

**FIFTH AMENDMENT
RIGHTS OF PERSONS**

**FIFTH AMENDMENT
RIGHTS OF PERSONS**

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FIFTH AMENDMENT—RIGHTS OF PERSONS

Amdt5.1 Overview of Fifth Amendment, Rights of Persons

The Fifth Amendment protects individuals by preventing the government from abusing its prosecutorial powers. For instance, the Fifth Amendment, provides a check on government prosecutions by requiring “presentment or indictment of a Grand Jury” for a “capital, or otherwise infamous crime.”¹ Likewise, the Fifth Amendment’s Double Jeopardy Clause prevents the government from re-prosecuting a person for a crime for which he or she has been acquitted. The Fifth Amendment prohibition against requiring a person in a criminal case to testify against him- or herself secured a common law privilege that one commentator saw as preventing use of the “rack or torture in order to procure a confession of guilt,”² while the Fifth Amendment’s Due Process Clause—“nor be deprived of life, liberty, or property, without due process of law”³—provided for “the right of trial according to the process and proceedings of the common law.”⁴ In interpreting the Due Process Clause, the Supreme Court has recognized that the Fifth Amendment guarantees procedural and substantive due process. The Fifth Amendment’s guarantee of procedural due process often requires the federal government to provide notice and a hearing before depriving a person of a protected life, liberty, or property interest, while substantive due process generally protects certain fundamental constitutional rights from federal government interference in specific subject areas such as liberty of contract, marriage, or privacy. Finally, the Takings Clause of the Fifth Amendment requires that the government pay “just compensation” to owners of private property that the government takes for public use.

Amdt5.2 Grand Jury Clause

Amdt5.2.1 Historical Background on Grand Jury Clause

Fifth Amendment:

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

The history of the grand jury is rooted in the common and civil law, extending back to Athens, pre-Norman England, and the Assize of Clarendon promulgated by Henry II.¹ The right seems to have been first mentioned in the colonies in the Charter of Liberties and Privileges of 1683, which was passed by the first assembly permitted to be elected in the colony of New York.² Included from the first in James Madison’s introduced draft of the Bill of Rights, the provision elicited no recorded debate and no opposition. “The grand jury is an English

¹ U.S. CONST. amend. V.

² 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1788 (1833).

³ U.S. CONST. amend. V.

⁴ 3 STORY, *supra* note 2, at § 1789.

¹ Wayne L. Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101 (1931).

² 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 162, 166 (1971). The provision read: “That in all Cases Capital or Criminal there shall be a grand Inquest who shall first present the offence. . . .”

FIFTH AMENDMENT—RIGHTS OF PERSONS
Grand Jury Clause

Amdt5.2.1

Historical Background on Grand Jury Clause

institution, brought to this country by the early colonists and incorporated in the Constitution by the Founders. There is every reason to believe that our constitutional grand jury was intended to operate substantially like its English progenitor. The basic purpose of the English grand jury was to provide a fair method for instituting criminal proceedings against persons believed to have committed crimes. Grand jurors were selected from the body of the people and their work was not hampered by rigid procedural or evidential rules. In fact, grand jurors could act on their own knowledge and were free to make their presentments or indictments on such information as they deemed satisfactory. Despite its broad power to institute criminal proceedings the grand jury grew in popular favor with the years. It acquired an independence in England free from control by the Crown or judges. Its adoption in our Constitution as the sole method for preferring charges in serious criminal cases shows the high place it held as an instrument of justice. And in this country as in England of old the grand jury has convened as a body of laymen, free from technical rules, acting in secret, pledged to indict no one because of prejudice and to free no one because of special favor.”³

Amdt5.2.2 Grand Jury Clause Doctrine and Practice

Fifth Amendment:

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

The prescribed constitutional function of grand juries in federal courts¹ is to return criminal indictments. But grand juries serve a considerably broader series of purposes as well. Principal among these is the investigative function, which grand juries serve by summoning witnesses, compelling testimony, and gathering evidence. Operating in secret, under the direction but not control of a prosecutor, grand juries may examine witnesses in the absence of their counsel.² The exclusionary rule is inapplicable in grand jury proceedings, with the result

³ *Costello v. United States*, 350 U.S. 359, 362 (1956). “The grand jury is an integral part of our constitutional heritage which was brought to this country with the common law. The Framers, most of them trained in the English law and traditions, accepted the grand jury as a basic guarantee of individual liberty; notwithstanding periodic criticism, much of which is superficial, overlooking relevant history, the grand jury continues to function as a barrier to reckless or unfounded charges . . . Its historic office has been to provide a shield against arbitrary or oppressive action, by insuring that serious criminal accusations will be brought only upon the considered judgment of a representative body of citizens acting under oath and under judicial instruction and guidance.” *United States v. Mandujano*, 425 U.S. 564, 571 (1976) (plurality opinion). *See id.* at 589–91 (Brennan, J., concurring).

¹ This provision applies only in federal courts and is not applicable to the states, either as an element of due process or as a direct command of the Fourteenth Amendment. *Hurtado v. California*, 110 U.S. 516 (1884); *Palko v. Connecticut*, 302 U.S. 319, 323 (1937); *Alexander v. Louisiana*, 405 U.S. 625, 633 (1972).

² Witnesses are not entitled to have counsel present in the room. Fed. R. Civ. P. 6(d). The validity of this restriction was asserted in dictum in *In re Groban*, 352 U.S. 330, 333 (1957), and inferentially accepted by the dissent in that case. *In re Groban*, 352 U.S. at 346–47 (Black, J., distinguishing grand juries from the investigative entity before the Court). The decision in *Coleman v. Alabama*, 399 U.S. 1 (1970), deeming the preliminary hearing a “critical stage of the prosecution” at which counsel must be provided, called this rule in question, inasmuch as the preliminary hearing and the grand jury both determine whether there is probable cause with regard to a suspect. *See Coleman*, 399 U.S. at 25 (Burger, C.J., dissenting). In *United States v. Groban*, 352 U.S. 330, 333 (1957), and inferentially accepted by the dissent in that case. *In re Groban*, 352 U.S. at 346–47 (Justice Black, distinguishing grand juries from the investigative entity before the Court). The decision in *Coleman v. Alabama*, 399 U.S. 1 (1970), deeming the preliminary hearing a “critical stage of the prosecution” at which counsel must be provided, called this rule in question, inasmuch as the preliminary hearing and the grand jury both determine whether there is probable cause with regard to a suspect. *See Coleman*, 399 U.S. at 25 (Burger, C.J., dissenting). In *United States v. Mandujano*, 425 U.S. 564, 581 (1976) (plurality

FIFTH AMENDMENT—RIGHTS OF PERSONS
Grand Jury Clause

Amdt5.2.2
Grand Jury Clause Doctrine and Practice

that a witness called before a grand jury may be questioned on the basis of knowledge obtained through illegally seized evidence.³ Similarly, grand jury witnesses are not entitled to be informed that they may be indicted for the offense under inquiry.⁴ While some constitutional guarantees that apply in other settings are thus inapplicable in grand jury proceedings, other guarantees do apply in such proceedings. For example, a grand jury may not compel a person to produce books and papers that would incriminate him or her.⁵ Besides indictments, grand juries may also issue reports that may indicate nonindictable misbehavior, mis- or malfeasance of public officers, or other objectionable conduct.⁶ Despite the vast power of grand juries, there is little in the way of judicial or legislative response designed to impose some supervisory restrictions on them.⁷

opinion), Chief Justice Warren Burger wrote: “Respondent was also informed that if he desired he could have the assistance of counsel, but that counsel could not be inside the grand jury room. That statement was plainly a correct recital of the law. No criminal proceedings had been instituted against respondent, hence the Sixth Amendment right to counsel had not come into play.” By emphasizing the point of institution of criminal proceedings, relevant to the right of counsel at line-ups and the like, the Chief Justice not only reasserted the absence of a right to counsel in the room but also, despite his having referred to it, cast doubt upon the existence of any constitutional requirement that a grand jury witness be permitted to consult with counsel out of the room, and, further, raised the implication that a witness or putative defendant unable to afford counsel would have no right to appointed counsel. Concurring, Justice William Brennan argued that access to counsel was essential and constitutionally required for the protection of constitutional rights; Brennan accepted the likelihood, without agreeing, that consultation outside the room would be adequate to preserve a witness’s rights, *Mandujano*, 425 U.S. at 602–09 (with Justice Thurgood Marshall). Justices Potter Stewart and Harry Blackmun reserved judgment. *Id.* at 609.

³ *United States v. Calandra*, 414 U.S. 338 (1974). The Court has interpreted a provision of federal wiretap law, 18 U.S.C. § 2515, to prohibit use of unlawful wiretap information as a basis for questioning witnesses before grand juries. *Gelbard v. United States*, 408 U.S. 41 (1972).

⁴ *United States v. Washington*, 431 U.S. 181 (1977). Because defendant when he appeared before the grand jury was warned of his rights to decline to answer questions on the basis of self-incrimination, the decision was framed in terms of those warnings, but the Court twice noted that it had not decided, and was not deciding, “whether any Fifth Amendment warnings whatever are constitutionally required for grand jury witnesses” *Id.* at 186.

