.² After congressional hearings on Nixon’s nominee, House Republican

⁶ H. REP. NO. 89-564, at 3–4 (1965) (Conf. Rep.). The conferees also decided that presidential inability declarations would be sent to the Speaker of the House and the President pro tempore of the Senate. *Id.* at 3; 111 CONG. REC. 15378 (1965) (statement of Sen. Bayh). The conferees adopted the House language clarifying that a President could resume his powers and duties at any time after a self-certified Section 3 disability by transmitting proper notice. *See* H. REP. NO. 89-564, at 3 (1965) (Conf. Rep.); 111 CONG. REC. 15214 (1965) (statement of Rep. Poff).

⁷ 111 CONG. REC. 15216 (1965).

⁸ *Id.* at 15596.

⁹ Certification of Amendment to Constitution of the United States Relating to Succession to the Presidency and Vice Presidency and to Cases Where the President Is Unable to Discharge the Powers and Duties of His Office, 81 Stat. 983, 983–84 (1967); Intro.6.6 Post-War Amendments (Twenty-Third Through Twenty-Seventh Amendments) (showing that three-fourths of the states had ratified the Twenty-Fifth Amendment as of February 10, 1967). At the time of the Twenty-Fifth Amendment’s ratification, federal law authorized the Administrator of General Services to certify that the states had ratified an amendment to the Constitution. *See* Act of Oct. 31, 1951, ch. 655, § 2(b), 65 Stat. 710, 710. In 1985, the National Archivist assumed this role. *See* Pub. L. No. 98-497, tit. I, §§ 107(d), 301, 98 Stat. 2285, 2291 (1984) (codified at 1 U.S.C. § 106(b)).

¹⁰ President Lyndon B. Johnson, Remarks at Ceremony Marking the Ratification of the Presidential Inability (25th) Amendment to the Constitution (Feb. 23, 1967), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/remarks-ceremony-marking-the-ratification-the-presidential-inability-25th-amendment-the>.

¹¹ *Id.*

¹ Consistent with Supreme Court dicta and the Amendment’s legislative history, this essay uses the term “Cabinet” to refer to the “principal officers of the executive departments” designated in 5 U.S.C. § 101.

² *See* Remarks of the President Announcing His Nominee for Vice President (Oct. 12, 1973), FORD LIBR. MUSEUM, https://www.fordlibrarymuseum.gov/library/document/25thamend/19731012_nixonnomannoun.pdf; Spiro Agnew, FBI RECORDS: THE VAULT, <https://vault.fbi.gov/Spiro%20Agnew> (discussing the Federal Bureau of Investigation’s corruption investigation into Agnew). Agnew resigned as Vice President and pleaded no contest to federal tax evasion charges. He was not charged with bribery. *See id.*

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Leader and Representative Gerald R. Ford of Michigan, Congress confirmed Ford to serve as Vice President by a majority vote in each chamber.³ Ford was sworn into office in front of a joint session of Congress by Supreme Court Chief Justice Warren Burger almost two months after Agnew's resignation.⁴

A year later, Sections 1 and 2 were invoked as a result of President Nixon's resignation under threat of impeachment for his involvement in the Watergate scandal. The Watergate scandal involved the June 1972 arrests of five men for breaking into the Democratic National Committee headquarters at the Watergate Hotel and Office Building.⁵ The arrested men were employed by the Committee to Re-Elect the President, a campaign organization formed to support President Nixon's reelection.⁶ Congressional and criminal investigations implicated President Nixon and other White House officials in the cover-up of the break-in and attempts to harass political adversaries.⁷ Following hearings and further investigations, the House Judiciary Committee approved three articles of impeachment charging Nixon with obstruction of justice, abuse of power, and refusal to cooperate with the committee's investigation.⁸

President Nixon resigned on August 9, 1974, before the House held a floor vote on the articles of impeachment, and Vice President Ford immediately became President by operation of Section 1 of the Twenty-Fifth Amendment.⁹ President Ford nominated former New York Governor Nelson A. Rockefeller to become Vice President under Section 2.¹⁰ Rockefeller took office on December 19, 1974, after a nearly four-months-long confirmation process that culminated in a vote of approval by each chamber of Congress.¹¹ As a result, Gerald Ford and Nelson Rockefeller, two men who had not faced the voters in a national election, became President and Vice President, respectively.

³ 119 CONG. REC. 38225 (1973) (Senate confirmation by a vote of 92 to 3); *id.* at 39899 (House confirmation by a vote of 387 to 35). For additional background on the confirmation process and hearings held by the Senate Committee on Rules and Administration and the House Judiciary Committee, see THOMAS H. NEALE, CONG. RSCH. SERV. NO. 98-730, VICE PRESIDENTIAL VACANCIES: CONGRESSIONAL PROCEDURES IN THE FORD AND ROCKEFELLER NOMINATIONS (1998), https://www.everycrsreport.com/files/19980821_98-730_add110a4a6216e0d5f733c990e773d105dd1871b.pdf.

⁴ 119 CONG. REC. 39925–26 (1973).

⁵ For more information on the Watergate scandal, see ArtII.S4.4.7 President Richard Nixon and Impeachable Offenses.

⁶ *See id.*

⁷ *See id.*

⁸ *See id.*; H. COMM. ON THE JUDICIARY, IMPEACHMENT OF RICHARD M. NIXON, PRESIDENT OF THE UNITED STATES, H.R. REP. NO. 93-1305, at 1–11 (1974). For more on the impeachment process, see ArtI.S2.C5.1 Overview of Impeachment; ArtII.S4.1 Overview of Impeachment Clause.

⁹ Letter from President Richard Nixon to Secretary of State Henry Kissinger Resigning the Office of President of the United States (Aug. 9, 1974), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/letter-resigning-the-office-president-the-united-states>.

¹⁰ *See* Remarks of the President Upon His Announcing Nelson Rockefeller as Vice President-Designate (Aug. 20, 1974), FORD LIBR. MUSEUM, <https://www.fordlibrarymuseum.gov/library/document/0248/whpr19740820-020.pdf>.

¹¹ 120 CONG. REC. 38936 (1974) (Senate confirmation by a vote of 90 to 7); *id.* at 41516–17 (House confirmation by a vote of 287 to 128). The 1974 midterm elections and the complexity of Rockefeller's personal finances may have slowed congressional action on the nomination. For additional background on the confirmation process, see THOMAS H. NEALE, CONG. RSCH. SERV. NO. 98-730, VICE PRESIDENTIAL VACANCIES: CONGRESSIONAL PROCEDURES IN THE FORD AND ROCKEFELLER NOMINATIONS (1998), https://www.everycrsreport.com/files/19980821_98-730_add110a4a6216e0d5f733c990e773d105dd1871b.pdf.

Finally, since the Twenty-Fifth Amendment's ratification, a few presidents have invoked Section 3 to transfer their powers and duties to the Vice President temporarily while they were sedated for medical procedures.¹²

¹² See, e.g., Letter from President Joseph R. Biden, Jr. to President Pro Tempore of the Senate on the Temporary Transfer of the Powers and Duties of President of the United States (Nov. 19, 2021), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/letter-president-pro-tempore-the-senate-the-temporary-transfer-the-powers-and-duties> (routine colonoscopy); Letter from President George W. Bush to Congressional Leaders on Temporary Transfer of the Powers and Duties of President of the United States (June 29, 2002), AM. PRESIDENCY PROJECT, www.presidency.ucsb.edu/node/213575 (same). President Ronald Reagan implicitly invoked Section 3 of the Twenty-Fifth Amendment to transfer his powers and duties to Vice President George H. W. Bush when undergoing colon cancer surgery in 1985. See Letter from President Ronald Reagan to the President Pro Tempore of the Senate and the Speaker of the House on the Discharge of the President's Powers and Duties During His Surgery (July 13, 1985), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/letter-the-president-pro-tempore-the-senate-and-the-speaker-the-house-the-discharge-the> (stating that Reagan was “mindful of the provisions of Section 3 of the 25th Amendment to the Constitution and of the uncertainties of its application to such brief and temporary periods of incapacity”). For a list of letters in which presidents transferred or resumed their powers and duties under Section 3, see *List of Vice-Presidents Who Served as Acting President Under the 25th Amendment*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/list-vice-presidents-who-served-acting-president-under-the-25th-amendment>.

TWENTY-SIXTH AMENDMENT

REDUCTION OF VOTING AGE

Amdt26.1 Overview of the Twenty-Sixth Amendment, Reduction of Voting Age

The Twenty-Sixth Amendment prohibits the federal and state governments from denying or abridging, on the basis of age, the voting rights of U.S. citizens who are at least 18 years old.¹ The Amendment effectively lowered the minimum voting age to 18² for all federal, state, and local elections.³ Section 2 of the Amendment grants Congress the power to enforce the prohibitions in Section 1 by enacting “appropriate legislation.”⁴ The Supreme Court has not decided any cases definitively interpreting the Twenty-Sixth Amendment,⁵ but lower courts have occasionally confronted questions about the Amendment’s scope since its 1971 ratification.⁶

The Constitution originally deferred to each state’s determination of who could vote in federal and state elections and did not prohibit the states from restricting citizens’ eligibility to vote on the basis of age.⁷ Many Founding-era state constitutions, laws, and customs limited voting privileges to White men who were at least 21 years of age and owned a certain amount of property, among other qualifications.⁸ In the nation’s early years—and even well into the twentieth century—many Americans believed that a minimum voting age of 21 was necessary to ensure that voters would possess sufficient independence and “sound judgment.”⁹ Although the Fourteenth Amendment, ratified in 1868 after the Civil War, appeared to recognize that all of the states had adopted 21 as

¹ U.S. CONST. amend. XXVI, § 1.

² Prior to the Twenty-Sixth Amendment’s ratification, Congress successfully lowered the minimum voting age to 18 in federal elections—but not state elections—by enacting the Voting Rights Act Amendments of 1970. *See* Amdt26.2.4 The Vietnam War, Voting Rights Act Amendments of 1970, and *Oregon v. Mitchell*. Some states maintained minimum voting ages below 21 before the Amendment became part of the Constitution. *See* Amdt26.2.6 Proposal of the Twenty-Sixth Amendment: Congressional Floor Debates and Final Passage.

³ *See* U.S. CONST. amend. XXVI, § 1. The Twenty-Sixth Amendment’s framers appear to have understood that the Amendment would lower the minimum voting age to 18—and prohibit age-based discrimination against adult citizen voters—in primary and general elections. *See, e.g.*, H.R. REP. NO. 92-37, at 8 (1971). At least some of the Amendment’s framers contemplated that a state might lower its minimum voting age below 18 by exercising its power to set voter qualifications. *See generally, e.g.*, U.S. CONST. art. I, § 2, cl. 1; 117 CONG. REC. 7535 (1971) (statement of Rep. Poff).

⁴ U.S. CONST. amend. XXVI, § 2.

⁵ In *Symm v. United States*, the Supreme Court summarily affirmed the judgment of a three-judge district court, which had enjoined a Texas county voter registrar’s discriminatory use of a complex residency questionnaire for certain prospective student voters living on college campuses. The questionnaire required the students to demonstrate their intent to remain in the county after graduation in order to register to vote. The lower court held this to be a violation of the Twenty-Sixth Amendment as enforced under Title III of the Voting Rights Act Amendments of 1970, and the Supreme Court affirmed the lower court’s judgment without a written opinion. 439 U.S. 1105, 1105 (1979), *summarily aff’g* *United States v. Texas*, 445 F. Supp. 1245, 1257–58, 1261 (S.D. Tex. 1978); *see also* *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) (observing that a summary affirmance does not necessarily imply the Supreme Court’s endorsement of the lower court’s reasoning).

⁶ *See* Amdt26.2.8 The Scope of the Twenty-Sixth Amendment (discussing lower court decisions addressing whether the Amendment protects young citizens’ participation in various aspects of the political process other than voting (e.g., running for public office); whether a state may make it easier for adult voters in a particular age group (e.g., adults over the age of 65) to vote without abridging the Twenty-Sixth Amendment rights of other age groups of adult voters; and the standard of review that applies to Twenty-Sixth Amendment claims).

⁷ *See* Amdt26.2.1 Voter Age Qualifications in the Early United States.

⁸ *See id.*

⁹ *See id.*

TWENTY-SIXTH AMENDMENT—REDUCTION OF VOTING AGE

Overview of the Twenty-Sixth Amendment, Reduction of Voting Age

the minimum voting age at the time,¹⁰ the issue of voter age qualifications did not receive significant nationwide attention until the United States entered World War II in the 1940s.¹¹

Shortly after the United States entered the war, Congress lowered the minimum draft age to 18 through successive amendments to the Selective Training and Service Act of 1940.¹² These amendments prompted some public officials to question why 18- to 20-year-old men serving in the nation's Armed Forces could not vote in federal or state elections.¹³ Alluding to this perceived contradiction, the slogan “old enough to fight, old enough to vote” became popular among proponents of lowering the voting age during the war.¹⁴

In the decades after World War II, public support for lowering the minimum voting age grew as Americans questioned why young soldiers fighting in Korea and Vietnam could not exercise the franchise.¹⁵ Additionally, many policymakers contended that 18- to 20-year-olds had earned the right to vote by demonstrating sufficient knowledge, responsibility, and maturity.¹⁶ In the midst of campus protests against the Vietnam War, some Members of Congress argued that conferring the franchise on young voters would allow them to express their views peacefully within the political process.¹⁷

When extending the Voting Rights Act of 1965 in 1970, Congress included a provision lowering the age qualification to vote in all elections—federal, state, and local—to eighteen.¹⁸ In a divided decision in the 1970 case *Oregon v. Mitchell*, the Supreme Court held that Congress was empowered to lower the age qualification in federal elections, but voided its attempt to lower the minimum voting age in all other elections as beyond congressional power.¹⁹ Confronted with the possibility that they might have to maintain two sets of registration books and incur the expense of running separate election systems for federal elections as compared to all other elections, many states were

¹⁰ See *id.*; U.S. CONST. amend. XIV, § 2 (providing that “when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.”).