⁵ In *Hale v. Henkel*, the Supreme Court observed: “Of course, the grand jury’s subpoena power is not unlimited. It may consider incompetent evidence, but it may not itself violate a valid privilege, whether established by the Constitution, statutes, or the common law Although, for example, an indictment based on evidence obtained in violation of a defendant’s Fifth Amendment privilege is nevertheless valid, the grand jury may not force a witness to answer questions in violation of that constitutional guarantee. . . . Similarly, a grand jury may not compel a person to produce books and papers that would incriminate him. The grand jury is also without power to invade a legitimate privacy interest protected by the Fourth Amendment. A grand jury’s subpoena *duces tecum* will be disallowed if it is ‘far too sweeping in its terms to be regarded as reasonable’ under the Fourth Amendment.” *Hale v. Henkel*, 201 U.S. 43, 76 (1906). “Judicial supervision is properly exercised in such cases to prevent the wrong before it occurs.” *United States v. Calandra*, 414 U.S. 338, 346 (1974). *See also* *United States v. Dionisio*, 410 U.S. 1, 11–12 (1973). Grand juries must operate within the limits of the First Amendment and may not harass the exercise of speech and press rights. *Branzburg v. Hayes*, 408 U.S. 665, 707–08 (1972). Protection of Fourth Amendment interests is as extensive before the grand jury as before any investigative officers, *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Hale*, 201 U.S. at 76–77, but not more so either. *United States v. Dionisio*, 410 U.S. 1 (1973) (subpoena to give voice exemplars); *United States v. Mara*, 410 U.S. 19 (1973) (handwriting exemplars). The Fifth Amendment’s Self-Incrimination Clause must be respected. *Blau v. United States*, 340 U.S. 159 (1950); *Hoffman v. United States*, 341 U.S. 479 (1951). On common-law privileges, *see* *Blau v. United States*, 340 U.S. 332 (1951) (husband-wife privilege); *Alexander v. United States*, 138 U.S. 353 (1891) (attorney-client privilege). The traditional secrecy of grand jury proceedings has been relaxed a degree to permit a limited discovery of testimony. *Compare* *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395 (1959), *with* *Dennis v. United States*, 384 U.S. 855 (1966). *See* Fed. R. Crim. P. 6(e) (secrecy requirements and exceptions).

⁶ The grand jury “is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of whether any particular individual will be found properly subject to an accusation of crime.” *Blair v. United States*, 250 U.S. 273, 281 (1919). On the reports function of the grand jury, *see In re Grand Jury* January, 1969, 315 F. Supp. 662 (D. Md. 1970), and Report of the January 1970 Grand Jury (Black Panther Shooting) (N.D. Ill., released May 15, 1970). Congress has now specifically authorized issuance of reports in cases concerning public officers and organized crime. 18 U.S.C. § 333.

⁷ Congress has required that in the selection of federal grand juries, as well as petit juries, random selection of a fair cross section of the community is to take place, and has provided a procedure for challenging discriminatory selection by moving to dismiss the indictment. 28 U.S.C. §§ 1861–68. Racial discrimination in selection of juries is constitutionally proscribed in both state and federal courts.

FIFTH AMENDMENT—RIGHTS OF PERSONS
Grand Jury Clause

Amdt5.2.2
Grand Jury Clause Doctrine and Practice

By its terms, the Grand Jury Clause applies only to “capital” or “otherwise infamous” crimes. Whether a crime qualifies as “infamous” depends on the quality of the associated punishment.⁸ The Supreme Court has held that the prospect of imprisonment in a state prison or penitentiary⁹ or hard labor at a non-penitentiary workhouse¹⁰ are sufficient to render a crime “infamous” within the meaning of the Grand Jury Clause. By contrast, the Court has held that conduct punishable by a fine of not more than \$1,000 or imprisonment for not more than six months can be tried without indictment.¹¹ In analyzing whether a crime is “infamous,” the pivotal question is whether the offense is one for which the court is authorized to award such punishment; the sentence actually imposed is immaterial.¹²

A person can be tried only upon the indictment as found by the grand jury—in particular, upon the language in the charging part of the instrument.¹³ A change in the indictment that does not narrow its scope deprives the court of the power to try the accused.¹⁴ Although additions to offenses alleged in an indictment are prohibited, the Supreme Court has ruled that it is permissible “to drop from an indictment those allegations that are unnecessary to an offense that is clearly contained within it,” as, for example, a lesser included offense.¹⁵

Because there is no constitutional requirement that an indictment be presented by a grand jury as a body, an indictment delivered by the foreman in the absence of other grand jurors is valid.¹⁶ If valid on its face, an indictment returned by a legally constituted, non-biased grand jury satisfies the requirement of the Fifth Amendment and is enough to call for a trial on the merits; such an indictment is not open to challenge on the ground that there was inadequate or incompetent evidence before the grand jury.¹⁷

Amdt5.2.3 Military Exception to Grand Jury Clause

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be

⁸ *Ex parte Wilson*, 114 U.S. 417 (1885).

⁹ *Mackin v. United States*, 117 U.S. 348, 352 (1886).

¹⁰ *United States v. Moreland*, 258 U.S. 433 (1922).

¹¹ *Duke v. United States*, 301 U.S. 492 (1937).

¹² *Ex parte Wilson*, 114 U.S. at 426.

¹³ See *Stirone v. United States*, 361 U.S. 212 (1960), which held that a variation between pleading and proof deprived petitioner of his right to be tried only upon charges presented in the indictment.

¹⁴ *Ex parte Bain*, 121 U.S. 1, 12 (1887). In *United States v. Cotton*, the Supreme Court overruled *Ex parte Bain* in *United States v. Miller*, 471 U.S. 130 (1985), to the extent that it held that a narrowing of an indictment is impermissible. The Court also overruled *Ex parte Bain* to the extent that it held that a defective indictment was not just substantive error, but that it deprived a court of subject-matter jurisdiction over a case. *United States v. Cotton*, 535 U.S. 625 (2002). While a defendant’s failure to challenge an error of substantive law at trial level may result in waiver of such issue for purpose of appeal, challenges to subject-matter jurisdiction may be made at any time. Thus, where a defendant failed to assert his right to a non-defective grand jury indictment, appellate review of the matter would be limited to a “plain error” analysis. *Cotton*, 535 U.S. at 631.

¹⁵ *United States v. Miller*, 471 U.S. 130, 144 (1985).

¹⁶ *Breese v. United States*, 226 U.S. 1 (1912).

¹⁷ *Costello v. United States*, 350 U.S. 359 (1956); *Lawn v. United States*, 355 U.S. 339 (1958); *United States v. Blue*, 384 U.S. 251 (1966). Cf. *Gelbard v. United States*, 408 U.S. 41 (1972).

FIFTH AMENDMENT—RIGHTS OF PERSONS

Double Jeopardy Clause

Amdt5.3.1

Overview of Double Jeopardy Clause

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.

The Grand Jury Clause contains an exception for persons serving in the armed forces. All persons in the regular armed forces are subject to court martial rather than grand jury indictment or trial by jury.¹ The Supreme Court has held that the exception's limiting words—"when in actual service in time of War or public danger"—apply only to members of the militia, not to members of the regular armed forces.² Thus, members of the regular armed forces can be tried by court martial even when the alleged offenses are not connected to their service in the armed forces.³

Amdt5.3 Double Jeopardy Clause

Amdt5.3.1 Overview of Double Jeopardy Clause

Fifth Amendment:

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

The Clause speaks of being put in "jeopardy of life or limb," which as derived from the common law, generally referred to the possibility of capital punishment upon conviction, but it is now settled that the Clause protects with regard "to every indictment or information charging a party with a known and defined crime or misdemeanor, whether at the common law or by statute."¹ Despite the Clause's literal language, it can apply as well to sanctions that are civil in form if they clearly are applied in a manner that constitutes "punishment."² Ordinarily,

¹ Johnson v. Sayre, 158 U.S. 109, 114 (1895). See also Lee v. Madigan, 358 U.S. 228, 232–35, 241 (1959).

² Sayre, 158 U.S. at 114.

³ Solorio v. United States, 483 U.S. 435 (1987). The *Solorio* Court overruled *O'Callahan v. Parker*, 395 U.S. 258 (1969) in which the Court had held that offenses that are not "service connected" may not be punished under military law, but instead must be tried in the civil courts. Chief Justice William Rehnquist's opinion in *Solorio* for the Court was joined by Justices Byron White, Lewis Powell, Sandra Day O'Connor, and Antonin Scalia. Justice John Paul Stevens concurred in the judgment but thought it unnecessary to reexamine *O'Callahan*. Dissenting Justice Thurgood Marshall, joined by Justices William Brennan and Harry Blackmun, thought the service connection rule justified by the language of the Fifth Amendment's exception, based on the nature of cases (those "arising in the land or naval forces") rather than the status of defendants. Offenses against the laws of war, whether committed by citizens or by alien enemy belligerents, may be tried by a military commission. *Ex parte Quirin*, 317 U.S. 1, 44 (1942).

¹ *Ex parte Lange*, 85 U.S. (18 Wall.) 163, 169 (1874). The Clause generally has no application in noncriminal proceedings. *Helvering v. Mitchell*, 303 U.S. 391 (1938).

² The Clause applies in juvenile court proceedings that are formally civil. *Breed v. Jones*, 421 U.S. 519 (1975). See also *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *United States v. Halper*, 490 U.S. 435 (1989) (civil penalty under the False Claims Act constitutes punishment if it is overwhelmingly disproportionate to compensating the government for its loss, and if it can be explained only as serving retributive or deterrent purposes); *Montana Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994) (tax on possession of illegal drugs, "to be collected only after any state or federal fines or forfeitures have been satisfied," constitutes punishment for purposes of double jeopardy). But see *Seling v. Young*, 531 U.S. 250 (2001) (a statute that has been held to be civil and not criminal in nature cannot be deemed punitive "as applied" to a single individual). The issue of whether a law is civil or punitive in nature is essentially the same for ex post facto and for double jeopardy analysis. 531 U.S. at 263.

The Clause applies in juvenile court proceedings that are formally civil. *Breed v. Jones*, 421 U.S. 519 (1975). See also *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984); *United States v. Halper*, 490 U.S. 435 (1989) (civil penalty under the False Claims Act constitutes punishment if it is overwhelmingly disproportionate to compensating

FIFTH AMENDMENT—RIGHTS OF PERSONS
Double Jeopardy Clause

Amdt5.3.1
Overview of Double Jeopardy Clause

however, civil in rem forfeiture proceedings may not be considered punitive for purposes of double jeopardy analysis,³ and the same is true of civil commitment following expiration of a prison term.⁴

Amdt5.3.2 Historical Background on Double Jeopardy Clause

Fifth Amendment:

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

The concept of double jeopardy has a long history, but its development was uneven and its meaning has varied. The English view of double jeopardy, under the influence of Sir Edward Coke and William Blackstone, came gradually to mean that a defendant at trial could plead former conviction or former acquittal as a special plea in bar to defeat the prosecution.¹ In this country, the common-law rule was in some cases limited to this rule and in other cases extended to bar a new trial even though the former trial had not concluded in either an acquittal or a conviction.

The rule's elevation to fundamental status by its inclusion in several state bills of rights following the Revolution continued the differing approaches.² James Madison's version of the guarantee as introduced in the House of Representatives read: "No person shall be subject, except in cases of impeachment, to more than one punishment or trial for the same offense."³ Some Members of the House opposed this proposal on the grounds that it could be construed to prohibit a second trial after a successful appeal by a defendant. They viewed this as problematic for two reasons. First, they argued that such a rule could constitute a hazard to the public by freeing the guilty. Second, they reasoned that prohibiting re-trials after successful

the government for its loss, and if it can be explained only as serving retributive or deterrent purposes); *Montana Dep't of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994) (tax on possession of illegal drugs, "to be collected only after any state or federal fines or forfeitures have been satisfied," constitutes punishment for purposes of double jeopardy). *But see* *Seling v. Young*, 531 U.S. 250 (2001) (a statute that has been held to be civil and not criminal in nature cannot be deemed punitive "as applied" to a single individual). The issue of whether a law is civil or punitive in nature is essentially the same for ex post facto and for double jeopardy analysis. 531 U.S. at 263.

³ *United States v. Ursery*, 518 U.S. 267 (1996) (forfeitures, pursuant to 19 U.S.C. § 981 and 21 U.S.C. § 881, of property used in drug and money laundering offenses, are not punitive). The Court in *Ursery* applied principles that had been set forth in *Various Items of Personal Property v. United States*, 282 U.S. 577 (1931) (forfeiture of distillery used in defrauding government of tax on spirits), and *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984) (forfeiture, pursuant to 18 U.S.C. § 924(d), of firearms "used or intended to be used in" firearms offenses). A two-part inquiry is followed. First, the Court inquires whether Congress intended the forfeiture proceeding to be civil or criminal. Then, if Congress intended that the proceeding be civil, the court determines whether there is nonetheless the "clearest proof" that the sanction is "so punitive" as to transform it into a criminal penalty. *89 Firearms*, 465 U.S. at 366.

⁴ *Kansas v. Hendricks*, 521 U.S. 346, 369–70 (1997) (commitment under state's Sexually Violent Predator Act).

¹ M. FRIEDLAND, *DOUBLE JEOPARDY* part 1 (1969); *Crist v. Bretz*, 437 U.S. 28, 32–36 (1978), and *id.* at 40 (Powell, J., dissenting); *United States v. Wilson*, 420 U.S. 332, 340 (1975).

² J. SIGLER, *DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY* 21–27 (1969). The first bill of rights that expressly adopted a double jeopardy clause was the New Hampshire Constitution of 1784. "No subject shall be liable to be tried, after an acquittal, for the same crime or offence." Art. I, Sec. XCI, 4 F. Thorpe, *The Federal and State Constitution*, reprinted in H.R. Doc. No. 357, 59th Congress, 2d Sess. 2455 (1909). A more comprehensive protection was included in the Pennsylvania Declaration of Rights of 1790, which had language almost identical to the present Fifth Amendment provision. *Id.* at 3100.

³ 1 ANNALS OF CONGRESS 434 (June 8, 1789).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Double Jeopardy Clause

Amdt5.3.3
Dual Sovereignty Doctrine

appeals might make appellate courts less likely to reverse improper convictions.⁴ Ultimately, the language barring a second trial was dropped in response to these concerns.⁵

Amdt5.3.3 Dual Sovereignty Doctrine

Fifth Amendment:

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

Throughout most of its history, the Double Jeopardy Clause was only binding on the Federal Government. In *Palko v. Connecticut*,¹ the Supreme Court rejected an argument that the Fourteenth Amendment incorporated *all* provisions of the first eight Amendments as limitations on the states. The Court, however, enunciated a due process theory under which *some* Bill of Rights guarantees are considered so “fundamental” that they are “of the very essence of the scheme of ordered liberty” and “neither liberty nor justice would exist if they were sacrificed.”² The Double Jeopardy Clause, like many other procedural rights of defendants, was not considered “fundamental” in *Palko*; it could be absent and fair trials could still be had. Still, a defendant’s due process rights, absent double jeopardy, might be violated in the Court’s view if the state “creat[ed] a hardship so acute and shocking as to be unendurable,” but that was not the situation in *Palko*.³

In *Benton v. Maryland*, however, the Supreme Court concluded “that the double jeopardy prohibition of the Fifth Amendment represents a fundamental ideal in our constitutional heritage.”⁴ And, the Court noted, “[o]nce it is decided that a particular Bill of Rights guarantee is ‘fundamental to the American scheme of justice,’ the same constitutional standards apply against both the State and Federal Governments.” Accordingly, after *Benton*, the double jeopardy limitation applies to both federal and state governments. State rules on double jeopardy, with regard to matters such as when jeopardy attaches, must be considered in light of federal standards.⁵

In a federal system, different governmental bodies⁶ may have different interests to serve when defining crimes and enforcing their laws. Where different bodies have overlapping

⁴ *Id.* at 753.

⁵ 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 1149, 1165 (1971). In *Crist v. Bretz*, 437 U.S. 28, 40 (1978) (dissenting), Justice Lewis Powell attributed to inadvertence the broadening of the “rubric” of double jeopardy to incorporate the common law rule against dismissal of the jury prior to verdict, a question the majority passed over as being “of academic interest only.” *Id.* at 34 n.10.

¹ 302 U.S. 319 (1937).

² *Id.* at 325, 326.

³ *Id.* at 328.

⁴ 395 U.S. 784, 795 (1969) (citation omitted).

⁵ *Crist v. Bretz*, 437 U.S. 28, 37–38 (1978). *But see id.* at 40 (Powell, J., dissenting, joined by Burger, C.J. & Rehnquist, J.) (standard governing states should be more relaxed).

⁶ *Id.* See also cases cited in *Bartkus v. Illinois*, 359 U.S. 121, 132 n.19 (1959); *Abbate v. United States*, 359 U.S. 187, 192–93 (1959).

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jurisdiction, a person may engage in conduct that will violate the laws of more than one body.⁷ Although the Court had long accepted in dictum the principle that prosecution by two governments of the same defendant for the same conduct would not constitute double jeopardy, it was not until *United States v. Lanza*⁸ that the conviction in federal court of a person previously convicted in a state court for performing the same acts was sustained. The *Lanza* Court stated: “We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter within the same territory. . . . Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other.”⁹ The Court’s reasoning came to be known as the “dual sovereignty” doctrine.

Although the Supreme Court has been asked to overrule the dual sovereignty doctrine in a number of cases, it has repeatedly declined to do so.¹⁰ In 2019, in *Gamble v. United States*, the Court clarified that “where there are two sovereigns, there are two laws, and two ‘offences.’”¹¹ The Court asserted that this dual sovereignty doctrine was justified by historical understandings of the Double Jeopardy Clause.¹² Observing that the Clause prohibits dual prosecution for the same “offence,” the Court explained that at the time the Constitution was written, an “offence” was defined as a violation of a particular law.¹³ In the Court’s view, two sovereigns will have two different laws, meaning that violations of those laws will be two different offenses.¹⁴ In *Gamble*, the Court emphasized that by 2019, the doctrine had been applied in “a chain of precedent linking dozens of cases over 170 years.”¹⁵

In prior cases, the Supreme Court also recognized practical considerations justifying the dual sovereignty doctrine, noting that without this principle, states could “hinder[]” federal law enforcement by imposing more lenient sentences on defendants under state law, thereby barring federal prosecution even if the “defendants’ acts impinge more seriously on a federal interest than on a state interest.”¹⁶ In *Gamble*, the Court also noted the international consequences of the doctrine, stating that if “only one sovereign may prosecute for a single act, no American court—state or federal—could prosecute conduct already tried in a foreign court.”¹⁷ If the Double Jeopardy Clause barred such U.S. prosecutions, the Court noted this could raise prudential concerns about the U.S. Government’s ability to vindicate its interests in enforcing its own criminal laws, particularly if the foreign government’s legal system is seen as somehow inadequate.¹⁸

⁷ This issue was recognized as early as in *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820), and the doctrine’s rationale was confirmed within thirty years. *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847); *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850); *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1853).

⁸ 260 U.S. 377 (1922).

⁹ *Id.* at 382. *See also* *Hebert v. Louisiana*, 272 U.S. 312 (1924); *Screws v. United States*, 325 U.S. 91, 108 (1945); *Jerome v. United States*, 318 U.S. 101 (1943).

¹⁰ *Gamble v. United States*, No. 17-646, slip op. at 3 (U.S. June 17, 2019); *Abbate*, 359 U.S. at 195; *Bartkus*, 359 U.S. at 138. The Court has applied the dual sovereignty doctrine without expressly reconsidering and reaffirming its validity in a number of additional cases, as detailed in *Gamble*, slip op. at 6, and *Bartkus*, 359 U.S. at 129–33.

¹¹ *Gamble*, slip op. at 3, 4 (quoting U.S. CONST. amend. V).

¹² *Id.* at 4.

¹³ *Id.* at 4.

¹⁴ *Abbate*, 359 U.S. at 195; *accord, e.g., United States v. Wheeler*, 435 U.S. 313, 318 (1978).

¹⁵ *Gamble*, slip op. at 8.

¹⁶ *Abbate*, 359 U.S. at 195; *accord, e.g., Wheeler*, 435 U.S. at 318.

¹⁷ *Gamble*, slip op. at 6.

¹⁸ *Id.*

FIFTH AMENDMENT—RIGHTS OF PERSONS
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Amdt5.3.4
Re-Prosecution After Mistrial

The dual sovereignty doctrine has also been applied to permit successive prosecutions by two different states for the same conduct,¹⁹ and to permit a federal prosecution after a conviction in an Indian tribal court for an offense stemming from the same conduct.²⁰ When two different governmental bodies are subject to the same sovereign, however, the Double Jeopardy Clause bars separate prosecutions by those bodies for the same offense.²¹

In *Puerto Rico v. Sanchez Valle*,²² the Supreme Court held that the separate prosecutions of an individual by the United States and Puerto Rico for the same underlying conduct violated the Double Jeopardy Clause because the two governments are not “separate sovereigns.” Even though Puerto Rico has exercised self-rule through a popularly ratified constitution since the mid-twentieth century, the Court concluded that the “original source” of Puerto Rico’s authority to prosecute crimes was Congress—specifically a federal statute authorizing the people of Puerto Rico to draft their own constitution.²³ As a result, both the United States and Puerto Rico were exercising prosecutorial authority that stemmed from the same source.