¹¹ See Amdt26.2.1 Voter Age Qualifications in the Early United States.

¹² See Amdt26.2.2 Voter Age Qualifications, World War II, and the 1940s.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See Amdt26.2.3 Voter Age Qualifications, the Korean War, and the 1950s; Amdt26.2.4 The Vietnam War, Voting Rights Act Amendments of 1970, and *Oregon v. Mitchell*.

¹⁶ See Amdt26.2.3 Voter Age Qualifications, the Korean War, and the 1950s.

¹⁷ See Amdt26.2.6 Proposal of the Twenty-Sixth Amendment: Congressional Floor Debates and Final Passage.

¹⁸ See Amdt26.2.4 The Vietnam War, Voting Rights Act Amendments of 1970, and *Oregon v. Mitchell*. Congress sought to rely on its Fourteenth Amendment enforcement power as supplemented by the Necessary and Proper Clause to lower the voting age in state and local elections. See U.S. CONST. art. I, § 8, cl. 18; amend. XIV, § 5; 116 Cong. Rec. 6649–51 (1970).

¹⁹ 400 U.S. 112, 117–19 (1970).

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receptive to Congress proposing a constitutional amendment to establish a minimum age qualification of eighteen for all elections.²⁰

On March 23, 1971, Congress approved the proposed Twenty-Sixth Amendment and submitted it to the states for potential ratification.²¹ The Amendment attained the three-fourths majority of the states necessary for ratification a few months later on July 1, 1971.²² On July 5, the Administrator of the General Services Administration officially certified that the Amendment had been ratified and become part of the Constitution.²³

Amdt26.2 Historical Background

Amdt26.2.1 Voter Age Qualifications in the Early United States

The original Constitution, which took effect in 1789, deferred to each state's determination of who could vote in federal and state elections¹ and did not prohibit the states from restricting citizens' eligibility to vote on the basis of age.² Consistent with British legal tradition,³ many Founding-era state constitutions, laws, and customs limited voting

²⁰ See Amdt26.2.4 The Vietnam War, Voting Rights Act Amendments of 1970, and *Oregon v. Mitchell*; H.R. REP. NO. 92-37, at 6–7 (1971) (observing that many states would have to amend their constitutions in order to lower their voting ages and that, in many cases, this could not be done before the next election).

²¹ See 117 Cong. Rec. 7570 (1971). The introductory text of the joint resolution proposing the Twenty-Sixth Amendment required three-fourths of the state legislatures to ratify the Amendment within seven years of its submission to the states in order for it to become part of the Constitution. See Joint Resolution Proposing an Amendment to the Constitution of the United States Extending the Right to Vote to Citizens Eighteen Years of Age or Older, S.J. Res. 7, 92nd Cong., 1st Sess., 85 Stat. 825, 825 (1971).

²² See Intro.6.6 Post-War Amendments (Twenty-Third Through Twenty-Seventh Amendments).

²³ Certification of Amendment to Constitution of the United States Extending the Right to Vote to Citizens Eighteen Years of Age or Older, 85 Stat. 829, 829–30 (1971). At the time of the Twenty-Sixth Amendment's ratification, federal law authorized the Administrator of General Services to certify that the states had ratified an amendment to the Constitution. See Act of Oct. 31, 1951, ch. 655, § 2(b), 65 Stat. 710, 710. In 1985, the National Archivist assumed this role. See Pub. L. No. 98-497, tit. I, §§ 107(d), 301, 98 Stat. 2285, 2291, 2295 (1984) (codified at 1 U.S.C. § 106b).

¹ See U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); ArtI.S2.C1.2 Voter Qualifications for House of Representatives Elections. The Voter Qualifications Clause refers only to elections to the House of Representatives because state legislatures originally selected Senators. Adopted in 1913, the Seventeenth Amendment has identical voter qualification requirements for Senate elections. See U.S. CONST. amend. XVII cl. 1. See also *id.* art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors [for President] . . .”).

² See sources cited *supra* note 24. The subsequently ratified Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments limit the states in the setting of qualifications in terms of race, sex, payment of poll taxes, and age. In addition, the Supreme Court's interpretation of the Fourteenth Amendment's Equal Protection Clause has also excluded certain qualifications in regard to all elections. See ArtI.S2.C1.2 Voter Qualifications for House of Representatives Elections.

³ At the time of the Constitution's drafting, British legal tradition, which was derived in significant part from English statutes and common law, had established 21 as the age of legal majority for voting purposes. Parliamentary Elections Act 1695, 7 & 8 Will. 3, c. 25, § 7 (Eng.) (1696) (“And bee itt further enacted That noe Person whatsoever being under the Age of One and twenty Yeares shall att any tyme hereafter bee admitted to give his Voice for Election of any Member or Members to serve in this present or any future Parliament.”); CORINNE T. FIELD, “If You Have the Right to Vote at 21 Years, Then I Have”: Age and Equal Citizenship in the Nineteenth-Century United States, in AGE IN AMERICA: THE COLONIAL ERA TO THE PRESENT 74 (2015) (“In English common law, twenty-one had long been recognized as the age of legal majority, the moment when an individual was freed from guardianship and granted the legal standing of an adult in all matters regarding person and property.”). The American colonies and early states made only a few brief exceptions to the British rule. See, e.g., F.M. Brewer, *The Voting Age*, CQ PRESS (Sept. 9, 1944), <https://cqpress.sagepub.com/cqresearcher/report/download/voting-age-cqresrre1944090900> (observing that certain males between the ages of 16 and 20 who

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privileges to White men who were at least 21 years of age and owned a certain amount of property, among other qualifications.⁴ In the nation's early years—and even well into the twentieth century—many Americans believed that a minimum voting age of 21 was necessary to ensure that voters would possess sufficient independence and “sound judgment.”⁵

The Fourteenth Amendment, ratified in 1868 after the Civil War, appeared to recognize that all of the states had adopted 21 as the minimum voting age at the time.⁶ In an effort to prevent southern states from interfering with African American men's citizenship rights, Section 2 of the Amendment penalized states that restricted the voting rights of male inhabitants who were citizens of at least 21 years of age by reducing the states' representation in the House of Representatives and Electoral College.⁷ However, the issue of voter age qualifications did not receive significant nationwide attention until the United States entered World War II in the 1940s.⁸

served in a state militia in New England were allowed to elect their officers); FIELD, *supra*, at 75 (describing Pennsylvania's brief grant of the right to vote in general elections to teenage White males in 1776).

⁴ See, e.g., GA. CONST. OF 1777, art. IX (“All male white inhabitants, of the age of twenty-one years, and possessed in his own right of ten pounds value, and liable to pay tax in this State, or being of any mechanic trade, and shall have been resident six months in this State, shall have a right to vote at all elections for representatives, or any other officers, herein agreed to be chosen by the people at large; and every person having a right to vote at any election shall vote by ballot personally.”); MD. CONST. OF 1776, THE CONSTITUTION, OR FORM OF GOVERNMENT, cl. II (“That the House of Delegates shall be chosen in the following manner: All freemen, above twenty-one years of age, having a freehold of fifty acres of land, in the county in which they offer to vote, and residing therein—and all freemen, having property in this State above the value of thirty pounds current money, and having resided in the county, in which they offer to vote, one whole year next preceding the election, shall have a right of suffrage, in the election of Delegates for such county.”); PA. CONST. OF 1776, PLAN OR FRAME OF GOVERNMENT FOR THE COMMONWEALTH OR STATE OF PENNSYLVANIA, § 6 (“Every freemen of the full age of twenty-one Years, having resided in this state for the space of one whole Year next before the day of election for representatives, and paid public taxes during that time, shall enjoy the right of an elector.”); sources cited *supra* note 26.

⁵ See, e.g., 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 203 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (Madison's notes, Aug. 7, 1787) (statement of Gouverneur Morris) (“The man who does not give his vote freely is not represented. It is the man who dictates the vote. Children do not vote. Why? Because they want prudence. Because they have no will of their own. The ignorant and the dependent can be as little trusted with the public interest.”); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 578 (1833) (observing that “infants” and “minors . . . have been, without scruple, denied the right [to vote] as not having the sound judgment and discretion fit for its exercise”); see also 117 Cong. Rec. 7546 (1971) (statement of Rep. Schmitz) (“Maturity comes from getting out in the world and cutting one's own path.”); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 165–66 (Chicago 1979) (1765) (“[A]ll popular states have been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.”).

⁶ See U.S. CONST. amend. XIV, § 2. The American colonies and early states had made only a few brief exceptions to the British legal tradition, which had established 21 as the age of legal majority for voting purposes. See sources cited *supra* note 26. In 1943, Georgia became the first state since the Founding Era to lower its minimum voting age below 21. See GA. CONST. OF 1877, § 2-602 (adopted Aug. 3, 1943).

⁷ See U.S. CONST. amend. XIV, § 2. The provision, which was never successfully used, contains an exception allowing restrictions on voting rights for “participation in rebellion, or other crime.” *Id.*; see also Amdt14.S2.1 Overview of Apportionment of Representation.

⁸ At New York's 1867 Constitutional Convention, some delegates proposed amending the state's charter to grant voting rights to men between the ages of 18 and 20. However, the proposal was not adopted. See PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION HELD IN 1867 AND 1868 IN THE CITY OF ALBANY 489–91, 540–42 (Edward F. Underhill ed., 1868) (July 24–25, 1867) (amendments offered by Delegate Marcus Bickford).

Amdt26.2.2 Voter Age Qualifications, World War II, and the 1940s

The minimum voting age received significant nationwide attention when the United States entered World War II during the 1940s. The war began in Europe when Nazi Germany invaded Poland in 1939.¹ Although the United States remained neutral during the conflict's early years, Congress enacted the Selective Training and Service Act of 1940 to require men between the ages of 21 and 35 to register for the military draft.² After Japan attacked the U.S. Naval Base at Pearl Harbor in the Territory of Hawaii on December 7, 1941, the United States entered World War II on the side of the Allied powers.³ Congress subsequently amended the Selective Service Act to make men ages 20 to 45 potentially liable for military service.⁴

Almost a year after the United States entered the conflict, many policymakers contended that “successful prosecution” of the nation’s war effort required more enlisted men.⁵ In October 1942, President Franklin D. Roosevelt, speaking to the nation in one of his “fireside chat” radio addresses, supported drafting men as young as 18 to enhance the military’s size and effectiveness.⁶ The next month, Congress amended the Selective Training and Service Act to lower the minimum conscription age to 18.⁷ These amendments prompted some public officials, including First Lady Eleanor Roosevelt, to question why 18- to 20-year-old men serving in the nation’s Armed Forces could not vote in federal or state elections.⁸ Alluding to this perceived contradiction, the slogan “old

¹ *The Invasion of Poland*, NAT’L WORLD WAR II MUSEUM, <https://www.nationalww2museum.org/war/articles/invasion-poland-september-1939>.

² Pub. L. No. 76-783, §§ 1–3, 15(a), 54 Stat. 885, 885, 896 (1940). The Act authorized the President to induct registered men into military service. *Id.* § 3(a), 54 Stat. at 885.

³ Joint Resolution of December 8, 1941, Pub.L. No. 77-328, 55 Stat. 795, 795 (declaring war on the Imperial Government of Japan); *Air Raid on Pearl Harbor*, LIBR. OF CONG., <https://www.loc.gov/item/today-in-history/december-07>. The United States would subsequently declare war on Germany, Italy, Bulgaria, Hungary, and Romania. *About Declarations of War by Congress*, U.S. SENATE, <https://www.senate.gov/about/powers-procedures/declarations-of-war.htm>. The Allies included the United Kingdom, the Soviet Union, and China.

⁴ Pub. L. No. 77-360, § 3(a), 55 Stat. 844, 845 (1941). Men under 20 years of age could volunteer for military service.

⁵ See, e.g., President Franklin D. Roosevelt, Statement on Signing the Bill Reducing the Draft Age (Nov. 13, 1942), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/statement-signing-the-bill-reducing-the-draft-age>.

⁶ President Franklin D. Roosevelt, Radio Address, Report on the Home Front (Oct. 12, 1942), UVA MILLER CTR., <https://millercenter.org/the-presidency/presidential-speeches/october-12-1942-fireside-chat-23-home-front> (“All of our combat units that go overseas must consist of young, strong men who have had thorough training. An Army division that has an average age of twenty-three or twenty-four is a better fighting unit than one which has an average age of thirty-three or thirty-four. The more of such troops we have in the field, the sooner the war will be won, and the smaller will be the cost in casualties. Therefore, I believe that it will be necessary to lower the present minimum age limit for Selective Service from twenty years down to eighteen. We have learned how inevitable that is—and how important to the speeding up of victory.”).

⁷ Pub. L. No. 77-772, § 1, 56 Stat. 1018, 1018–19 (1942).

⁸ E.g., Eleanor Roosevelt, *My Day*, THE ELEANOR ROOSEVELT PAPERS PROJECT, Jan. 21, 1943, https://www2.gwu.edu/~erpapers/myday/displaydoc.cfm?_y=1943&_f=md056400 (“If young men of eighteen and nineteen are old enough to be trained to fight their country’s battles and to proceed from training to the battlefields, I think we must accept the fact that they are also old enough to know why we fight this war. If that is so, then they are old enough to take part in the political life of their country and to be full citizens with voting powers.”); 88 Cong. Rec. 8316 (1942) (statement of Sen. Vandenberg) (“[I]f young men are to be drafted at 18 years of age to fight for their Government, they ought to be entitled to vote at 18 years of age for the kind of government for which they are best satisfied to fight.”).