More recently, the Supreme Court has emphasized the source of the authority *defining the offense*, as opposed to the body carrying out the prosecution, when determining the dual sovereignty doctrine’s applicability. In *Denezpi v. United States*,²⁴ the Court upheld a federal prosecution that followed a Court of Indian Offenses prosecution. According to the Court, even assuming that prosecution in the Court of Indian Offenses—which was created by the federal Executive Branch and operates pursuant to the *Code of Federal Regulations*²⁵—is a form of prosecution by the United States, double jeopardy does not attach so long as the United States is prosecuting an offense defined by a separate sovereign, such as a federally recognized tribe. Because the defendant in *Denezpi* was convicted of violating a tribal ordinance in the first prosecution, the Double Jeopardy Clause did not prohibit a subsequent prosecution in federal court for a federal statutory offense arising from the same conduct.²⁶

Amdt5.3.4 Re-Prosecution After Mistrial

Fifth Amendment:

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

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

¹⁹ *Heath v. Alabama*, 474 U.S. 82 (1985) (defendant who crossed state line in the course of a kidnapping and murder was prosecuted for murder in both states).

²⁰ *E.g.*, *United States v. Lara*, 541 U.S. 193, 199 (2004); *Wheeler*, 435 U.S. at 329–30.

²¹ *See, e.g.*, *Waller v. Florida*, 397 U.S. 387 (1970) (trial by municipal court precluded trial for same offense by state court); *Grafton v. United States*, 206 U.S. 333 (1907) (trial by military court-martial precluded subsequent trial in territorial court).

²² 579 U.S. 59 (2016).

²³ *Id.* at 61.

²⁴ No. 20-7622, slip op. at 5 (U.S. June 13, 2022).

²⁵ *See* 25 C.F.R. §§ 11.102 *et seq.*

²⁶ *Denezpi*, slip op. at 16.

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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 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

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 *United States v. Jorn*, 400 U.S. 470, 486 (1971) (plurality opinion).

⁵ *Arizona v. Washington*, 434 U.S. 497, 503–05 (1978); *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 *United States v. Perez*, 22 U.S. (9 Wheat.) 579 (1824); *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).

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 v. Hunter*, 336 U.S. 684 (1949) (court-martial discharged because enemy advancing on site).

⁹ *Illinois v. Somerville*, 410 U.S. 458, 463 (1973).

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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 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

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).

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.

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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 reprosecution, 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 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.

²⁰ *Arizona v. Washington*, 434 U.S. 497, 514 (1978).

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 *United States v. Jorn*, 400 U.S. 470, 485 (1971) (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 *United States v. Dinitz*, 424 U.S. 600 (1976).

²⁶ *Id.* at 609.

²⁷ *Id.* at 611.

²⁸ *Compare* *United States v. Dinitz*, 424 U.S. 600, 611 (1976), *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.

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Double Jeopardy Clause

Amdt5.3.5
Re-Prosecution After Conviction

Amdt5.3.5 Re-Prosecution After Conviction

Fifth Amendment:

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

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 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

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).

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).

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Re-Prosecution After Conviction

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

Amdt5.3.6 Re-Prosecution After Acquittal

Amdt5.3.6.1 Overview of Re-Prosecution After Acquittal

Fifth Amendment:

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

That a defendant may not be retried following an acquittal is “the most fundamental rule in the history of double jeopardy jurisprudence.”¹ “[T]he law attaches particular significance to an acquittal. To permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant so that ‘even though innocent he may be found guilty.’”² Although, in other areas of double jeopardy doctrine, consideration is given to the public-safety interest in having a criminal trial proceed to an error-free conclusion, no such balancing of interests is permitted with respect to acquittals, “no matter how erroneous,” no matter even if they were “egregiously erroneous.”³ Thus, an acquittal resting on the trial judge’s misreading of the elements of an offense precludes further prosecution.⁴

The acquittal being final, there is no governmental appeal constitutionally possible from such a judgment. This was firmly established in *Kepner v. United States*,⁵ which arose under a Philippines appeals system in which the appellate court could make an independent review of the record, set aside the trial judge’s decision, and enter a judgment of conviction.⁶ Previously,

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).

¹ *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

² *United States v. Scott*, 437 U.S. 82, 91 (1978) (quoting *Green v. United States*, 355 U.S. 184, 188 (1957)).

³ *Burks v. United States*, 437 U.S. 1, 16 (1978); *Fong Foo v. United States*, 369 U.S. 141, 143 (1962). For evaluation of those interests of the defendant that might support the absolute rule of finality, and rejection of all such interests save the right of the jury to acquit against the evidence and the trial judge’s ability to temper legislative rules with leniency, see Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 122–37.

⁴ *Evans v. Michigan*, 568 U.S. 313 (2013) (acquittal after judge ruled the prosecution failed to prove that a burned building was not a dwelling, but such proof was not legally required for the arson offense charged).

⁵ 195 U.S. 100 (1904). The case interpreted not the constitutional provision but a statutory provision extending double jeopardy protection to the Philippines. The Court has described the case, however, as correctly stating constitutional principles. *See, e.g.*, *United States v. Wilson*, 420 U.S. 332, 346 n.15 (1975); *United States v. DiFrancesco*, 449 U.S. 117, 113 n.13 (1980).

⁶ In dissent, Justice Oliver Wendell Holmes, joined by three other Justices, propounded a theory of “continuing jeopardy,” so that until the case was finally concluded one way or another, through judgment of conviction or acquittal, and final appeal, there was no second jeopardy no matter how many times a defendant was tried. 195 U.S. at 134. The

FIFTH AMENDMENT—RIGHTS OF PERSONS
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Amdt5.3.6.2
Acquittal by Jury and Re-Prosecution

under the Due Process Clause, there was no barrier to state provision for prosecutorial appeals from acquittals.⁷ But there are instances in which the trial judge will dismiss the indictment or information without intending to acquit or in circumstances in which retrial would not be barred, and the prosecution, of course, has an interest in seeking on appeal to have errors corrected. Until 1971, however, the law providing for federal appeals was extremely difficult to apply and insulated from review many purportedly erroneous legal rulings,⁸ but in that year Congress enacted a new statute permitting appeals in all criminal cases in which indictments are dismissed, except in those cases in which the Double Jeopardy Clause prohibits further prosecution.⁹ In part because of the new law, the Court has dealt in recent years with a large number of problems in this area.

Amdt5.3.6.2 Acquittal by Jury and Re-Prosecution

Fifth Amendment:

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

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 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

Court has numerous times rejected any concept of "continuing jeopardy." *E.g.*, *Green v. United States*, 355 U.S. 184, 192 (1957); *United States v. Wilson*, 420 U.S. 332, 351–53 (1975); *Breed v. Jones*, 421 U.S. 519, 533–35 (1975).

⁷ *Palko v. Connecticut*, 302 U.S. 319 (1937). *Palko* is no longer viable. *Cf.* *Greene v. Massey*, 437 U.S. 19 (1978).

⁸ The Criminal Appeals Act of 1907, 34 Stat. 1246, was "a failure . . . , a most unruly child that has not improved with age." *United States v. Sisson*, 399 U.S. 267, 307 (1970). *See also* *United States v. Oppenheimer*, 242 U.S. 85 (1916); *Fong Foo v. United States*, 369 U.S. 141 (1962).

⁹ Title III of the Omnibus Crime Control Act, Pub. L. No. 91-644, 84 Stat. 1890, 18 U.S.C. § 3731. Congress intended to remove all statutory barriers to governmental appeal and to allow appeals whenever the Constitution would permit, so that interpretation of the statute requires constitutional interpretation as well. *United States v. Wilson*, 420 U.S. 332, 337 (1975). *See Sanabria v. United States*, 437 U.S. 54, 69 n.23 (1978), and *id.* at 78 (Stevens, J., concurring).

¹ What constitutes a jury acquittal may occasionally be uncertain. 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 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

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Amdt5.3.6.3
Acquittal by Trial Judge and Re-Prosecution

Amdt5.3.6.3 Acquittal by Trial Judge and Re-Prosecution

Fifth Amendment:

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

When a trial judge acquits a defendant, that action concludes the matter to the same extent that acquittal by jury verdict does.¹ There is no possibility of retrial for the same offense.² But it may be difficult at times to determine whether the trial judge's action was in fact an acquittal or whether it was a dismissal or some other action, which the prosecution may be able to appeal or the judge may be able to reconsider.³ The question is "whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged."⁴ Thus, an appeal by the government was held barred in a case in which the deadlocked jury had been discharged, and the trial judge had granted the defendant's motion for a judgment of acquittal under the appropriate federal rule, explicitly based on the judgment that the government had not proved facts constituting the offense.⁵ Even if, as happened in *Sanabria v. United States*,⁶ the trial judge erroneously excludes evidence and then acquits on the basis that the remaining evidence is insufficient to convict, the judgment of acquittal produced thereby is final and unreviewable.⁷

Some limited exceptions exist with respect to the finality of trial judge acquittal. First, because a primary purpose of the Due Process Clause is the prevention of successive trials and not of prosecution appeals per se, it is apparently the case that, if the trial judge permits the case to go to the jury, which convicts, and the judge thereafter enters a judgment of acquittal, even one founded upon his belief that the evidence does not establish guilt, the prosecution may appeal, because the effect of a reversal would be not a new trial but reinstatement of the

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 *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 570–72 (1977); *Sanabria v. United States*, 437 U.S. 54, 63–65 (1978); *Finch v. United States*, 433 U.S. 676 (1977).

² In *Fong Foo v. United States*, 369 U.S. 141 (1962), the Court acknowledged that the trial judge's action in acquitting was "based upon an egregiously erroneous foundation," but it was nonetheless final and could not be reviewed. *Id.* at 143.