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enough to fight, old enough to vote” became popular among proponents of lowering the voting age during the war.⁹

In the years after Congress lowered the draft age, several Members of the 77th and 78th Congresses, including then-Representative Jennings Randolph of West Virginia, introduced joint resolutions proposing to lower the minimum voting age to 18 for all citizens nationwide by amending the Constitution.¹⁰ A subcommittee of the House Judiciary Committee held hearings on the Randolph proposal in 1943.¹¹ However, no proposal was considered on the House or Senate floor during the 1940s. In 1943, the State of Georgia became the first state to lower its minimum voting age to 18 for both federal and state elections when its voters approved an amendment to the state’s constitution by referendum.¹²

Amdt26.2.3 Voter Age Qualifications, the Korean War, and the 1950s

After World War II ended in 1945, the issue of lowering the minimum voting age received renewed attention when the United States entered the Korean War as part of the United Nations Forces defending the Republic of Korea from North Korea and China.¹ In 1950, at the beginning of U.S. involvement in the Korean War, the Selective Service Act of 1948 established 19 as the age at which men were liable for military service.² In 1951, Congress amended the law to lower the draft age to 18-and-a-half years old.³ At the time, most soldiers under the age of 21 could not vote in federal or state elections.⁴

⁹ *Constitutional Amendment to Reduce Voting Age to Eighteen: Hearings on H.J. Res. 39 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 78th Cong. 1, 11 (1943) (statement of Rep. Celler) (discussing the slogan’s use in Georgia and questioning its logic). During World War II, American women, who were not subject to the draft, nevertheless “played important roles . . . both at home and in uniform.” See *History At a Glance: Women in World War II*, NAT’L WORLD WAR II MUSEUM, <https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/women-wwii>.

¹⁰ See, e.g., S.J. Res. 89, 78th Cong., 1st Sess. (1943) (Kilgore resolution); S.J. Res. 7, 78th Cong., 1st Sess. (1943) (Vandenberg resolution); H.J. Res. 356, 77th Cong., 2d Sess. (1942) (Johnson resolution); H.J. Res. 354, 77th Cong., 2d Sess. (1942) (Randolph resolution); S.J. Res. 166, 77th Cong. (1942) (Vandenberg resolution). Rep. Victor Wickersham introduced a joint resolution that applied only to federal elections. H.J. Res. 352, 77th Cong., 2d Sess. (1942).

¹¹ *Constitutional Amendment to Reduce Voting Age to Eighteen: Hearings on H.J. Res. 39 Before Subcomm. No. 1 of the H. Comm. on the Judiciary*, 78th Cong. 1 (1943).

¹² GA. CONST. OF 1877, § 2-602 (adopted Aug. 3, 1943) (“Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people.”).

¹ *Korean War*, DWIGHT D. EISENHOWER PRES. LIBR., MUSEUM & BOYHOOD HOME, <https://www.eisenhowerlibrary.gov/research/online-documents/korean-war>.

² Selective Service Act of 1948, Pub. L. No. 80-759, tit. I, §§ 3, 4(a), 62 Stat. 604–06.

³ Universal Military Training and Service Act Amendments of 1951, Pub. L. No. 82-51, tit. I, § 1(d), 65 Stat. 75–76. The 1951 amendments renamed the Selective Service Act of 1948.

⁴ See SEN. BIRCH BAYH, S. COMM. ON THE JUDICIARY, 92d Cong., PASSAGE AND RATIFICATION OF THE TWENTY-SIXTH AMENDMENT: REPORT OF CONSTITUTIONAL AMENDMENTS SUBCOMMITTEE 3 (Comm. Print 1971). *But see* GA. CONST. OF 1877, § 2-602 (adopted Aug. 3, 1943) (“Every citizen of this State who is a citizen of the United States, eighteen years old or upwards, not laboring under any of the disabilities named in this Article, and possessing the qualifications provided by it, shall be an elector and entitled to register and vote at any election by the people.”).

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The Korean War ended with the signing of an armistice in July 1953.⁵ In his January 1954 State of the Union Speech, President Dwight D. Eisenhower observed that “[f]or years our citizens between the ages of 18 and 21 have, in time of peril, been summoned to fight for America. They should participate in the political process that produces this fateful summons.”⁶ Eisenhower recommended several measures to enhance access to the ballot, including “a constitutional amendment permitting citizens to vote when they reach the age of 18.”⁷ Although many 1950s-era proponents of lowering the voting age continued to focus on the perceived unfairness of denying the franchise to young men in the Armed Forces, other supporters argued that young men and women had earned the right to vote by demonstrating sufficient knowledge, responsibility, and maturity.⁸

Soon after President Eisenhower delivered his State of the Union speech, Senator William Langer of North Dakota, chairman of the Senate Judiciary Committee, introduced a joint resolution that proposed a constitutional amendment to lower the voting age to 18 in federal and state elections.⁹ The Senate Judiciary Committee favorably reported the resolution, observing that men between the ages of 18 and 21 could be drafted for military service, and that President Eisenhower supported the measure.¹⁰ According to the committee, withholding the right to vote from young men and women until they became 21 “diminishe[d]” their “enthusiasm” for participating in the political process.¹¹ The committee contended that the amendment would not infringe on states’ authority to set voter qualifications because its successful ratification required the approval of three-fourths of the state legislatures.¹²

Senator Langer’s joint resolution became the first proposed constitutional amendment that would have lowered the voting age to be debated on the floor of either house of Congress. However, the Senate narrowly failed to approve the joint resolution by the necessary two-thirds vote.¹³ During the 1950s, several states considered measures to lower their minimum voting ages below 21, and three states adopted them.¹⁴ Kentucky lowered its voting age to 18 when voters amended its constitution by referendum in

⁵ See *Armistice Negotiations*, U.N. COMMAND, <https://www.uncmil/History/1951-1953-Armistice-Negotiations/>.

⁶ President Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union (Jan. 7, 1954), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-13>.

⁷ *Id.* In his 1955 State of the Union Speech, President Eisenhower called for a constitutional amendment lowering the voting age in federal elections but not state elections. President Dwight D. Eisenhower, Annual Message to the Congress on the State of the Union (Jan. 6, 1955), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-state-the-union-12>.

⁸ See, e.g., 100 Cong. Rec. 6971 (1954) (statement of Sen. Dirksen); Jenny Diamond Cheng, *Voting Rights for Millennials: Breathing New Life into the Twenty-Sixth Amendment*, 67 SYRACUSE L. REV. 653, 669 (2017).

⁹ S.J. Res. 53, 83d Cong., 1st Sess. (1953). The joint resolution’s operative language was nearly identical to the later-ratified Twenty-Sixth Amendment. See *id.*

¹⁰ S. REP. NO. 83-1075, at 1–2 (1954); see also S. REP. NO. 82-2036, at 1 (1952) (favorably reporting a similar joint resolution in the 82nd Congress, S.J. Res. 127, which was not debated on the floor).

¹¹ S. REP. NO. 83-1075, at 2 (1954). The committee also observed that 18- to 20-year-old persons were permitted to “exercise” various “responsibilities commensurate with maturity” (e.g., marry) and noted the State of Georgia’s positive experience with youth voting. *Id.* at 2–3.

¹² *Id.* at 2.

¹³ See 100 Cong. Rec. 6956–59, 6963–68, 6969–80 (1954) (recording a vote of 34-24). Thirty-seven Senators did not vote on the joint resolution. See *id.* at 6979–80.

¹⁴ THOMAS H. NEALE, CONG. RSCH. SERV., 83-103, THE EIGHTEEN YEAR OLD VOTE: THE TWENTY-SIXTH AMENDMENT AND SUBSEQUENT VOTING RATES FOR NEWLY ENFRANCHISED AGE GROUPS 6 (1983) (reporting that the “legislatures of no fewer than 35 States considered reducing the age requirement between 1950 and 1954”).

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1955.¹⁵ In addition, Alaska and Hawaii were admitted to the United States with voting ages of 19 and 20, respectively, in 1959.¹⁶

Amdt26.2.4 The Vietnam War, Voting Rights Act Amendments of 1970, and *Oregon v. Mitchell*

During the 1960s, public support for lowering the minimum voting age increased as the U.S. Armed Forces became directly involved in defending South Vietnam from North Vietnam and the Viet Cong guerilla forces.¹ Although men as young as 18 could be drafted to fight in the Vietnam War,² only a few states allowed persons under the age of 21 to vote.³ As U.S. involvement in the war reached its peak in the late 1960s, President Lyndon B. Johnson wrote a message to Congress calling for an amendment to the Constitution lowering the voting age.⁴ Referring to the ballot box as the “anvil of democracy, where government is shaped by the will of the people,” Johnson remarked that “reason does not permit us to ignore any longer the reality that eighteen-year-old young Americans are prepared—by education, by experience, by exposure to public affairs of their own land and all the world—to assume and exercise the privilege of voting.”⁵

When extending the Voting Rights Act of 1965 in 1970, Congress included a provision lowering the age qualification to vote in all elections—federal, state, and local—to 18.⁶ In the findings section accompanying this provision, Congress explained that the law was necessary to protect the “inherent constitutional rights” of 18- to 20-year-old citizens, particularly in light of “the national defense responsibilities imposed upon such citizens.”⁷ Congress asserted that it possessed the authority to enact the youth enfranchisement provision because it was necessary to enforce the Fourteenth Amendment’s equal protection and due process guarantees against the states.⁸

¹⁵ See BAYH, *supra* note 47, at 3.

¹⁶ See *id.*

¹ *Vietnam War*, NAVAL HIST. & HERITAGE COMMAND, <https://www.history.navy.mil/browse-by-topic/wars-conflicts-and-operations/vietnam-war0.html>.

² *Changes from Vietnam to Now*, SELECTIVE SERV. SYS., <https://www.sss.gov/history-and-records/changes-from-vietnam-to-now/>.

³ These states included Alaska, Georgia, Hawaii, and Kentucky. See SEN. BIRCH BAYH, S. COMM. ON THE JUDICIARY, 92d Cong., PASSAGE AND RATIFICATION OF THE TWENTY-SIXTH AMENDMENT: REPORT OF CONSTITUTIONAL AMENDMENTS SUBCOMMITTEE 3 (Comm. Print 1971).

⁴ President Lyndon B. Johnson, Special Message to the Congress, To Vote at Eighteen: Democracy Fulfilled and Enriched (June 27, 1968), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/special-message-the-congress-vote-eighteen-democracy-fulfilled-and-enriched>.

⁵ *Id.* In 1963, a commission established by President John F. Kennedy to investigate low voter registration and turnout recommended to President Johnson that “each State should carefully consider reducing the minimum voting age to 18.” REPORT OF THE PRESIDENT’S COMMISSION ON REGISTRATION AND VOTING PARTICIPATION 43 (1963), <https://babel.hathitrust.org/cgi/pt?id=umn.31951d029875154&view=1up&seq=3>.

⁶ This provision covered primary and general elections. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 302, 84 Stat. 314, 318, *invalidated in part by Oregon v. Mitchell*, 400 U.S. 112, 117–19 (1970). The Voting Rights Act of 1965 prohibits states from denying or abridging the right to vote on the basis of race or color. See 52 U.S.C. §§ 10301–10314.

⁷ Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 301, 84 Stat. 314, 318.

⁸ *Id.*; see also U.S. CONST. amend. XIV, § 5. In March 1970, Senator Ted Kennedy of Massachusetts argued in testimony before the Senate Judiciary Committee’s Subcommittee on Constitutional Amendments that Congress could lower the minimum voting age by statute through the exercise of its Fourteenth Amendment enforcement power as supplemented by the Necessary and Proper Clause:

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On June 22, 1970, President Richard Nixon signed the Voting Rights Act Amendments into law but issued a statement questioning the constitutionality of the legislation's provision lowering the voting age in all elections to 18.⁹ Nixon wrote, "Although I strongly favor the 18-year-old vote, I believe—along with most of the Nation's leading constitutional scholars—that Congress has no power to enact it by simple statute, but rather it requires a constitutional amendment."¹⁰ Nixon directed the U.S. Attorney General to file a lawsuit seeking a court's judgment on the provision's constitutionality and called upon Congress to propose an amendment to the Constitution lowering the minimum voting age.¹¹

Subsequently, the Supreme Court considered several challenges to the constitutionality of the Voting Rights Act Amendments of 1970, including Title III, which lowered the minimum voting age.¹² In a divided decision in the 1970 case *Oregon v. Mitchell*, the Supreme Court held that Congress was empowered to lower the age qualification in federal elections, but voided the application of Title III of the Act in all other elections as beyond congressional power.¹³ Confronted with the possibility that they might have to maintain two sets of registration books and incur the expense of running separate election systems for federal elections as compared to all other elections, many states

Congress is given the power under Section 5 [of the Fourteenth Amendment] to enact legislation to enforce the Equal Protection Clause, the Due Process Clause, and all the other great provisions contained in Section 1 of the Amendment. It is Section 5 that gives Congress the power to legislate in the area of voting qualifications, as well as in many other areas affecting fundamental rights. Thus, the authority of Congress to reduce the voting age by statute is based on Congress's power to enforce the Equal Protection Clause by whatever legislation it believes is appropriate.

See 116 CONG. REC. 6649–51 (1970) (discussing *Katzenbach v. Morgan*, 384 U.S. 641 (1966), among other Supreme Court decisions); see also, e.g., *id.* at 6142 (statement of Sen. Moss) ("Under the [Fourteenth Amendment], Congress has the power to find that a distinction between those who are 18 to 21 and those who are over 21 is an invidious classification and, therefore, a denial of equal protection under the law."); *id.* at 5950 (amendment offered by Sen. Mansfield to the Voting Rights Act Amendments of 1970 to lower the minimum voting age to 18 in federal, state, and local elections).

⁹ President Richard Nixon, Statement on Signing the Voting Rights Act Amendments of 1970 (June 22, 1970), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/statement-signing-the-voting-rights-act-amendments-1970>.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Oregon* and *Texas*, which each maintained a minimum voting age of 21, sought a federal court injunction preventing the U.S. Attorney General from enforcing the minimum voting age provisions on the grounds that they exceeded Congress's power and infringed on the states' constitutional authority to regulate elections. In separate lawsuits that the Supreme Court consolidated with *Oregon's* and *Texas's* actions, the U.S. Attorney General sought a court order directing *Arizona* and *Idaho* to comply with Title III and other provisions of the Act. *Oregon v. Mitchell*, 400 U.S. 112, 117 n.1 (1970).

¹³ *Oregon*, 400 U.S. at 117–18. None of the Justices' opinions garnered a majority of votes. Justices William O. Douglas, William J. Brennan, Jr., Byron White, and Thurgood Marshall agreed that Congress could lower the minimum voting age in both federal and state elections. However, Chief Justice Warren E. Burger and Justices John Marshall Harlan, Potter Stewart, and Harry Blackmun agreed that none of Congress's constitutional powers, including its power to enforce the Fourteenth Amendment's Equal Protection Clause, authorized it to lower the minimum voting age to 18 in federal or state elections. Justice Hugo Black cast the deciding votes in the case. He voted to uphold Title III insofar as it lowered the voting age in federal elections based on his view that Congress's power under the Elections Clause in Article I, Section 4, Clause 1, as supplemented by the Necessary and Proper Clause, gave Congress the power to lower the age in federal elections. However, he voted to strike down Title III insofar as it lowered the voting age in state and local elections based on his view that Congress had not acted to enforce "the Civil War Amendments' ban on racial discrimination." See *id.* at 117–31.

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were receptive to Congress proposing a constitutional amendment to establish a minimum age qualification of 18 for all elections.¹⁴

Amdt26.2.5 Proposal of the Twenty-Sixth Amendment: Introduction and Committee Action

By the late 1960s, a large bipartisan movement supported lowering the voting age in all elections to 18.¹ This broad, nationwide coalition included young persons, students, teachers, civil rights groups, religious groups, and labor unions.² Supporters of lowering the voting age petitioned Congress, lobbied state legislatures and the public, pursued litigation in the courts, and held conferences and rallies.³ In the midst of campus protests against the Vietnam War, some Members of Congress and other officials argued that giving young people the vote would allow them to express their views peacefully within the political process.⁴

On January 25, 1971, Senator Jennings Randolph introduced S.J. Res. 7, a proposed constitutional amendment to lower the voting age to 18, in the 92nd Congress.⁵ Less than two months after it was referred to the Senate Judiciary Committee,⁶ the committee reported the joint resolution favorably.⁷ The committee explained that the draft Twenty-Sixth Amendment was modeled after the Fifteenth Amendment, which prohibits racial discrimination in voting, and the Nineteenth Amendment, which recognizes women's suffrage and prohibits sex discrimination in voting.⁸ The committee explained that the amendment would prohibit age-based discrimination against citizens 18 years

¹⁴ S. REP. NO. 92-26, at 12–18 (1971); H.R. REP. NO. 92-37, at 6–7 (1971) (observing that many states would have to amend their constitutions in order to lower their voting ages and that, in many cases, this could not be done before the next election).

¹ Alison Ge, *The Twenty-Sixth Amendment and Protecting the Youth Vote*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 167, 174–75 (2022). See also Amdt26.2.4 The Vietnam War, Voting Rights Act Amendments of 1970, and *Oregon v. Mitchell* (discussing the Voting Rights Act Amendments of 1970 and the Supreme Court's decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

² *Id.* at 174–75. For more on the role that this movement played in laying the groundwork for the Twenty-Sixth Amendment, see JENNIFER FROST, “LET US VOTE!”: YOUTH VOTING RIGHTS AND THE 26TH AMENDMENT (2021).

³ FROST, *supra* note 75, at 192–212.

⁴ Ge, *supra* note 74, at 174–75. (citing testimony in congressional hearings); see also NAT'L COMM'N ON THE CAUSES AND PREVENTION OF VIOLENCE, FINAL REPORT ON THE CAUSES AND PREVENTION OF VIOLENCE 225 (1969). During the 1968 presidential election, both major political party platforms supported lowering the voting age to 18, but the Republican Party's platform contended that states should take the lead on the issue rather than Congress. 1968 *Democratic Party Platform* (Aug. 26, 1968), AM. PRESIDENCY PROJECT, <https://www.presidency.ucs.edu/documents/1968-democratic-party-platform> (supporting an amendment to the Constitution lowering the minimum voting age to 18); 1968 *Republican Party Platform* (Aug. 5, 1968), AM. PRESIDENCY PROJECT, <https://www.presidency.ucs.edu/documents/republican-party-platform-1968> (encouraging states to consider lowering the minimum voting age to 18).

⁵ 117 CONG. REC. 363 (1971). Senator Randolph had introduced nearly identical proposed amendments in earlier Congresses, including when he served as a House Member in the 1940s. See S. REP. NO. 92-26, at 2 (1971). In the years leading up to Congress's proposal of the Twenty-Sixth Amendment, the Senate Judiciary Committee's Subcommittee on Constitutional Amendments held several hearings on lowering the voting age. See, e.g., *Lowering the Voting Age to 18: Hearings Before the Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 91st Cong. 1 (1970); *Lowering the Voting Age to 18: Hearings Before Subcomm. on Constitutional Amendments of the S. Comm. on the Judiciary*, 90th Cong. 1 (1968).

⁶ See 117 Cong. Rec. 364 (1971).

⁷ S. REP. NO. 92-26, at 1 (1971). The committee reported the joint resolution with technical amendments adopted by its Subcommittee on Constitutional Amendments that conformed the formatting and language of the joint resolution's preamble to prior ratified amendments. See *id.*

⁸ *Id.* at 2. Accord 117 Cong. Rec. 7534 (1971) (statement of Rep. Poff); *id.* at 7539 (statement of Rep. Pepper).

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of age or older in all federal, state, and local elections.⁹ In the committee's view, the draft amendment would also prohibit imposing "special burdens" on these young voters, such as compelling them to vote by absentee ballot or in "one centralized location," which the committee believed would be inconsistent with the purposes of the Fourteenth Amendment's Equal Protection Clause and the Voting Rights Act.¹⁰

Observing that the proposed amendment had attained broad bipartisan support, the committee explained why the Constitution should be amended to lower the voting age to 18.¹¹ First, many Americans believed that 18- to 20-year-olds possessed the maturity and knowledge needed to vote.¹² Second, by age 18, millions of young Americans were legally responsible for their actions and had assumed citizenship responsibilities like raising families, paying taxes, or serving in the Armed Forces.¹³ Finally, many proponents of lowering the voting age argued that it would help to bring youthful "idealism" and "energies" into the political process and "give young people the real opportunity to influence [American] society in a peaceful and constructive manner."¹⁴

Turning to practical considerations, the committee observed that the proposed amendment would resolve administrative difficulties resulting from the Supreme Court's decision in *Oregon v. Mitchell*, which held that Congress could lower the voting age in federal elections but not any other elections.¹⁵ The amendment would thus alleviate the danger of "confusion," "delay," and "fraud" from states' maintenance of two separate elections systems.¹⁶ The committee also observed that the proposed amendment would allow young adult citizens in all of the states to vote in state and local elections and thereby express their views on matters particularly relevant to their lives, such as education.¹⁷

On January 29, 1971, Representative Emanuel Celler, chairman of the House Judiciary Committee, introduced a nearly identical joint resolution, H.J. Res. 223, in the House of Representatives.¹⁸ It was referred to the House Committee on the Judiciary,¹⁹ and in March, the committee reported the joint resolution favorably.²⁰ In explaining its support for the joint resolution, the committee cited many of the arguments contained in the Senate Judiciary Committee's report on S.J. Res. 7, including concerns about states maintaining "dual-age" voting systems and the need for a constitutional amendment to prevent Congress or state legislatures from raising the minimum voting age in the

⁹ S. REP. NO. 92-26, at 2 (1971).

¹⁰ *Id.* at 14.

¹¹ *Id.* at 5-6.

¹² *Id.* at 6.

¹³ *Id.* at 6-7.

¹⁴ *Id.*

¹⁵ *See id.* at 12.

¹⁶ *Id.* The committee also observed that there were significant questions about whether 18- to 20-year-olds could vote in elections for state delegates who would nominate candidates to both federal and state offices. *See id.* at 17.

¹⁷ *Id.* at 12.

¹⁸ 117 CONG. REC. 1047 (1971).

¹⁹ *Id.*

²⁰ H.R. REP. NO. 92-37, at 1 (1971).

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future.²¹ Referring to the proposed amendment as “part of a constitutional tradition of enlarging participation in [the nation’s] political processes,” the House report stated that the Amendment would give citizens 18 to 20 years of age the right to vote and, more broadly, participate “in the political process, free of discrimination on account of age.”²²

Amdt26.2.6 Proposal of the Twenty-Sixth Amendment: Congressional Floor Debates and Final Passage

Congress debated the language that would become the Twenty-Sixth Amendment in March 1971. At the time, nine states maintained minimum voting ages under 21, and many other states were considering lower voting ages.¹ During Senate debates, proponents of the draft amendment argued that young voters were mature and knowledgeable enough to vote; that they had already assumed many of the responsibilities of adult citizenship; and that they would be able to play a “constructive role in the political process.”² Proponents also cited concerns about a dual-age voting system for federal elections as compared to all other elections.³ The Senate passed the joint resolution unanimously.⁴

House debates explored many of the same themes as the Senate debates, including young persons’ knowledge and responsibilities at age 18 and concerns about the impracticality and expense of maintaining a dual-age voting system.⁵ Proponents also argued that lowering the voting age would help to combat voter apathy that might result from delaying young persons’ access to the franchise for a few years after they had assumed adult responsibilities.⁶

Individual representatives also offered their interpretations of the draft amendment’s provisions. For instance, Representative Emanuel Celler of New York, chairman of the House Judiciary Committee, contended that the right to “vote” protected in Section 1 of the proposed amendment would encompass “all action necessary to make a vote effective in any primary, special or general election.”⁷ Celler further observed that Section 2 of the draft amendment mirrored congressional enforcement clauses in other provisions of the Constitution.⁸

²¹ *Id.* at 5–8. The committee also observed that, absent an amendment to the federal Constitution, many states would need to amend their constitutions to lower the voting age, which would likely be impossible before the 1972 elections. However, state legislatures could likely ratify the proposed Twenty-Sixth Amendment before these elections. *Id.* at 7.

²² *Id.* at 7–9 (expressing the view that the proposed amendment would encompass the “entire political selection process,” including “all action necessary to make a vote effective in any primary, special, or general election” but was not intended to alter age qualifications for public office).

¹ S. REP. NO. 92-26, at 3 (1971).

² See, e.g., 117 CONG. REC. 5489 (1971) (statement of Sen. Bayh); *id.* at 5817 (statement of Sen. Percy).

³ E.g., *id.* at 5515 (statement of Sen. Randolph).

⁴ *Id.* at 5830 (recording a vote of 94 to 0).

⁵ E.g., *id.* at 7533 (statement of Rep. Celler); *id.* at 7534 (statement of Rep. Poff); *id.* at 7550 (statement of Rep. Biaggi); *id.* (statement of Rep. Leggett).

⁶ *Id.* at 7549 (statement of Rep. Scheuer).

⁷ *Id.* at 7533 (defining “vote” to include “registration or other action required by law prerequisite to voting, casting a ballot, or having such ballot counted properly and included in the totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election”).

⁸ *Id.* See also, e.g., U.S. CONST. amends. XV, XIX.

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Representative Richard Poff of Virginia stated that the “right to vote” protected by the amendment would encompass “the entire process by which the people make their political choices,” including participation in primary, special, and general elections for federal, state, and local offices; nomination of candidates by petition or convention; ballot initiatives; and recall elections.⁹ Poff expressed the view that the amendment would prohibit age discrimination against any age group of adult voters (e.g., adults over the age of 65)¹⁰ but would not nullify federal or state laws establishing a minimum age for holding political office.¹¹ Poff observed that, unlike Title III of the Voting Rights Act Amendments of 1970, which had attempted to lower the minimum voting age in all elections, the draft amendment would prohibit government restrictions on young citizens’ exercise of the franchise that fell short of completely denying them the right to vote.¹²

Opponents of the draft Twenty-Sixth Amendment argued that the states possessed primary constitutional authority to determine who could vote in state and local elections.¹³ Some opponents argued that granting young persons the right to vote would allow “transient” out-of-state college students to decide elections for college town governments.¹⁴ Other opponents argued that young voters lacked sufficient maturity, responsibility, or life experience to vote.¹⁵ Opponents also suggested that young voters would not turn out to vote in large numbers.¹⁶

After the debates concluded, the House approved the amendment in the form of H.J. Res. 223 by a vote of 401 to 19.¹⁷ It then called up an identical Senate joint resolution, S.J. Res. 7, and passed it by the requisite two-thirds vote, laying its own joint resolution on the table.¹⁸

Amdt26.2.7 Ratification of the Twenty-Sixth Amendment

Congress submitted the proposed Twenty-Sixth Amendment to the states for potential ratification on March 23, 1971 when the House of Representatives approved S.J. Res. 7.¹ The Senate had previously passed the joint resolution on March 10.² The Amendment attained the three-fourths majority of the states necessary for ratification a few months

⁹ 117 CONG. REC. 7535 (1971) (statement of Rep. Poff); *see also id.* at 7540 (statement of Rep. Wiggins) (“The act of voting, to which the amendment is addressed, encompasses, as I read it, the full range of rights to participate in the election process.”).