³ As a general rule a state may prescribe that a judge's midtrial determination of the sufficiency of the prosecution's proof may be reconsidered. *Smith v. Massachusetts*, 543 U.S. 462 (2005) (Massachusetts had not done so, however, so the judge's midtrial acquittal on one of three counts became final for double jeopardy purposes when the prosecution rested its case).

⁴ *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977).

⁵ 430 U.S. at 570–76. See also *United States v. Scott*, 437 U.S. 82, 87–92 (1978); *Smalis v. Pennsylvania*, 476 U.S. 140 (1986) (demurrer sustained on basis of insufficiency of evidence is acquittal).

⁶ 437 U.S. 54 (1978).

⁷ See also *Smith v. Massachusetts*, 543 U.S. 462 (2005) (acquittal based on erroneous interpretation of precedent).

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Double Jeopardy Clause, Re-Prosecution After Acquittal

Amdt5.3.6.4

Trial Court Rulings Terminating Trial Before Verdict and Re-Prosecution

jury's verdict and the judgment thereon.⁸ Second, if the trial judge enters or grants a motion of acquittal, even one based on the conclusion that the evidence is insufficient to convict, then the prosecution may appeal if jeopardy had not yet attached in accordance with the federal standard.⁹

Amdt5.3.6.4 Trial Court Rulings Terminating Trial Before Verdict and Re-Prosecution

Fifth Amendment:

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

If, after jeopardy attaches, a trial judge grants a motion for mistrial, ordinarily the defendant is subject to retrial;¹ if, after jeopardy attaches, but before a jury conviction occurs, the trial judge acquits, perhaps on the basis that the prosecution has presented insufficient evidence or that the defendant has proved a requisite defense such as “insanity” or entrapment, the defendant is not subject to retrial.² This is so even where the trial court's ruling on the sufficiency of the evidence is based on an erroneous interpretation of the statute defining the elements of the offense.³ However, it may be that the trial judge will grant a motion to dismiss that is neither a mistrial nor an acquittal, but is instead a termination of the trial in defendant's favor based on some decision not relating to his factual guilt or innocence, such as prejudicial preindictment delay.⁴ The prosecution may not simply begin a new trial but must seek first to appeal and overturn the dismissal, a course that was not open to federal prosecutors until enactment of the Omnibus Crime Control Act in 1971.⁵ That law has resulted in tentative and uncertain rulings with respect to when such dismissals may be appealed and further proceedings directed. In the first place, it is unclear in many instances whether a judge's ruling is a mistrial, a dismissal, or an acquittal.⁶ In the second place, because the

⁸ In *United States v. Wilson*, 420 U.S. 332 (1975), following a jury verdict to convict, the trial judge granted defendant's motion to dismiss on the ground of prejudicial delay, not a judgment of acquittal; the Court permitted a government appeal because reversal would have resulted in reinstatement of the jury's verdict, not in a retrial. In *United States v. Jenkins*, 420 U.S. 358, 365 (1975), the Court assumed, on the basis of *Wilson*, that a trial judge's acquittal of a defendant following a jury conviction could be appealed by the government because, again, if the judge's decision were set aside there would be no further proceedings at trial. In overruling *Jenkins* in *United States v. Scott*, 437 U.S. 82 (1978), the Court noted the assumption and itself assumed that a judgment of acquittal bars appeal only when a second trial would be necessitated by reversal. *Id.* at 91 n.7.

⁹ *Serfass v. United States*, 420 U.S. 377 (1975) (after request for jury trial but before attachment of jeopardy judge dismissed indictment because of evidentiary insufficiency; appeal allowed); *United States v. Sanford*, 429 U.S. 14 (1976) (judge granted mistrial after jury deadlock, then four months later dismissed indictment for insufficient evidence; appeal allowed, because granting mistrial had returned case to pretrial status).

¹ See Amdt5.3.4 Re-Prosecution After Mistrial.

² See Amdt5.3.4 Re-Prosecution After Mistrial.

³ See *Evans v. Michigan*, 568 U.S. 313 (2013).

⁴ *United States v. Wilson*, 420 U.S. 332 (1975) (preindictment delay); *United States v. Jenkins*, 420 U.S. 358 (1975) (determination of law based on facts adduced at trial; ambiguous whether judge's action was acquittal or dismissal); *United States v. Scott*, 437 U.S. 82 (1978) (preindictment delay).

⁵ See *United States v. Scott*, 437 U.S. 82, 84–86 (1978); *United States v. Sisson*, 399 U.S. 267, 291–96 (1970).

⁶ *Cf. Lee v. United States*, 432 U.S. 23 (1977).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Double Jeopardy Clause, Re-Prosecution After Acquittal

Amdt5.3.6.4

Trial Court Rulings Terminating Trial Before Verdict and Re-Prosecution

Justices have such differing views about the policies underlying the Double Jeopardy Clause, determinations of which dismissals preclude appeals and further proceedings may result from shifting coalitions and from revised perspectives. Thus, the Court first fixed the line between permissible and impermissible appeals at the point at which further proceedings would have had to take place in the trial court if the dismissal were reversed. If the only thing that had to be done was to enter a judgment on a guilty verdict after reversal, appeal was constitutional and permitted under the statute;⁷ if further proceedings, such as continuation of the trial or some further factfinding was necessary, appeal was not permitted.⁸ Now, but by a close division of the Court, the determining factor is not whether further proceedings must be had but whether the action of the trial judge, whatever its label, correct or not, resolved some or all of the factual elements of the offense charged in defendant's favor, whether, that is, the court made some determination related to the defendant's factual guilt or innocence.⁹ Such dismissals relating to guilt or innocence are functional equivalents of acquittals, whereas all other dismissals are functional equivalents of mistrials.

Amdt5.3.7 Multiple Punishments for Same Offense

Amdt5.3.7.1 Legislative Discretion as to Multiple Sentences

Fifth Amendment:

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

A single criminal action may violate multiple laws resulting in multiple sentences.¹ The Double Jeopardy Clause does not appear to bar legislatures from splitting criminal actions

⁷ United States v. Wilson, 420 U.S. 332 (1975) (after jury guilty verdict, trial judge dismissed indictment on grounds of preindictment delay; appeal permissible because upon reversal all trial judge had to do was enter judgment on the jury's verdict).

⁸ United States v. Jenkins, 420 U.S. 358 (1975) (after presentation of evidence in bench trial, judge dismissed indictment; appeal impermissible because if dismissal was reversed there would have to be further proceedings in the trial court devoted to resolving factual issues going to elements of offense charged and resulting in supplemental findings).

⁹ United States v. Scott, 437 U.S. 82 (1978) (at close of evidence, court dismissed indictment for preindictment delay; ruling did not go to determination of guilt or innocence, but, like a mistrial, permitted further proceedings that would go to factual resolution of guilt or innocence). The Court thought that double jeopardy policies were resolvable by balancing the defendant's interest in having the trial concluded in one proceeding against the government's right to one complete opportunity to convict those who have violated the law. The defendant chose to move to terminate the proceedings and, having made a voluntary choice, is bound to the consequences, including the obligation to continue in further proceedings. *Id.* at 95–101. The four dissenters would have followed *Jenkins*, and accused the Court of having adopted too restrictive a definition of acquittal. Their view is that the rule against retrials after acquittal does not, as the Court believed, “safeguard determination of innocence; rather, it is that a retrial following a final judgment for the accused necessarily threatens intolerable interference with the constitutional policy against multiple trials.” *Id.* at 101, 104 (Justices Brennan, White, Marshall, and Stevens). They would, therefore, treat dismissals as functional equivalents of acquittals, whenever further proceedings would be required after reversals.

¹ Multiple sentences may arise in (1) “double-description” cases in which conduct arising out of a single transaction violates multiple criminal laws (*e.g.*, *Gore v. United States*, 357 U.S. 386, 392–93 (1958) (one sale of narcotics resulted in three separate counts: (i) sale of drugs not in pursuance of a written order, (ii) sale of drugs not in the original stamped package, and (iii) sale of drugs with knowledge that they had been unlawfully imported)); and (2) “unit-of-prosecution” cases in which the same conduct may violate the same statutory prohibition multiple times. *E.g.*, *Bell v. United States*, 349 U.S. 81 (1955) (defendant who transported two women across state lines for an immoral purpose in one trip in same car indicted on two counts of violating Mann Act). See Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 111–22.

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that occur in a single transaction into separate crimes thereby allowing prosecutors a choice of charges to try and making multiple punishments possible.² In *Missouri v. Hunter*, the Supreme Court stated: “Where . . . a legislature specifically authorizes cumulative punishment under two statutes, regardless of whether those two statutes proscribe the ‘same’ conduct . . . a court’s task of statutory construction is at an end and . . . the trial court or jury may impose cumulative punishment under such statutes in a single trial.”³

The Court has held that the Double Jeopardy Clause establishes a presumption against multiple punishments for the same criminal transaction unless Congress has “spoken in language that is clear and definite”⁴ that multiple punishments are to be imposed. Absent clearly expressed congressional intent, courts use the “same evidence” rule to determine whether Congress intended to punish conduct occurring in the same criminal transaction as separate offenses. Explaining the “same evidence” rule in *Blockburger v. United States*, the Supreme Court stated: “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.”⁵ For example, in *Gore v. United States*,⁶ the Court held that because the defendant’s act of selling narcotics violated three distinct criminal statutes, each of which required proof of a fact not required by the others, the government could prosecute the defendant on all three counts in the same proceeding.⁷

The Court has also held that the “same evidence” rule does not upset “established doctrine” that, for double jeopardy purposes, “a conspiracy to commit a crime is a separate offense from the crime itself,”⁸ or the related principle that Congress may provide that predicate offenses and “continuing criminal enterprise” are separate offenses.⁹ On the other hand, in *Whalen v. United States*,¹⁰ the Court determined that a defendant could not be punished separately for the crimes of rape and killing in the course of rape when the offenses concerned a single criminal transaction and victim, the statutes required proof of the same facts, and the statutes

² *Albernaz v. United States*, 450 U.S. 333, 343–44 (1981) (defendants convicted on separate counts of conspiracy to import marijuana and conspiracy to distribute marijuana for the same marijuana).

³ *Missouri v. Hunter*, 459 U.S. 359, 368–69 (1983) (separate offenses of “first degree robbery” defined to include robbery under threat of violence and “armed criminal action”).

⁴ *United States v. Universal C.I.T. Corp.*, 344 U.S. 218, 221–22 (1952).

⁵ *Blockburger v. United States*, 284 U.S. 299, 304 (1932). *Blockburger* was not a double jeopardy case, but it derived the rule from *Gavieres v. United States*, 220 U.S. 338, 342 (1911), which was a double jeopardy case. *See also* *Carter v. McClaghry*, 183 U.S. 365 (1902); *Morgan v. Devine*, 237 U.S. 632 (1915); *Albrecht v. United States*, 273 U.S. 1 (1927); *Pinkerton v. United States*, 328 U.S. 640 (1946); *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Michener*, 331 U.S. 789 (1947); *Pereira v. United States*, 347 U.S. 1 (1954); *Callanan v. United States*, 364 U.S. 587 (1961).

⁶ 357 U.S. 386 (1958).

⁷ *See also* *Albernaz v. United States*, 450 U.S. 333 (1981); *Iannelli v. United States*, 420 U.S. 770 (1975) (defendant convicted on two counts, one of the substantive offense, one of conspiracy to commit the substantive offense; defense raised variation of *Blockburger* test, Wharton’s Rule requiring that one may not be punished for conspiracy to commit a crime when the nature of the crime necessitates participation of two or more persons for its commission; Court recognized Wharton’s Rule as a double-jeopardy inspired presumption of legislative intent but held that congressional intent in this case was “clear and unmistakable” that both offenses be punished separately).

⁸ *United States v. Felix*, 503 U.S. 378, 391 (1992). *But cf.* *Rutledge v. United States*, 517 U.S. 292 (1996) (21 U.S.C. § 846, prohibiting conspiracy to commit drug offenses, does not require proof of any fact that is not also a part of the continuing criminal enterprise offense under 21 U.S.C. § 848, so there are not two separate offenses).

⁹ *Garrett v. United States*, 471 U.S. 773 (1985) (“continuing criminal enterprise” is a separate offense under the Comprehensive Drug Abuse Prevention and Control Act of 1970).

¹⁰ 445 U.S. 684 (1980).

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Amdt5.3.7.1
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and legislative history did not indicate that Congress wanted the offenses punished separately.¹¹ A guilty plea ordinarily precludes collateral attack.¹²

Amdt5.3.7.2 Successive Prosecutions for Same Offense and Double Jeopardy

Fifth Amendment:

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

Successive prosecutions raise double jeopardy concerns. It is more burdensome for a defendant to face charges in separate proceedings, and if those proceedings occur over a lengthy period, the defendant must live in a continuing state of uncertainty. At the same time, multiple prosecutions allow the state to hone its trial strategies.¹

In *Brown v. Ohio*,² the Court applied the “same evidence test” to bar successive prosecutions for different statutory offenses involving the same conduct. The defendant had been convicted of “joyriding”—defined as operating a motor vehicle without the owner’s consent—and was then prosecuted and convicted of stealing the same automobile. Because the state courts had conceded that joyriding was a lesser included offense of auto theft, the Court overturned the second conviction,³ observing that each offense required the same proof and for double jeopardy purposes met the “same evidence” test in *Blockburger v. United States*.⁴ The Court later applied the same principles to hold that a conviction for failing to reduce speed to avoid an accident did not preclude a second trial for involuntary manslaughter. In reaching this conclusion, the Court reasoned that failing to reduce speed was not a necessary element of the manslaughter offense.⁵

¹¹ The Court reasoned that a conviction for killing in the course of rape could not be had without providing all of the elements of the offense of rape. *See also* *Jeffers v. United States*, 432 U.S. 137 (1977) (no indication in legislative history Congress intended defendant to be prosecuted both for conspiring to distribute drugs and for distributing drugs in concert with five or more persons); *Simpson v. United States*, 435 U.S. 6 (1978) (defendant improperly prosecuted both for committing bank robbery with a firearm and for using a firearm to commit a felony); *Bell v. United States*, 349 U.S. 81 (1955) (simultaneous transportation of two women across state lines for immoral purposes one violation of Mann Act rather than two).

¹² *United States v. Broce*, 488 U.S. 563 (1989) (defendant who pled guilty to two separate conspiracy counts is barred from collateral attack alleging that in fact there was only one conspiracy and that double jeopardy applied).

¹ For discussion on this dynamic, see *Grady v. Corbin*, 495 U.S. 508, 518–19 (1990), *overruled by* *United States v. Dixon*, 509 U.S. 688 (1993) (“We therefore accept the Government’s invitation to overrule *Grady*, and Counts II, III, IV, and V of *Foster’s* subsequent prosecution are not barred.”).

² 432 U.S. 161 (1977). *Cf. In re Nielsen*, 131 U.S. 176 (1889) (prosecution for adultery held impermissible following the defendant’s conviction for cohabiting with more than one woman, even though second prosecution required proof of an additional fact—that he was married to another woman).

³ *See also* *Harris v. Oklahoma*, 433 U.S. 682 (1977) (defendant who had been convicted of felony murder for participating in a store robbery with another person who shot a store clerk could not be prosecuted for robbing the store, since store robbery was a lesser-included crime in the offense of felony murder).

⁴ 284 U.S. 299, 304 (1932). *Blockburger* was not a double jeopardy case, but it derived the rule from *Gavieres v. United States*, 220 U.S. 338, 342 (1911), which was a double jeopardy case. *See also* *Carter v. McLaughry*, 183 U.S. 365 (1902); *Morgan v. Devine*, 237 U.S. 632 (1915); *Albrecht v. United States*, 273 U.S. 1 (1927); *Pinkerton v. United States*, 328 U.S. 640 (1946); *Am. Tobacco Co. v. United States*, 328 U.S. 781 (1946); *United States v. Michener*, 331 U.S. 789 (1947); *Pereira v. United States*, 347 U.S. 1 (1954); *Callanan v. United States*, 364 U.S. 587 (1961).

⁵ *Illinois v. Vitale*, 447 U.S. 410 (1980).

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Amdt5.3.7.3
Collateral Estoppel (Issue Preclusion) and Double Jeopardy

The *Brown* Court noted some limitations to its holding⁶ and more have emerged subsequently. Principles appropriate in the “classically simple” lesser-included-offense and related situations are not readily transposable to “multilayered conduct” governed by the law of conspiracy and continuing criminal enterprise, and it remains the law that “a substantive crime and a conspiracy to commit that crime are not the ‘same offense’ for double jeopardy purposes.”⁷ For double jeopardy purposes, a defendant is “punished . . . only for the offense of which [he] is convicted”; a later prosecution or later punishment is not barred simply because the underlying criminal activity has been considered at sentencing for a different offense.⁸ Similarly, recidivism-based sentence enhancement does not constitute multiple punishment for the “same” prior offense, but instead is a stiffened penalty for the later crime.⁹

Amdt5.3.7.3 Collateral Estoppel (Issue Preclusion) and Double Jeopardy

Fifth Amendment:

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

The Supreme Court has also interpreted the Double Jeopardy Clause to incorporate the doctrine of “collateral estoppel” or “issue preclusion”¹ which prohibits re-litigating an issue of fact or law raised and necessarily resolved by a prior judgment.² The Court first recognized the Double Jeopardy Clause’s issue-preclusion component in *Ashe v. Swenson*,³ which involved a robbery of six poker players.⁴ After being acquitted of robbing *one* of the players because of insufficient evidence, the *Ashe* defendant was tried and convicted of robbing *another* player.⁵ Because the sole issue in dispute in the first trial was whether the defendant was one of the robbers, the Court held that the defendant’s acquittal for robbing one player in the first trial

⁶ The Court suggested that if the legislature had provided that joyriding is a separate offense for each day the vehicle is operated without the owner’s consent, so that the two indictments each specifying a different date on which the offense occurred would have required different proof, the result might have been different, but this, of course, met the *Blockburger* problem. *Brown v. Ohio*, 432 U.S. 161, 169 n.8 (1977). The Court also suggested that an exception might be permitted where the state is unable to proceed on the more serious charge at the outset because the facts necessary to sustain that charge had not occurred or had not been discovered. *Id.* at 169 n.7. *See also* *Jeffers v. United States*, 432 U.S. 137, 150–54 (1977) (plurality opinion) (exception where defendant elects separate trials); *Ohio v. Johnson*, 467 U.S. 493 (1984) (trial court’s acceptance of guilty plea to lesser included offense and dismissal of remaining charges over prosecution’s objections does not bar subsequent prosecution on those “remaining” counts).

⁷ *United States v. Felix*, 503 U.S. 378, 389 (1992). The fact that *Felix* constituted a “large exception” to *Grady* was one of the reasons the Court cited in overruling *Grady*. *United States v. Dixon*, 509 U.S. 688, 709–10 (1993)

⁸ *Witte v. United States*, 515 U.S. 389 (1995) (consideration of defendant’s alleged cocaine dealings in determining sentence for marijuana offenses does not bar subsequent prosecution on cocaine charges).

⁹ *Monge v. California*, 524 U.S. 721, 728 (1998).

¹ *See Ashe v. Swenson*, 397 U.S. 436, 445 (1970). Collateral estoppel and issue preclusion are synonymous terms. *See* BLACK’S LAW DICTIONARY 312 (10th ed. 2014) (defining “collateral estoppel”).

² *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (Am. Law Inst. 1981).

³ 397 U.S. at 445. Previously, the Court in *Hoag v. New Jersey*, concluded that successive trials arising out of a tavern hold-up in which five customers were robbed did not violate the Due Process Clause of the Fourteenth Amendment. *See* 356 U.S. 464, 466 (1958).

⁴ *Ashe*, 397 U.S. at 437.

⁵ *Id.* at at 439–40.