¹⁰ *Id.* at 7534 (statement of Rep. Poff) (“In this regard, the proposed amendment would protect not only an 18-year-old, but also the 88-year-old.”).

¹¹ *Id.* at 7535.

¹² *Id.*

¹³ *See, e.g., id.* at 7536 (statement of Rep. Poage); *id.* at 7544 (statement of Rep. Mayne).

¹⁴ *E.g., id.* at 7538 (statement of Rep. Michel).

¹⁵ *E.g., id.* at 7545–46 (statement of Rep. Schmitz); *id.* at 7562 (statement of Rep. Goldwater).

¹⁶ *Id.* (statement of Rep. Goldwater).

¹⁷ *Id.* at 7569–70.

¹⁸ *Id.* at 7570.

¹ 117 CONG. REC. 7570 (1971). *See also* Joint Resolution Proposing an Amendment to the Constitution of the United States Extending the Right to Vote to Citizens Eighteen Years of Age or Older, S.J. Res. 7, 92nd Cong., 1st Sess., 85 Stat. 825, 825 (1971). The introductory text of the joint resolution proposing the Twenty-Sixth Amendment required three-fourths of the state legislatures to ratify the Amendment within seven years of its submission to the states in order for it to become part of the Constitution. *Id.*

² 117 CONG. REC. 5830 (1971).

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later on July 1.³ At a July 5 White House ceremony celebrating Independence Day, the Administrator of the General Services Administration officially certified the Amendment to have been ratified.⁴ President Richard Nixon remarked that the nation's 11 million new young voters would contribute "a spirit of moral courage" and "high idealism" to the electorate.⁵

Amdt26.2.8 The Scope of the Twenty-Sixth Amendment

The Supreme Court has not decided any cases interpreting the Twenty-Sixth Amendment.¹ However, lower federal courts and state courts have grappled with questions about the scope of the Amendment's prohibitions on laws, policies, or practices that "deny" or "abridge" adult citizens' voting rights on the basis of age.² These lower court decisions help to elucidate issues that the Supreme Court has not addressed. For example, shortly after the Twenty-Sixth Amendment's ratification, several lower courts considered whether the Amendment prohibits state officials from declining to register persons at least 18 years of age, who are otherwise eligible to vote, at the place where they actually reside, such as a college campus, rather than where their parents live.³

³ See Intro.6.6 Post-War Amendments (Twenty-Third Through Twenty-Seventh Amendments).

⁴ Certification of Amendment to Constitution of the United States Extending the Right to Vote to Citizens Eighteen Years of Age or Older, 85 Stat. 829, 829–30 (1971). President Nixon and three 18-year-old witnesses signed the certificate even though their signatures were not necessary for ratification. See *id.* At the time of the Twenty-Sixth Amendment's ratification, federal law authorized the Administrator of General Services to certify that the states had ratified an amendment to the Constitution. See Act of Oct. 31, 1951, ch. 655, § 2(b), 65 Stat. 710, 710. In 1985, the National Archivist assumed this role. See Pub. L. No. 98-497, tit. I, §§ 107(d), 301, 98 Stat. 2285, 2291, 2295 (1984) (codified at 1 U.S.C. § 106b).

⁵ President Richard Nixon, Remarks at a Ceremony Marking the Certification of the 26th Amendment to the Constitution (July 5, 1971), AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/documents/remarks-ceremony-marking-the-certification-the-26th-amendment-the-constitution>. Congress subsequently provided for enforcement of the Twenty-Sixth Amendment against the states in federal courts. See 52 U.S.C. § 10701 (authorizing the Department of Justice to enforce the Amendment against state and local governments in federal district courts with expedited review and direct appeal to the Supreme Court; and criminalizing the denial or attempted denial of a person's rights under the Amendment).

¹ In *Symm v. United States*, the Supreme Court summarily affirmed the judgment of a three-judge district court, which had enjoined a Texas county voter registrar's discriminatory use of a complex residency questionnaire for certain prospective student voters living on college campuses. The questionnaire required the students to demonstrate their intent to remain in the county after graduation in order to register to vote. The lower court held this to be a violation of the Twenty-Sixth Amendment as enforced under Title III of the Voting Rights Act Amendments of 1970, and the Supreme Court affirmed the lower court's judgment without a written opinion. 439 U.S. 1105, 1105 (1979), *summarily aff'g* *United States v. Texas*, 445 F. Supp. 1245, 1257–58, 1261 (S.D. Tex. 1978); see also *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) (observing that a summary affirmance does not necessarily imply the Supreme Court's endorsement of the lower court's reasoning).

² Under the Constitution, states have principal authority for regulating the "Times, Places and Manner of holding Elections," subject to congressional override. See U.S. CONST. art. I, § 4, cl. 1. This group of essays does not examine the potential enforcement of youth voting rights under provisions of the Constitution other than the Twenty-Sixth Amendment. The Supreme Court has held that, under the Fourteenth Amendment's Equal Protection Clause, regulatory classifications based on age are neither suspect nor entitled to intermediate scrutiny. Thus, they receive rational basis review, which is deferential to legislatures. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976); Amdt14.S1.8.7.1 Overview of Non-Race Based Classifications.

³ See, e.g., *Ownby v. Dies*, 337 F. Supp. 38, 39 (E.D. Tex. 1971) (striking down a provision of the Texas Election Code as violative of the Fourteenth Amendment's Equal Protection Clause and Twenty-Sixth Amendment because it "provide[d] for a determination of voting residency of persons under twenty-one years of age on a different basis than persons twenty-one years of age and older"); *Jolicoeur v. Mihaly*, 5 Cal. 3d 565, 569, 582 (1971) (holding that state officials violated the Twenty-Sixth Amendment when they treated unmarried "minor" citizens of at least 18 years of age who did not live with their parents "differently from adults" for voting purposes by declining to allow the minors to register to vote in the place where they had actually

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Beyond securing young citizens' voting rights, lower courts have also considered whether the Twenty-Sixth Amendment protects youth participation in various other aspects of the political process. For example, lower courts have addressed whether the Twenty-Sixth Amendment grants otherwise qualified persons between 18 and 20 years of age the right to hold elective public office;⁴ serve on juries;⁵ and participate in the initiation of legislation through a state's referendum process by signing and circulating initiative petitions.⁶ Lower courts have also examined whether the Amendment requires states to allow persons under 18 to participate in primary elections when they will be 18 years old at the time of the general election.⁷ In the 21st century, lower court decisions addressed whether a state may make it easier for adult voters in a particular age group (e.g., adults over the age of 65) to vote without abridging the Twenty-Sixth Amendment rights of other age groups of adult voters.⁸

Because of a lack of Supreme Court precedent interpreting the Twenty-Sixth Amendment, it is unclear how courts should evaluate laws that allegedly “deny” or “abridge” adult citizens' voting rights on account of age. In the decade after the Amendment's

established a permanent residence rather than their parents' address); *Worden v. Mercer Cnty. Bd. of Elections*, 61 N.J. 325, 327, 333–348 (1972) (holding that, in the absence of a compelling state interest, the Fourteenth Amendment's Equal Protection Clause and Twenty-Sixth Amendment prohibited local officials from requiring college students who resided in college communities to undertake additional steps in order to register to vote there because they were students); *Palla v. Suffolk Cnty. Bd. of Elections*, 31 N.Y.2d 36, 46, 50 (1972) (holding that a New York election law that determined voter residency did not discriminate against 18-year-old college students in violation of the Twenty-Sixth Amendment, in part because its criteria were uniformly applied to “all prospective registrants, student and nonstudent alike”).

⁴ *E.g.*, *Opatz v. St. Cloud*, 293 Minn. 379, 379–83 (1972) (upholding a provision of the Minnesota constitution prohibiting persons under the age of 21 from holding certain elective state offices as consistent with the federal Constitution's Fourteenth Amendment Equal Protection Clause and Twenty-Sixth Amendment while observing that “there are many provisions in the Minnesota and in the United States Constitutions fixing the age at which certain individuals may hold office”); *Spencer v. Bd. of Educ.*, 39 A.D.2d 399, 402 (N.Y. App. Div. 1972) (“The Twenty-Sixth Amendment conferred only the right to vote on the 18-year-olds, and extended no concurrent right to hold office.”).

⁵ *E.g.*, *United States v. Olson*, 473 F.2d 686, 687–88 (8th Cir. 1973) (holding that the states' ratification of the Twenty-Sixth Amendment did not render unconstitutional a federal statute setting the minimum age to serve on a federal jury at 21); *Johnson v. State*, 260 So. 2d 436, 437 (Miss. 1972) (rejecting an 18-year-old criminal defendant's argument that the Twenty-Sixth Amendment requires persons between the ages of 18 and 20 to appear on state jury lists).

⁶ *E.g.*, *Common Cause v. Anderson*, 178 Colo. 1, 4, 8 (1972) (striking down provisions of a Colorado law prohibiting otherwise qualified electors between the ages of 18 and 20 from participating in the initiative process while observing that “public policy, as prescribed by the United States Congress in the Twenty-Sixth Amendment, ratified by the Colorado Legislature May 24, 1971, has moved in a direction favoring full participation of young voters in the political process”).

⁷ *E.g.*, *Gaunt v. Brown*, 341 F. Supp. 1187, 1191 (S.D. Ohio 1972) (surveying the Twenty-Sixth Amendment's drafting history and concluding that the Amendment does not protect the rights of persons under age 18 to vote in a primary election); *Totton v. Murdock*, 482 S.W.2d 65, 66–68 (Mo. 1972) (deciding that the Twenty-Sixth Amendment did not protect the right of 17-year-olds to vote in a primary election even if they would be 18 by the time of the general election).

⁸ *E.g.*, *Tully v. Okeson*, 78 F.4th 377, 378–79, 387–88 (7th Cir. 2023) (determining that Indiana could accommodate voters over the age of 65 at higher risk for complications from COVID-19 by allowing them to vote absentee by mail upon request, without having to claim that they fell within a specific category of voter entitled to such privileges, consistent with the Twenty-Sixth Amendment rights of younger voters, who retained other options for exercising the franchise (e.g., early in-person voting)); *Tex. Dem. Party v. Abbott*, 978 F.3d 168, 174, 192–94 (5th Cir. 2020) (determining that a Texas absentee voting law that allowed any voter at least 65 years of age to vote by mail without excuse did not deny or abridge the Twenty-Sixth Amendment rights of younger voters who were not accorded that privilege because it did not make voting more difficult for younger voters than it had been prior to the law's enactment or the Amendment's ratification); L. PAIGE WHITAKER, CONG. RSCH. SERV., LSB10470, ELECTION 2020 AND THE COVID-19 PANDEMIC: LEGAL ISSUES IN ABSENTEE AND ALL-MAIL VOTING, <https://www.crs.gov/Reports/LSB10470>.

TWENTY-SIXTH AMENDMENT—REDUCTION OF VOTING AGE

Historical Background, The Scope of the Twenty-Sixth Amendment

ratification, lower courts often applied strict scrutiny to election laws that were found to impose significant burdens on Twenty-Sixth Amendment rights.⁹ However, subsequent court decisions have not definitively identified the proper analytical framework for considering claims that a law violates the Twenty-Sixth Amendment.¹⁰ Some lower courts have required plaintiffs to show that state legislators intentionally deprived them of their right to vote on the basis of age.¹¹ Other lower courts have applied a balancing test that weighs a state's asserted nondiscriminatory governmental interests for a particular restriction (e.g., fraud prevention) against an individual's voting rights.¹²

The scope of Congress's power to enforce the Twenty-Sixth Amendment under Section 2 against state laws or practices that "deny" or "abridge" voting rights of persons in specific age groups is also unclear.

⁹ See *supra* note 119 (discussing *Symm v. United States*, 439 U.S. 1105 (1979), in which the Supreme Court summarily affirmed a lower court decision that had applied strict scrutiny to enjoin a Texas county voter registrar's discriminatory use of a complex residency questionnaire for certain prospective student voters living on college campuses); *Worden v. Mercer Cnty. Bd. of Elections*, 61 N.J. 325, 327, 333–348 (1972) (holding that, in the absence of a compelling state interest, the Fourteenth Amendment's Equal Protection Clause and Twenty-Sixth Amendment prohibited local officials from requiring college students who resided in college communities to undertake additional steps in order to register to vote there because they were students); Yael Bromberg, *Youth Voting Rights and the Unfulfilled Promise of the Twenty-Sixth Amendment*, 21 U. PA. J. CONST. L. 1105, 1119 (2019) ("[C]ourts originally applied heightened scrutiny to Twenty-Sixth Amendment claims based on the fundamental right to vote.").

¹⁰ See, e.g., *Tex. Dem. Party*, 978 F.3d at 193–94 (expressing, in dicta, uncertainty as to whether courts should apply rational-basis review or a heightened standard of review to laws that allegedly abridge Twenty-Sixth Amendment rights).

¹¹ Some lower courts have applied a test for intentional discrimination from the Supreme Court's Fourteenth Amendment Equal Protection Clause reasoning in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). See, e.g., *One Wis. Inst., Inc. v. Nichol*, 186 F. Supp. 3d 958, 976 (W.D. Wis. 2016) (applying the *Arlington Heights* framework and stating that "plaintiffs must adduce evidence that the Wisconsin legislature passed the challenged regulations with the purpose of making it harder for younger citizens to vote. . . . [E]vidence of a disparate impact on younger voters will not be sufficient."); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1221–22 (N.D. Fla. 2018) (applying the *Arlington Heights* framework and observing that, in the absence of a "stark" pattern of discrimination, a law's disparate impact on a protected class is not "determinative" but that the Florida Secretary of State's legal opinion interpreting Florida law to forbid early voting on college campuses was intentional discrimination "unexplainable on grounds other than age").

¹² Some lower courts have applied a balancing test from the Supreme Court's Fourteenth Amendment reasoning on voting restrictions in *Burdick v. Takushi*, 504 U.S. 428, 432–34 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), which weighs asserted nondiscriminatory governmental interests for a particular restriction (e.g., fraud prevention) against an individual's voting rights. See *One Wis. Inst., Inc.*, 186 F. Supp. 3d at 970–71 (discussing the *Anderson-Burdick* standard); see also Bromberg, *supra* note 127, at 1105, 1164 (suggesting that courts evaluate Twenty-Sixth Amendment claims that a government actor has "abridged" voting rights on the basis of age using a "hybrid test" that allows plaintiffs to establish a violation by showing "[d]irect evidence of *prima facie* intentional discrimination," "factors . . . probative of intent to discriminate," or that "[a]n undue burden specifically and disproportionately affects an age-based class"); Alison Ge, *The Twenty-Sixth Amendment and Protecting the Youth Vote*, 25 N.Y.U. J. LEGIS. & PUB. POL'Y 167, 171 (2022) (discussing relevant cases).

TWENTY-SEVENTH AMENDMENT

CONGRESSIONAL COMPENSATION

Amdt27.1 Overview of the Twenty-Seventh Amendment, Congressional Compensation

The Twenty-Seventh Amendment prevents laws that modify Members of Congress's compensation from taking effect until after an intervening congressional election.¹ The Supreme Court has not decided any cases interpreting the Twenty-Seventh Amendment.² Nonetheless, the unusual circumstances of the Amendment's ratification, which occurred more than 200 years after Congress initially proposed it, have raised important questions about Article V's process for amending the Constitution.³

The Twenty-Seventh Amendment's history spans more than two centuries from the Colonial Era to the 1990s. Generally, the governments of Great Britain's American Colonies—and, later, the state governments—followed the “ancient” British practice of compensating legislators.⁴ Consistent with this practice, the Constitution's Framers determined that Members of the proposed bicameral national legislature would receive compensation for their services.⁵ However, at the 1787 Federal Convention, the Framers debated whether compensation for Members of Congress should be determined by the Constitution, the Members themselves, or the state legislatures.⁶ Ultimately, the Framers determined that the national government would compensate Members of Congress for their services in amounts set by congressional legislation.⁷

The original Constitution, which took effect in 1789, did not prevent federal laws that increased or decreased Members' compensation from becoming operative before the next congressional election.⁸ Some delegates to the state conventions that met to consider the Constitution's ratification viewed the absence of an intervening electoral check on Congress's power to set its own pay as a flaw in the Constitution's design.⁹ When ratifying the Constitution, several state conventions recommended amendments to the nation's charter to address concerns that Members of Congress would abuse the power to set their pay.¹⁰

Early in the First Congress, James Madison, then a Virginia congressman, introduced a series of resolutions proposing to amend the Constitution.¹¹ Many of these resolutions drew from the recommendations of the state ratifying conventions.¹² The third resolution prohibited any “law varying the compensation” of Members of Congress from becoming operative “before the next ensuing election of Representatives.”¹³ On Septem-

¹ U.S. CONST. amend. XXVII.

² See Amdt27.3 Scope of the Twenty-Seventh Amendment.

³ See Amdt27.4 Implications for the Article V Amendment Process. For an in-depth discussion of Article V, see ArtV Amending the Constitution.

⁴ See Amdt27.2.1 Debates in the Federal Convention on Congressional Compensation.

⁵ See *id.*

⁶ See *id.*

⁷ See *id.* See also U.S. CONST. art. I, § 6, cl. 1; ArtI.S6.C1.1 Compensation for Members of Congress.

⁸ See Amdt27.2.1 Congressional Compensation and Debates over Ratification of the Constitution.

⁹ See *id.*

¹⁰ See *id.*

¹¹ See Amdt27.2.4 Proposal of the Congressional Pay Amendment.

¹² See *id.*

¹³ See *id.*

TWENTY-SEVENTH AMENDMENT—CONGRESSIONAL COMPENSATION

Historical Background, Debates in the Federal Convention on Congressional Compensation

ber 25, 1789, Congress proposed a similarly worded Congressional Pay Amendment.¹⁴ It was submitted to the states for ratification along with an amendment addressing congressional apportionment¹⁵ and the ten amendments that became the Bill of Rights upon their ratification in 1791.¹⁶

By the end of 1791, only six states had ratified the Congressional Pay Amendment.¹⁷ In 1873, the Ohio legislature ratified the Amendment to protest a congressional pay raise.¹⁸ Thereafter, the Amendment lay dormant until the late twentieth century when it was rediscovered by Gregory D. Watson, then an undergraduate student at the University of Texas at Austin.¹⁹ Watson wrote a paper for a political science class arguing that the states could still ratify the Amendment²⁰ and subsequently urged state legislatures to adopt it.²¹ From the mid-1980s to the early 1990s, more than 30 state legislatures ratified the Amendment, responding to the American public's opposition to congressional pay increases.²² The National Archivist proclaimed the Twenty-Seventh Amendment to have been ratified on May 7, 1992, more than two centuries after Congress had initially proposed it.²³

Amdt27.2 Historical Background

Amdt27.2.1 Debates in the Federal Convention on Congressional Compensation

The concerns that motivated the proposal and ratification of the Twenty-Seventh Amendment grew out of debates at the Federal Convention about compensating Members of Congress. Prior to the Constitution's drafting, many of Great Britain's American Colonies—and, later, the states in their constitutions—adopted the British House of Commons's "ancient practice" of compensating legislators for their services.¹ Generally, state legislators set their compensation by law, which was paid out of the state's treasury.² Similarly, under the Articles of Confederation, states were responsible for compensating their delegates to the Confederation Congress.³ As Justice Joseph Story

¹⁴ See *id.* This group of essays refers to the Twenty-Seventh Amendment as the "Congressional Pay Amendment" prior to its ratification because the states ratified a significant number of other amendments to the Constitution between Congress's proposal of the Congressional Pay Amendment in 1789 and its ratification as the Twenty-Seventh Amendment in 1992. See generally Amdt27 Congressional Compensation.

¹⁵ For more on the amendment related to congressional apportionment, which has not been ratified, see Intro3.7 Proposed Amendments Not Ratified by the States.

¹⁶ See Amdt27.2.4 Proposal of the Congressional Pay Amendment.

¹⁷ See Amdt27.2.5 Ratification of the Twenty-Seventh Amendment.

¹⁸ See *id.*

¹⁹ See *id.*

²⁰ See *id.*

²¹ See *id.*

²² See *id.*

²³ See *id.*

¹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 849 (1833). Up until the mid-17th century, the British compensated members of the House of Commons for their services. *Id.* The British ceased to compensate these members by the time the Framers met in Philadelphia to draft the Constitution. *Id.*

² *Id.*

³ See, e.g., Articles of Confederation of 1781, art. V, ¶ 3 ("Each state shall maintain its own delegates in a meeting of the states, and while they act as members of the committee of the states."). Similarly, colonial legislatures were responsible for compensating their delegates to the Continental Congresses. See Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV.

TWENTY-SEVENTH AMENDMENT—CONGRESSIONAL COMPENSATION

Historical Background, Debates in the Federal Convention on Congressional Compensation

noted in his *Commentaries on the Constitution of the United States*, the American preference for compensating legislators had a longstanding pedigree.⁴ Its purposes were to ensure that a pool of talented people from all economic backgrounds would serve as legislators and to reduce the potential for corruption that might result if legislators received compensation from other sources.⁵ These historical practices informed the Framers' deliberations at the 1787 Constitutional Convention.⁶

At the beginning of the Federal Convention in Philadelphia, Virginia Governor and Convention delegate Edmund Randolph proposed a blueprint for the national government in a series of resolutions known as the "Virginia Plan."⁷ This plan addressed compensation for Members of the proposed bicameral national legislature.⁸ An early draft stated that Members of the Senate and House of Representatives would receive "liberal stipends, by which they may be compensated for the devotion of their time to public service."⁹

Convention delegates debated the issue of congressional compensation on many occasions. Concerns about legislator corruption featured prominently in these discussions.¹⁰ During several debates, the delegates argued about whether Members of Congress's compensation should be determined by the Constitution, the Members themselves, or the state governments.¹¹ An ancillary debate about Congress's power to set its pay grew out of these discussions.¹²

One group of delegates maintained that the Constitution should "fix" salaries for Members of Congress according to an objective standard. During one June 1787 debate, James Madison argued that it would be "an indecent thing" to permit Members of Congress to "regulate their own wages."¹³ Madison believed that the Members of the national legislature would be "too much interested to ascertain their own compensation"

497, 501–02 (1992). Some colonial and state legislatures withheld delegates' salaries in an effort to save money or exert pressure on Congress to further the state's interests. *See id.*

⁴ 3 STORY, *supra* note 1, § 851.

⁵ *Id.* However, as one commentator has noted, early in American history many states imposed property qualifications for holding political office that "helped to exclude from the [state legislatures] most of those who would rely on the salaries they might expect to receive as members." Bernstein, *supra* note 3, at 501.

⁶ *Id.* at 499.

⁷ 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 20 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (Madison's notes, May 29, 1787). James Madison played a key role in drafting the Virginia Plan. Bernstein, *supra* note 3, at 502.

⁸ 1 FARRAND'S RECORDS, *supra* note 7, at 20.

⁹ *Id.*

¹⁰ *E.g., id.* at 373–74 (Madison's notes, June 22, 1787). Concerns about legislator corruption motivated the Framers to include the Ineligibility Clause in the original Constitution. This Clause, which shares some similarities with the later-ratified Twenty-Seventh Amendment, prohibits a Member of Congress from being appointed to a federal civil office that was created, or had its compensation increased, during the Member's elected term. For additional information, see ArtI.S6.C2.2 Ineligibility Clause (Emoluments or Sinécure Clause) and Congress. Another provision, often called the Incompatibility Clause, forbids a Member from simultaneously holding any Office under the United States. *See* ArtI.S6.C2.1 Overview of Federal Office Prohibition.

¹¹ 1 FARRAND'S RECORDS, *supra* note 7, at 215–16 (Madison's notes, June 12, 1787). *See also id.* at 372 (Madison's notes, June 22, 1787).

¹² *See* sources cited *supra* note 11.

¹³ 1 FARRAND'S RECORDS, *supra* note 7, at 216 (Madison's notes, June 12, 1787). During the same June 12, 1787, debate, on the motion of Benjamin Franklin, the delegates unanimously agreed to strike out the word "liberal" before "stipends." Franklin expressed concerns that the inclusion of that term might lead to abuse. *Id.*

TWENTY-SEVENTH AMENDMENT—CONGRESSIONAL COMPENSATION
Historical Background, Debates in the Federal Convention on Congressional Compensation

and that they might “put their hands into the public purse for the sake of their own pockets.”¹⁴ Instead of adopting this “dangerous” path, Madison proposed tying Members’ salaries to the average price of a commodity, such as wheat.¹⁵

Other delegates disagreed with Madison’s view and argued that Members of Congress should determine their compensation by law. For example, Nathaniel Gorham, a delegate from Massachusetts, contended that Members of Congress should have the flexibility to adjust their salaries “from time to time,” noting that state legislators had often done so without incident.¹⁶ Under this proposal, Members’ salaries would be paid out of the national treasury¹⁷ and Congress could adjust its compensation in order to take account of future circumstances.¹⁸

A third group of Convention delegates argued that each state government—rather than the Constitution or Congress—should determine compensation for its Members of Congress, which would be paid out of the state’s treasury.¹⁹ Delegates who supported this arrangement argued that it would allow each state to adopt the amount of compensation that it deemed reasonable²⁰ and prevent states from unwillingly contributing a disproportionate amount of funds to Members’ salaries.²¹ Proponents also maintained that, by setting Members’ compensation, states could ensure that Senators, whom state legislatures would elect, would not “lose sight of their constituents” when serving in the nation’s capital.²²

¹⁴ *Id.* at 373–74 (Madison’s notes, June 22, 1787).

¹⁵ *Id.* at 216 (Madison’s notes, June 12, 1787). *See also id.* at 373 (Madison’s notes, June 22, 1787) (statement of James Madison) (agreeing that the state legislatures should not set compensation for Members of Congress, but arguing that the Constitution should fix compensation according to a standard “that would not vary with circumstances”).

¹⁶ *Id.* at 372 (statement of Nathaniel Gorham). At least some state constitutions in existence at the time of the Founding contemplated that state legislatures would set salaries for public officers of the various branches of government. *See, e.g.,* S.C. CONST. OF 1776 art. XXXIV (“That the following yearly salaries be allowed to the public officers undermentioned: The president and commander-in-chief nine thousand pounds; the chief justice and the assistant judges, the salaries, respectively, as by act of assembly established . . . and all other public officers shall have the same salaries as are allowed such officers, respectively, by act of assembly.”); MASS. CONST. OF 1780 pt. 2, ch. I, § 3, art. II (“The expenses of travelling to the general assembly and returning home, once in every session, and no more, shall be paid by the government out of the public treasury, to every member who shall attend as seasonably as he can, in the judgment of the house, and does not depart without leave.”).

¹⁷ 1 FARRAND’S RECORDS, *supra* note 7, at 373 (Madison’s notes, June 22, 1787). *See also* 3 STORY, *supra* note 1, § 854 (“If it be proper to allow a compensation for services to the members of congress, there seems the utmost propriety in its being paid out of the public treasury of the United States. The labour is for the benefit of the nation, and it should properly be remunerated by the nation.”).

¹⁸ 1 FARRAND’S RECORDS, *supra* note 7, at 373 (Madison’s notes, June 22, 1787) (statement of James Wilson). *See also* 3 STORY, *supra* note 1, § 855 (“If fixed by the constitution, [compensation] might, from the change of the value of money, and the modes of life, have become too low, and utterly inadequate. Or it might have become too high in consequence of serious changes in the prosperity of the nation. It is wisest, therefore, to have it left, where it is, to be decided by congress from time to time, according to their own sense of justice, and a large view of the national resources.”).

¹⁹ 1 FARRAND’S RECORDS, *supra* note 7, at 373 (Madison’s notes, June 22, 1787) (statement of Roger Sherman). *See also id.* at 427–28 (Madison’s notes, June 26, 1787) (recording a debate over whether Senators should be paid out of the state or national treasuries).

²⁰ *Id.* at 371–72 (Madison’s notes, June 22, 1787) (statement of Oliver Ellsworth).

²¹ *Id.*

²² 2 FARRAND’S RECORDS, *supra* note 7, at 290 (Madison’s notes, Aug. 14, 1787).

TWENTY-SEVENTH AMENDMENT—CONGRESSIONAL COMPENSATION
Historical Background, The Congressional Compensation Clause and the Federal Convention

Delegates who opposed allowing each state to determine its own Members' compensation independently of the other states, such as Alexander Hamilton, contended that this arrangement would allow state legislatures to exercise too much control over Members of Congress.²³ In this vein, opponents noted that individual states would control Members' salaries despite the fact that "the whole nation has an interest in the attendance and services of [all of] the members."²⁴ Opponents also argued that frugal states might reduce salaries to such a degree that talented people would not want to serve in Congress.²⁵

Amdt27.2.2 The Congressional Compensation Clause and the Federal Convention

On August 14, 1787, delegates to the Federal Convention reviewed a draft of the Constitution that authorized the states to set compensation for Members of Congress.¹ Delegate Gouverneur Morris moved to modify this draft to permit Congress to set its Members' salaries to be paid out of the national treasury.² Morris contended that "there could be no reason to fear that they would overpay themselves."³ James Madison agreed with other delegates that allowing the states to determine Members' compensation would undermine the national government's stability but continued to advocate for a fixed limit on Members' salaries in the Constitution.⁴ After some debate, the Convention delegates approved language providing for Members to set their pay by law, which would be paid out of the U.S. treasury.⁵ The delegates rejected a proposal that would have established a fixed amount for Members' compensation.⁶

As proposed to the states, the Congressional Compensation Clause in Article I, Section 6 provided that "[t]he Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United

²³ 1 FARRAND'S RECORDS, *supra* note 7, at 373 (Madison's notes, June 22, 1787). *See also* 2 FARRAND'S RECORDS, *supra* note 7, at 290 (Madison's notes, Aug. 14, 1787) (statement of Oliver Ellsworth). *See also* 3 STORY, *supra* note 1, § 855 ("If the compensation had been left, to be fixed by the state legislature, the general government would have become dependent upon the governments of the states; and the latter could almost, at their pleasure, have dissolved it. Serious evils were felt from this source under the confederation, by which each state was to maintain its own delegates in congress; for it was found, that the states too often were operated upon by local considerations, as contradistinguished from general and national interests.").

²⁴ 1 FARRAND'S RECORDS, *supra* note 7, at 372 (Madison's notes, June 22, 1787) (statement of Edmund Randolph).

²⁵ *Id.* (statement of Nathaniel Gorham); *id.* at 373 (statement of James Madison). *See also id.* at 216 (Madison's notes, June 12, 1787) (statement of George Mason) (noting, in addition, that if compensation for Members of Congress varied among the states, "an inequality would be felt among them"). Some delegates also argued that states distant from the national capital would bear a greater cost in compensating their Members for traveling to the nation's capital than closer states. 2 FARRAND'S RECORDS, at 290–91 (Madison's notes, Aug. 14, 1787).

¹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 290–91 (Max Farrand ed., 1911) [hereinafter FARRAND'S RECORDS] (Madison's notes, Aug. 14, 1787).

² *Id.*

³ *Id.*

⁴ *Id.* at 291.

⁵ *Id.* at 292–93.

⁶ *Id.* at 293.

TWENTY-SEVENTH AMENDMENT—CONGRESSIONAL COMPENSATION

Historical Background, Congressional Compensation and Debates over Ratification of the Constitution

States.”⁷ The Constitution thus provided for the national government to compensate Members of Congress for their services in amounts set by congressional legislation. Notably, the original Constitution did not prevent federal laws that increased or decreased Members’ salaries from taking effect before the next congressional election. The absence of an intervening electoral check on Congress’s power to set its own pay became a source of tension during debates in many of the state conventions that met to consider the Constitution’s ratification.⁸

Amdt27.2.3 Congressional Compensation and Debates over Ratification of the Constitution

The original Constitution, which took effect in 1789, did not prevent federal laws that increased or decreased Members of Congress’s salaries from becoming operative before the next congressional election. This became a source of tension during debates in many of the state ratifying conventions.¹ In particular, Anti-Federalists, who opposed the Constitution’s ratification because of concerns that the national government would become too powerful relative to the states and threaten individual rights, expressed the view that Members of Congress should not set their own pay.² For example, at the Virginia ratifying convention in June 1788, Patrick Henry, an Anti-Federalist and staunch opponent of ratifying the Constitution, objected to allowing Members of Congress to determine their compensation “by themselves, without limitation or restraint.”³ He stated that Members “may therefore indulge themselves in the fullest extent” by making their compensation “as high as they please.”⁴ Henry argued that having the

⁷ U.S. CONST. art. I, § 6, cl. 1. The Framers’ decision that Members of Congress should be paid from the U.S. Treasury reflected their view that Members of Congress worked for the nation as a whole and should be compensated accordingly. See ArtI.S6.C1.1 Compensation for Members of Congress.

⁸ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 855 (1833) (“[T]he omission to provide some constitutional mode of fixing the pay of members of congress, without leaving the subject to their discretion, formed in some minds a strong objection to the constitution.”).

¹ For example, in December 1787, during the Pennsylvania ratifying convention, delegate William Findley asked: “What can be a greater source of corruption than for the legislature to appoint officers and fix salaries?” PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787–1788, 775 (John Bach McMaster & Frederick D. Stone eds., 1888) (Wilson’s notes, Dec. 5, 1787) (statement of William Findley). Despite these concerns, the Pennsylvania legislature ratified the Constitution on December 12, 1787. Intro6.3 Constitutional Convention.

² See Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 508 (1992). Less than a month after the Constitution was submitted to the states for ratification, Edmund Randolph, who represented Virginia at the Federal Convention, wrote to the Virginia House of Delegates to explain why he was one of three delegates who refused to sign the nation’s proposed charter. Randolph feared that, by signing the proposed Constitution, he would be unable to justify his pursuit of “amendments” to the document in the state ratifying conventions. In his letter, Randolph expressed support for various amendments to the Constitution, including one that would prevent Members of Congress from determining their own salaries. Letter from Edmund Randolph to the Speaker of the Virginia House of Delegates (Oct. 10, 1787), reprinted in 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 123–27 (Max Farrand ed., 1911) [hereinafter FARRAND’S RECORDS]. Despite his objections, Randolph later voted in favor of ratification at the Virginia convention. See DAVID LOYD PULLIAM, THE CONSTITUTIONAL CONVENTIONS OF VIRGINIA FROM THE FOUNDATION OF THE COMMONWEALTH TO THE PRESENT TIME 37 (1901). See also 2 FARRAND’S RECORDS, *supra* note 2, at 632–33 (recording Federal Convention delegate Elbridge Gerry’s objections to the Constitution, including Congress’s “unlimited power . . . over their own compensations”). For further discussion of Anti-Federalists’ concerns about Members of Congress setting their own pay, see Bernstein, *supra* note 2, at 509–13.

³ 3 JONATHAN ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 368 (2d ed. 1836) [hereinafter ELLIOT’S DEBATES].

⁴ *Id.*

state legislatures fix Members' compensation would impose some measure of restraint on the national legislature.⁵

James Madison, who played a key role in drafting the Constitution and served as a delegate to the Federal Convention, defended the Congressional Compensation Clause at the Virginia ratifying convention. Madison contended that allowing state legislatures to determine congressional pay would make the national government too dependent on the state governments.⁶ Madison noted that, historically, state legislatures had not abused the privilege of setting their own compensation.⁷ He also argued that Members of Congress who engaged in such practices would incur the "general detestation" of their constituents.⁸

When ratifying the Constitution, conventions in New York, North Carolina, and Virginia recommended amendments to address concerns that Members of Congress would abuse the power to modify their compensation.⁹ For example, New York delegates recommended several amendments to the Constitution when they ratified the document in July 1788.¹⁰ One recommended amendment would have required "[t]hat the compensation for the Senators and Representatives be ascertained by standing laws; and that no alteration of the existing rate of compensation shall operate for the benefit of the Representatives until after a subsequent election shall have been had."¹¹ These recommendations informed Madison's introduction of draft amendments to the Constitution in the First Congress.

Amdt27.2.4 Proposal of the Congressional Pay Amendment

Early in the First Congress, James Madison, then a Virginia congressman, introduced a series of resolutions proposing to amend the Constitution.¹ Many of these resolutions drew from the recommendations of the state ratifying conventions and were intended to assuage Anti-Federalists' concerns that the new federal government would usurp state power and stifle individual rights.² The third resolution, initially proposed as a revision to the Congressional Compensation Clause rather than as a standalone, supplementary article, provided that "[n]o law varying the compensation last ascertained shall operate before the next ensuing election of Representatives."³

⁵ *Id.*

⁶ *Id.* at 369.

⁷ *See id.* at 369–70.

⁸ *See id.* Madison also responded to concerns that Members of Congress would lower their compensation such that "only the rich" would "fill the offices of senators and representatives." *Id.* at 372. He argued that the people of the United States could respond by electing other Members to reverse such a law. *Id.* The Virginia Convention narrowly ratified the proposed Constitution on June 25, 1788. Intro6.3 Constitutional Convention. ⁹ Bernstein, *supra* note 2, at 514. For more on the debate over the Bill of Rights, see Intro6.2 Bill of Rights (First Through Tenth Amendments).

¹⁰ 1 ELLIOT'S DEBATES, *supra* note 5, at 330.

¹¹ *Id.*

¹ 1 ANNALS OF CONG. 440–41 (June 8, 1789).

² *See id.* at 451. *See also id.* at 458 (statement of Rep. James Madison) (noting that the language of the draft amendment specifying when laws modifying congressional compensation could become effective was drawn from "several of the amendments which the different [state ratifying] conventions have proposed").

³ *Id.* at 451.

In explaining the need for this amendment, Madison stated that, although it was unlikely that Congress would abuse its spending power when determining its compensation, there was nonetheless “a seeming impropriety in leaving any set of men without control to put their hand into the public coffers, to take out money to put in their pockets.”⁴ He contended that the Congressional Pay Amendment would ensure that Members would not modify their compensation solely for their benefit.⁵

Madison’s proposed amendments underwent various revisions in the House and Senate before final passage and submission to the states.⁶ Records of congressional debates in the House of Representatives include a brief discussion of the proposed Congressional Pay Amendment.⁷ During this discussion, Representative Theodore Sedgwick of Massachusetts expressed general concerns that Members of Congress would reduce their pay, thereby discouraging qualified people from serving in the House.⁸ Madison stated that the Amendment might not be “absolutely necessary,” but that it would not affect Congress’s ability to attract a sufficient number of qualified Members.⁹

On September 25, 1789, after Congress approved the Congressional Pay Amendment by a vote of two-thirds of both Houses, it was submitted to the states as one of twelve proposed amendments to the Constitution.¹⁰

Amdt27.2.5 Ratification of the Twenty-Seventh Amendment

Congress proposed the Congressional Pay Amendment to the states in 1789 along with 11 other amendments, including the 10 proposals that would later become the Bill of Rights.¹ By the end of 1791, only 6 of the then-existing 14 states had ratified the Pay Amendment,² leaving it short of the 11 state legislatures needed to constitute a three-fourths majority for purposes of ratification at the time.³ In 1873, the Ohio legislature ratified the Amendment to protest a congressional pay raise.⁴ Thereafter, the compensation amendment lay dormant until the late twentieth century.

In 1982, Gregory D. Watson, an undergraduate student at the University of Texas at Austin, wrote about the Congressional Pay Amendment in a paper for a political science

⁴ *Id.* at 457.

⁵ *Id.* at 458.

⁶ See Intro6.2 Bill of Rights (First Through Tenth Amendments).

⁷ 1 ANNALS OF CONG. 756–57 (Aug. 14, 1789).

⁸ See *id.*

⁹ *Id.* at 757.

¹⁰ *Bill of Rights (1791)*, NAT’L ARCHIVES (Sept. 20, 2022), <https://www.archives.gov/milestone-documents/bill-of-rights> (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”).

¹ *Bill of Rights (1791)*, NAT’L ARCHIVES (Sept. 20, 2022), <https://www.archives.gov/milestone-documents/bill-of-rights> (“No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened.”).

² Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 532–33 (1992).

³ See *id.*

⁴ *Id.* at 534. During the nineteenth century, in response to various state petitions, Members of Congress introduced resolutions proposing amendments to the Constitution that sought to address the compensation issue. See Cong. Pay Amend., 16 *Op. O.L.C.* 85, 109–11 (1992).

TWENTY-SEVENTH AMENDMENT—CONGRESSIONAL COMPENSATION

Scope of the Twenty-Seventh Amendment

class.⁵ Watson argued that the states could adopt the Amendment because Congress had not imposed a deadline on its ratification.⁶ Watson's instructor gave him a grade of 'C' on the paper, reportedly telling him that the Amendment was a "dead letter."⁷ Thereafter, Watson mounted a campaign to obtain the state legislatures' ratification of the Amendment.⁸

From the mid-1980s to the early 1990s, more than 30 state legislatures ratified the Amendment, responding to public opposition to congressional pay increases.⁹ On May 18, 1992, National Archivist Don W. Wilson, on the advice of attorneys in the Department of Justice's Office of Legal Counsel, proclaimed the Amendment to have been ratified on May 7, 1992.¹⁰ Although the Constitution does not require Congress to confirm that an amendment has been ratified, the House and Senate each subsequently passed a concurrent resolution recognizing that the Amendment had been adopted.¹¹

Amdt27.3 Scope of the Twenty-Seventh Amendment

The Supreme Court has not decided any cases interpreting the Twenty-Seventh Amendment. However, in 1994, one federal court of appeals panel rejected a Twenty-Seventh Amendment challenge to congressional pay legislation.¹ In *Boehner v. Anderson*, Congressman John Boehner contended that provisions in the Ethics Reform Act of 1989 violated the Twenty-Seventh Amendment.² These provisions automatically adjust sal-

⁵ Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 FORDHAM L. REV. 497, 532–33 (1992).

⁶ *Id.*

⁷ *Id.* In 2017, Watson's grade on the paper was changed from a 'C' to an 'A'. Matt Largey, *The Bad Grade That Changed the U.S. Constitution*, NPR (May 5, 2017), <https://www.npr.org/2017/05/05/526900818/the-bad-grade-that-changed-the-u-s-constitution>.

⁸ Bernstein, *supra* note 2, at 537.

⁹ *Id.* at 537–38. Watson later discovered that Wyoming ratified the Amendment in 1978. *Id.* at 537. For additional information on how Members of Congress are compensated, see, IDA A. BRUDNICK, CONG. RSCH. SERV., REPORT 97-1011, SALARIES OF MEMBERS OF CONGRESS: RECENT ACTIONS AND HISTORICAL TABLES (2022), [HTTPS://CRSREPORTS.CONGRESS.GOV/PRODUCT/PDF/RS/97-1011/86](https://crsreports.congress.gov/product/pdf/RS/97-1011/86); IDA A. BRUDNICK, CONG. RSCH. SERV. REPORT 97-615, SALARIES OF MEMBERS OF CONGRESS: CONGRESSIONAL VOTES, 1990-2022 (2022), [HTTPS://CRSREPORTS.CONGRESS.GOV/PRODUCT/PDF/RL/97-615](https://crsreports.congress.gov/product/pdf/RL/97-615).

¹⁰ See Certification of Amendment to the Constitution of the United States Relating to Compensation of Members of Congress, 57 Fed. Reg. 21187, 21187 (1992). Under federal law, the Archivist of the United States is responsible for certifying that a proposed constitutional amendment has been ratified after receiving official notice from three-fourths of the states that they have adopted the amendment in accordance with the Constitution. See National Archives and Records Administration Act of 1984, Pub. L. No. 98-497, title I, §107(d), 98 Stat. 2280, 2291 (codified at 1 U.S.C. § 106b). For more information on the authentication of amendments to the Constitution, see ArtV.4.2.3 Authentication of an Amendment's Ratification.

¹¹ See H.R. Con. Res. 320, 102d Cong., 2d Sess. (1992); S. Con. Res. 120, 102d Cong., 2d Sess. (1992).

¹ *Boehner v. Anderson*, 30 F.3d 156, 162 (D.C. Cir. 1994). See also Schaffer v. Clinton, 240 F.3d 878, 882–86 (10th Cir. 2001) (determining that Representative Bob Schaffer lacked Article III standing to maintain a Twenty-Seventh Amendment challenge to the cost-of-living adjustment provision of the Ethics Reform Act of 1989), *cert. denied sub nom.* Schaffer v. O'Neill, 534 U.S. 992, 992 (2001).

² *Boehner*, 30 F.3d at 158. The plaintiff also challenged the Act's changes to the quadrennial pay raise system. *Id.* The Ethics Reform Act modified the quadrennial pay system by conditioning an adjustment to Members of Congress's pay (recommended by the President as informed by a pay adjustment commission) on Congress's enactment of a statute approving the pay adjustment. See *id.* at 163. It also required that an election of Representatives have intervened before such a law could take effect. *Id.* The court held that the plaintiff's challenge was not ripe for review. *Id.* Boehner also argued that a separate law cancelling the 1994 cost-of-living adjustment violated the Twenty-Seventh Amendment because it "varie[d] his compensation without an intervening election of Representatives." However, the court declined to consider this argument. *Id.* at 162–63.

aries and pensions for Members of Congress each year to account for increases in the cost of living unless Congress declines the adjustment.³ Boehner argued, among other things, that half of the annual adjustments (i.e., those taking effect in odd-numbered years) were “laws” that would modify pay for Members of Congress without an intervening election, violating the Twenty-Seventh Amendment.⁴

The D.C. Circuit Court of Appeals held that the cost-of-living adjustment mechanism did not violate the Twenty-Seventh Amendment.⁵ Assuming, without deciding, that the Amendment applied to a law enacted before the Amendment’s ratification in 1992, the court determined that the Ethics Reform Act of 1989 “did not cause any adjustment to congressional compensation until after the election of 1990 and the seating of the new Congress.”⁶ Thus, the court determined that the relevant “law” for purposes of the Twenty-Seventh Amendment was the Ethics Reform Act provision, enacted in 1989, rather than each subsequent automatic, annual pay adjustment.⁷ Because the Act, enacted in the 101st Congress, had taken effect after the seating of a new Congress on January 1, 1991, no Twenty-Seventh Amendment violation had occurred.⁸

Because of a lack of Supreme Court precedent, it is unclear whether various novel statutory mechanisms for regulating Members’ pay might comply with the Twenty-Seventh Amendment. For example, in 2013, Congress enacted the “No Budget, No Pay Act.”⁹ After a certain date, the Act would have temporarily withheld the payment of Senators’ or Representatives’ salaries until a Member’s respective house of Congress had agreed to a “a concurrent resolution on the budget for fiscal year 2014 pursuant to section 301 of the Congressional Budget Act of 1974.”¹⁰ In an effort to comply with the Twenty-Seventh Amendment, the Act would have released the funds for Members’ salaries on the last day of the 113th Congress if no budget resolution had been adopted in accordance with the Act’s terms.¹¹ Because each chamber passed a budget resolution prior to the Act’s deadline, Members’ pay was not withheld pursuant to the Act. As a result, the law was never tested in court.

Amdt27.4 Implications for the Article V Amendment Process

The unusual circumstances of the Twenty-Seventh Amendment’s ratification more than 200 years after its proposal have raised important questions about Article V’s process for amending the Constitution.¹ One question is whether there is an implicit time limit on an amendment’s ratification when Congress does not specify one in the amendment’s

³ See *id.* at 158.

⁴ *Id.* at 161.

⁵ *Id.* at 158, 162.

⁶ *Id.* at 162.

⁷ See *id.*

⁸ *Id.*

⁹ Pub. L. No. 113-3, § 3, 127 Stat. 51, 51–53 (Feb. 4, 2013).

¹⁰ *Id.*

¹¹ *Id.*

¹ For a more in-depth discussion of Article V, see ArtV Amending the Constitution. See also Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment*, 61 *FORDHAM L. REV.* 497, 546–51 (1992) (discussing debates over the issues of “contemporaneity,” “rescission,” and “constitutionality”).

text or the accompanying joint resolution.² Although the Supreme Court in *Dillon v. Gloss* opined that, regardless of whether Congress specifies a deadline, the time period for ratification must be “reasonable,”³ it appears this language was subsequently regarded as nonbinding dicta in *Coleman v. Miller*.⁴

Some scholars have argued, consistent with the dicta in *Dillon*, that Article V requires a “contemporaneous consensus” among Congress and the states in favor of an amendment,⁵ but other commentators disagree.⁶ The National Archivist’s certification of the Twenty-Seventh Amendment more than 200 years after it was proposed suggests that, if Congress does not specify a deadline for ratification, an amendment remains pending before the states until the requisite number of states have ratified it.⁷

Another question that emerged from the Twenty-Seventh Amendment’s ratification is whether Congress has any role to play in determining whether an amendment has been ratified.⁸ After the National Archivist certified the Twenty-Seventh Amendment as part of the Constitution, the House and Senate each passed a concurrent resolution recognizing that the Amendment had been adopted.⁹ In *Coleman v. Miller*, a 1939 case involving the unratified Child Labor Amendment, the Supreme Court indicated that Congress might play a role in “promulgating” an amendment, noting that Congress had adopted a concurrent resolution recognizing that the states had ratified the Fourteenth Amendment after the Civil War.¹⁰ However, the Court also noted the unique circumstances surrounding the ratification of the Fourteenth Amendment.¹¹ For instance, three southern states that previously rejected the Amendment had constituted new

² For more on this issue, see ArtV.4.2.1 Congressional Deadlines for Ratification of an Amendment. Beginning with its 1917 proposal of what would become the Eighteenth Amendment, Congress has specified a deadline of seven years for the ratification of every proposed amendment except for the proposal that became the Nineteenth Amendment recognizing women’s suffrage. See Ratification of the Equal Rts. Amend., 44 Op. O.L.C. __ at *15 (2020).

³ 256 U.S. 368, 375–76 (1921). At the time, the Court considered it “quite untenable” that the Congressional Pay Amendment remained pending before the states and could still be ratified. See *id.* at 375.

⁴ 307 U.S. 433, 453 (1939) (discussing *Dillon*, 256 U.S. at 375–76). In *Coleman*, Chief Justice Charles Evans Hughes suggested, in an opinion titled “Opinion of the Court,” that Congress is responsible for “promulgating” the “adoption” of a constitutional amendment and, consequently, Congress had the power to determine whether ratification of a proposed amendment occurred within a “reasonable time.” *Id.* at 453–56. However, subsequent commentators have argued that this dicta in *Coleman* is incorrect because the Constitution gives Congress no such role. See, e.g., Ratification of the Equal Rts. Amend., *supra* note 2, at *30–31.

⁵ See Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment*, 103 YALE L.J. 677, 692 (1993) (discussing the strengths and weaknesses of this argument).

⁶ See *id.*

⁷ See Certification of Amendment to the Constitution of the United States Relating to Compensation of Members of Congress, 57 Fed. Reg. 21187, 21187 (1992). At the time, the Department of Justice’s Office of Legal Counsel (O.L.C.) advised that the Amendment became part of the Constitution once the Archivist certified that the requisite number of states had ratified the Amendment. Cong. Pay Amend., 16 Op. O.L.C. 85, 87 (1992). Rejecting dicta to the contrary in *Dillon*, the OLC stated that, in the absence of a congressionally proposed deadline, an amendment remains pending before the states. *Id.* at 90, 97. Otherwise, in the O.L.C.’s view, the Article V process would become unworkable because states would not know whether they could still ratify an amendment. *Id.* at 97 (“The implicit time limit thesis is thus deeply implausible, because it introduces hopeless uncertainty into that part of the Constitution that must function with a maximum of formal clarity if it is to function.”). For an argument that Congress may rescind its proposal of an amendment to the Constitution by a two-thirds vote in both Houses, see Paulsen, *supra* note 5, at 727–29.

⁸ For more on this issue, see ArtV.4.2.2 Effect of Prior Rejection of an Amendment or Rescission of Ratification.

⁹ See H.R. Con. Res. 320, 102d Cong., 2d Sess. (1992); S. Con. Res. 120, 102d Cong., 2d Sess. (1992).

¹⁰ 307 U.S. 433, 448–50 (1939).

¹¹ See *id.*

governments at Congress's direction as a result of Reconstruction by the time they ratified it.¹² Thus, the Court's ruling in *Coleman* would not appear to have definitively resolved questions about Congress's role in the ratification process. Moreover, since *Coleman*, some commentators have expressed doubts that Congress has any constitutional role in determining whether the states have ratified a proposed constitutional amendment.¹³

¹² See *id.*

¹³ See Ratification of the Equal Rts. Amend., *supra* note 2, at *30 (expressing the view that Article V “contemplates no role for Congress in the ratification process after it proposes an amendment”); Cong. Pay Amend., *supra* note 7, at 98–99 (“[C]ongressional promulgation is neither required by Article V nor consistent with constitutional practice.”). The Twenty-Seventh Amendment's ratification also raised the question of whether a state may ratify an amendment after earlier rejecting it. By accepting the ratifications of New Hampshire and New Jersey, both of which had previously rejected the Twenty-Seventh Amendment, the National Archivist implicitly endorsed the notion that a state may ratify an amendment after rejecting it. See Certification of Amendment to the Constitution of the United States Relating to Compensation of Members of Congress, 57 Fed. Reg. 21187, 21187 (1992). See also Bernstein, *supra* note 1, at 547–58.

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