FIFTH AMENDMENT—RIGHTS OF PERSONS
Double Jeopardy Clause, Multiple Punishments for Same Offense

Amdt5.3.7.3

Collateral Estoppel (Issue Preclusion) and Double Jeopardy

precluded the government from subsequently charging him with robbing another player.⁶ Explaining that courts must apply issue preclusion in criminal cases with “realism and rationality,” the *Ashe* Court reasoned that the underlying record must be closely examined to determine what the first jury’s verdict of acquittal “actually decided.”⁷ If a criminal judgment does not depend on a jury’s determination of a particular factual issue, re-litigation of that issue *can* occur.⁸

In *United States v. Powell*, the Court rejected an argument that issue preclusion barred an “inconsistent” jury verdict that included an acquittal on a drug charge but guilty verdicts on using a telephone to “caus[e] and facilitat[e]” that same drug offense.⁹ Reaffirming a precedent from more than a half a century before,¹⁰ the *Powell* Court held that the “Government’s inability to invoke review, the general reluctance to inquire into the workings of the jury, and the possible exercise of lenity” by the jury cautioned against allowing defendants to challenge inconsistent verdicts on issue preclusion grounds.¹¹

In 2016, the Court extended the logic of *Powell* in *Bravo-Fernandez v. United States*.¹² In *Bravo-Fernandez*, a jury returned inconsistent verdicts of conviction and acquittal with respect to two criminal defendants, but the convictions were later vacated for legal errors unrelated to the inconsistency.¹³ Recognizing *Powell*’s conclusion that inconsistent verdicts do not indicate whether an acquittal resulted from “mistake, compromise, or lenity,”¹⁴ the Court held that the government could re-prosecute on the counts on which a conviction had been initially obtained. According to the Court, because of the “irrationality” of the earlier inconsistent verdicts,¹⁵ the criminal defendants could not demonstrate that the first jury had “actually decided” that they did not commit the crime underlying the second trial.¹⁶ As a result, while the government could not re-prosecute the defendants in *Bravo-Fernandez* on the charges that had resulted in acquittal,¹⁷ the government could re-prosecute on charges that had previously resulted in guilty verdicts.

⁶ *Id.* at 446 (quoting *Green v. United States*, 355 U.S. 184, 190 (1957)).

⁷ *Id.* at 444.

⁸ See *Bobby v. Bies*, 556 U.S. 825, 834 (2009) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. h).

⁹ See *United States v. Powell*, 469 U.S. 57, 68 (1984).

¹⁰ See *Dunn v. United States*, 284 U.S. 390, 392 (1932).

¹¹ 469 U.S. at 68–69.

¹² No. 15-537, slip op. at 15, 20 (U.S. Nov. 29, 2016) (“We therefore bracket this case with *Powell*. . .”).

¹³ *Id.* at 361. Had the convictions been overturned because of lack of evidence, the government would have been prohibited from retrying the defendants, as a court’s evaluation of the evidence as insufficient to convict is the equivalent to an acquittal and, accordingly, bars re-prosecution for that same offense. See *Burks v. United States*, 437 U.S. 1, 10–11 (1978).

¹⁴ See *Bravo-Fernandez*, No. 15-537, slip op. at 15.

¹⁵ *Id.* at 16.

¹⁶ *Id.* at 15. The *Bravo-Fernandez* Court distinguished the case from *Yeager v. United States*, 557 U.S. 110 (2009), where the Court held that *Powell* did not extend to the situation where a jury returned a verdict of acquittal on one count and hung on another count and prosecutors attempted to retry on the hung count. *Id.* at 124. Because the jury “speaks only through its verdict,” a hung count did not reveal anything about the jury’s reasoning and only the acquittal could factor into the issue preclusion analysis. *Id.* at 122. Unlike in *Yeager*, the acquittals in *Bravo-Fernandez* were accompanied with inconsistent guilty verdicts, leading the Court to conclude that the criminal defendants could not demonstrate that the jury had actually decided the underlying issue at the second trial. See *Bravo-Fernandez*, No. 15-537, slip op. at 15–16.

¹⁷ See *Bravo-Fernandez*, No. 15-537, slip op. at 16 (noting that the earlier acquittals “remain inviolate”).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Self-Incrimination

Amdt5.4.1
Historical Background on Self-Incrimination

Amdt5.4 Self-Incrimination

Amdt5.4.1 Historical Background on Self-Incrimination

Fifth Amendment:

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

The source of the Self-Incrimination Clause was the maxim “*nemo tenetur seipsum accusare*,” that “no man is bound to accuse himself.” The maxim is but one aspect of two different systems of law enforcement which competed in England for acceptance; the accusatorial and the inquisitorial. In the accusatorial system, which predated the reign of Henry II but was expanded and extended by him, first the community and then the state by grand and petit juries proceeded against alleged wrongdoers through the examination of others, and in the early years through examination of the defendant as well. The inquisitorial system, which developed in the ecclesiastical courts, compelled the alleged wrongdoer to affirm his culpability through the use of the oath *ex officio*. Under the oath, an official had the power to make a person before him take an oath to tell the truth to the full extent of his knowledge as to all matters about which he would be questioned; before administration of the oath the person was not advised of the nature of the charges against him, or whether he was accused of crime, and was also not informed of the nature of the questions to be asked.¹

The use of this oath in Star Chamber proceedings, especially to root out political heresies, combined with opposition to the ecclesiastical oath *ex officio*, led over a long period of time to general acceptance of the principle that a person could not be required to accuse himself under oath in any proceeding before an official tribunal seeking information looking to a criminal prosecution, or before a magistrate investigating an accusation against him with or without oath, or under oath in a court of equity or a court of common law.² The precedents in the colonies are few in number, but following the Revolution six states had embodied the privilege against self-incrimination in their constitutions,³ and the privilege was one of those recommended by several state ratifying conventions for inclusion in a federal bill of rights.⁴ James Madison’s version of the Clause read “nor shall be compelled to be a witness against himself,” but a House amendment inserted “in any criminal case” into the provision.⁵

¹ Mary H. Maguire, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England*, in *ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD McILWAIN* 199 (C. Wittke ed., 1936).

² The traditional historical account is 8 J. WIGMORE, *A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE* § 2250 (J. McNaughton rev. 1961), but more recent historical studies have indicated that Dean Wigmore was too grudging of the privilege. LEONARD LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* (1968); Morgan, *The Privilege Against Self-Incrimination*, 34 *MINN. L. REV.* 1 (1949).

³ 3 F. Thorpe, *The Federal and State Constitutions*, reprinted in H. Doc. No. 357, 59th Congress, 2d Sess. 1891 (1909) (Massachusetts); 4 *id.* at 2455 (New Hampshire); 5 *id.* at 2787 (North Carolina), 3038 (Pennsylvania); 6 *id.* at 3741 (Vermont); 7 *id.* at 3813 (Virginia).

⁴ Amendments were recommended by an “Address” of a minority of the Pennsylvania convention after they had been voted down as a part of the ratification action, 2 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 628, 658, 664 (1971), and then the ratifying conventions of Massachusetts, South Carolina, New Hampshire, Virginia, and New York formally took this step.

⁵ *Id.* at 753 (August 17, 1789).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Self-Incrimination

Amdt5.4.2
Early Doctrine on Self-Incrimination

Amdt5.4.2 Early Doctrine on Self-Incrimination

Fifth Amendment:

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

By the latter part of the eighteenth century, English and early American courts had determined that coerced confessions were potentially excludable from admission at trial because they were untrustworthy.¹ For much of the nineteenth century, the Supreme Court invoked unreliability as the basis for excluding such confessions without mentioning the constitutional bar against self-incrimination.²

In the 1897 case of *Bram v. United States*, the Court suggested that the Fifth Amendment imposed separate restrictions on a confession's admissibility. These restrictions focused on the confession's voluntariness as an indicator of its trustworthiness as evidence. The Court wrote that in criminal trials in federal court, "wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"³

Although the Supreme Court approved this Fifth Amendment interpretation in subsequent cases⁴ and reaffirmed *Bram* itself,⁵ the Court held in 1912 that a confession should not be excluded merely because the authorities had not warned a suspect of his right to remain silent.⁶ "In other cases, the Court expressed doubts as to whether the Fifth Amendment's protection against self-incrimination—rather than a common-law principle that forced confessions were untrustworthy—required exclusion of involuntary confessions from federal criminal trials."⁷ Because the Supreme Court had not yet ruled that the Self-Incrimination Clause applies to states through the Fourteenth Amendment, admissibility of confessions in state courts continued to be governed under due process standards developed from common-law principles. It was only in the 1960s, after the Court extended the Self-Incrimination Clause to the states, that a divided Court reaffirmed and extended the 1897 *Bram* ruling and imposed on both federal and state trial courts new rules for admitting or excluding confessions and other admissions made to police during custodial interrogation.⁸

¹ 3 JOHN WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 823 (1940); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954–59 (1966).

² *Hopt v. Utah*, 110 U.S. 574, 584–85 (1884). At the time of the Court's decision, Utah was a territory and subject to direct federal judicial supervision.

³ *Bram v. United States*, 168 U.S. 532, 542 (1897).

⁴ *Ziang Sun Wan v. United States*, 266 U.S. 1, 14–15 (1924). This case held that the circumstances of detention and interrogation were relevant on the question of a confession's admissibility. *Id.*

⁵ *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *Powers v. United States*, 223 U.S. 303, 313 (1912); *Shotwell Mfg. Co. v. United States*, 371 U.S. 342, 347 (1963).

⁶ *Powers v. United States*, 223 U.S. 303 (1912).

⁷ *United States v. Carignan*, 342 U.S. 36, 41 (1951). See also *McNabb v. United States*, 318 U.S. 332, 346 (1943); *Brown v. Mississippi*, 297 U.S. 278, 285 (1936); *Stein v. New York*, 346 U.S. 156, 191 n.35 (1953).

⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966). According to John Wigmore, "there never was any historical connection . . . between the constitutional [self-incrimination] clause and the [common law] confession-doctrine," 3 JOHN WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 823, at 250 n.5 (1940); see also 8 *id.* at § 2266 (1961). The two

FIFTH AMENDMENT—RIGHTS OF PERSONS
Self-Incrimination

Amdt5.4.3

General Protections Against Self-Incrimination Doctrine and Practice

Amdt5.4.3 General Protections Against Self-Incrimination Doctrine and Practice

Fifth Amendment:

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

The Court has settled upon the principle that the Clause serves two interrelated interests: the preservation of an accusatorial system of criminal justice, which goes to the integrity of the judicial system, and the preservation of personal privacy from unwarranted governmental intrusion.¹ To protect these interests and to preserve these values, the privilege “is not to be interpreted literally.” Rather, the “sole concern [of the privilege] is, as its name indicates, with the danger to a witness forced to give testimony leading to the infliction of penalties affixed to the criminal acts.”² Furthermore, “[t]he privilege afforded not only extends to answers that would in themselves support a conviction . . . but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute . . .”³

The privilege against self-incrimination parries the general obligation to provide testimony under oath when called upon, but it also applies in police interrogations. In all cases, the privilege must be supported by a reasonable fear that a response will be incriminatory. The issue is a matter of law for a court to determine,⁴ and therefore, with limited exceptions, one must claim the privilege to benefit from it.⁵ Otherwise, silence in the face of questioning may be insufficient to invoke the privilege because it may not afford an adequate opportunity either to test whether information withheld falls within the privilege or to cure a violation through a

rules appear to have developed separately. The bar against self-incrimination derived primarily from notions of liberty and fairness, whereas proscriptions against involuntary confessions derived primarily from notions of reliability. However, the rules stemmed from some of the same considerations. Some commentators have considered the confession rule in some respects to be an off-shoot of the privilege against self-incrimination. See LEONARD LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 325–32, 495 n.43 (1968). See also *Culombe v. Connecticut*, 367 U.S. 568, 581–84, especially 583 n.25 (1961).

¹ In *Teahan v. United States ex rel. Shott*, the Court noted:

[T]he basic purposes that lie behind the privilege against self-incrimination do not relate to protecting the innocent from conviction, but rather to preserving the integrity of a judicial system in which even the guilty

the right to be convicted unless the prosecution “should demand the aid of a lawyer’s help through the technical intricacies of a criminal trial or to deny a full opportunity to appeal a conviction because the accused is poor is to impede that purpose and to infect a criminal proceeding with the clear danger of convicting the innocent. . . . By contrast, the Fifth Amendment’s privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone.

Teahan v. United States ex rel. Shott, 382 U.S. 406, 415, 416 (1966); see also *California v. Byers*, 402 U.S. 424, 448–58 (1971) (Harlan, J., concurring); *Schmerber v. California*, 384 U.S. 757, 760–65 (1966); *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). For a critical view of the privilege, see Henry Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671 (1968).

² *Ullmann*, 350 U.S. at 438–39.

³ *Hoffman v. United States*, 341 U.S. 479, 486 (1951); see also *Emspak v. United States*, 349 U.S. 190 (1955); *Blau v. United States*, 340 U.S. 332 (1951); *Blau v. United States*, 340 U.S. 159 (1950).

⁴ *E.g.*, *Mason v. United States*, 244 U.S. 362 (1917).

⁵ The primary exceptions are for a criminal defendant not taking the stand and a suspect being subject to inherently coercive circumstances (*e.g.*, custodial interrogation). See *Salinas v. Texas*, 570 U.S. 178, 183–86 (2013) (plurality opinion).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Self-Incrimination

Amdt5.4.3

General Protections Against Self-Incrimination Doctrine and Practice

grant of immunity.⁶ A witness who fails to claim the privilege explicitly when an affirmative claim is required is deemed to have waived it, and waiver may be found where the witness has answered some preliminary questions but desires to stop at a certain point.⁷ However, an assertion of innocence in conjunction with a claim of the privilege does not obviate the right of witnesses to invoke it, as their responses still may provide the government with evidence it may later seek to use against them.⁸

Although individuals must have reasonable cause to apprehend danger and cannot be the judge of the validity of their claims, a court that would deny a claim of the privilege must be “*perfectly clear*, from a careful consideration of all the circumstances in the case, that the individual is mistaken, and that the answer[s] *cannot possibly* have such tendency to incriminate.”⁹ To reach a determination, furthermore, a trial judge may not require a witness to disclose so much of the danger as to render the privilege nugatory. As the Court observed:

[I]f the witness, upon interposing his claim, were required to prove the hazard . . . he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.¹⁰

The privilege against self-incrimination is a personal one and cannot be used by or on behalf of any organization, such as a corporation. Thus, a corporation cannot object on self-incrimination grounds to a subpoena of its records and books or to the compelled testimony of those corporate agents who have been given personal immunity from criminal prosecution.¹¹ Nor may a corporate official with custody of corporate documents that incriminate him personally resist their compelled production on the assertion of his personal privilege.¹²

⁶ In *Salinas v. Texas*, 570 U.S. 178 (2013), the defendant—Salinas—answered all questions during noncustodial questioning about a double murder, other than one about whether his shotgun would match shells recovered at the murder scene. He fell silent on this inquiry, but did not assert the privilege against self-incrimination. At closing argument at Salinas’s murder trial, the prosecutor argued that this silence indicated guilt, and a majority of the Court found the comments constitutionally permissible. The Court affirmed the Texas Supreme Court’s ruling that Salinas had failed to invoke his Fifth Amendment rights because he did not do so explicitly. Although no opinion drew a majority of Justices, in an opinion joined by Chief Justice John Roberts and Justice Anthony Kennedy, Justice Samuel Alito observed that a defendant could choose to remain silent for numerous reasons other than avoiding self-incrimination. *Id.* at 188–89 (plurality opinion).

⁷ *Rogers v. United States*, 340 U.S. 367 (1951); *United States v. Monia*, 317 U.S. 424 (1943). The “waiver” concept here has been pronounced “analytically [un]sound,” with the Court preferring to reserve the term “waiver” “for the process by which one affirmatively renounces the protection of the privilege.” *Garner v. United States*, 424 U.S. 648, 654 n.9 (1976). Thus, the Court has settled upon the concept of “compulsion” as applied to “cases where disclosures are required in the face of claim of privilege.” *Id.* “[I]n the ordinary case, if a witness under compulsion to testify makes disclosures instead of claiming the privilege, the government has not ‘compelled’ him to incriminate himself.” *Id.* at 654. Similarly, the Court has enunciated the concept of “voluntariness” to be applied in situations where it is claimed that a particular factor denied the individual a “free choice to admit, to deny, or to refuse to answer.” *Id.* at 654 n.9, 656–65.

⁸ *Ohio v. Reiner*, 532 U.S. 17 (2001).

⁹ *Hoffman v. United States*, 341 U.S. 479, 488 (1951) (quoting *Temple v. Commonwealth*, 75 Va. 892, 898 (1881)). For an application of these principles, see *Malloy v. Hogan*, 378 U.S. 1, 11–14 (1964), and *id.* at 33 (White, Stewart JJ., dissenting). Where the government is seeking to enforce an essentially noncriminal statutory scheme through compulsory disclosure, some Justices would apparently relax the *Hoffman* principles. *Cf.* *California v. Byers*, 402 U.S. 424 (1971) (plurality opinion).

¹⁰ *Hoffman*, 341 U.S. at 486–87.

¹¹ *United States v. White*, 322 U.S. 694, 701 (1944); *Baltimore & Ohio R.R. v. ICC*, 221 U.S. 612 (1911); *Hale v. Henkel*, 201 U.S. 43, 69–70, 74–75 (1906).

¹² *United States v. White*, 322 U.S. 694, 699–700 (1944); *Wilson v. United States*, 221 U.S. 361, 384–385 (1911). But the government may make no evidentiary use of the act of production in proceeding individually against the corporate

FIFTH AMENDMENT—RIGHTS OF PERSONS
Self-Incrimination

Amdt5.4.3

General Protections Against Self-Incrimination Doctrine and Practice

A witness has traditionally been able to claim the privilege in any proceeding whatsoever in which testimony is legally required when his answer might be used against him in that proceeding or in a future criminal proceeding or when it might be exploited to uncover other evidence against him.¹³ Incrimination is not complete once guilt has been adjudicated, and hence the privilege may be asserted during the sentencing phase of trial.¹⁴ Conversely, there is no valid claim on the ground that the information sought can be used in proceedings which are not criminal in nature,¹⁵ and there can be no valid claim if there is no criminal prosecution¹⁶ The Court in recent years has also applied the privilege to situations, such as police interrogation of suspects, in which there is no *legal* compulsion to speak.¹⁷

What the privilege protects against is compulsion of “testimonial” disclosures. Thus, the clause is not offended by such non-testimonial compulsions as requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to model particular clothing, or to give samples of handwriting, fingerprints, or blood.¹⁸ A person may be compelled to produce

custodian. *Braswell v. United States*, 487 U.S. 99 (1988). *Cf.* *George Campbell Painting Corp. v. Reid*, 392 U.S. 286 (1968); *United States v. Rylander*, 460 U.S. 752 (1983) (witness who had failed to appeal production order and thus had burden in contempt proceeding to show inability to then produce records could not rely on privilege to shift this evidentiary burden).

¹³ Thus, not only may a defendant or a witness in a criminal trial, including a juvenile proceeding, *In re Gault*, 387 U.S. 1, 42–57 (1967), claim the privilege but so may a party or a witness in a civil court proceeding, *McCarthy v. Arndstein*, 266 U.S. 34 (1924), a potential defendant or any other witness before a grand jury, *Reina v. United States*, 364 U.S. 507 (1960); *Counselman v. Hitchcock*, 142 U.S. 547, 563 (1892), or a witness before a legislative inquiry, *Watkins v. United States*, 354 U.S. 178, 195–96 (1957); *Quinn v. United States*, 349 U.S. 155 (1955); *Emspak v. United States*, 349 U.S. 190 (1955), or before an administrative body. *In re Groban*, 352 U.S. 330, 333, 336–37, 345–46 (1957); *ICC v. Brimson*, 154 U.S. 447, 478–80 (1894).

¹⁴ *Estelle v. Smith*, 451 U.S. 454, 462–63 (1981) (“We can discern no basis to distinguish between the guilt and penalty phases of respondent’s capital murder trial so far as the protection of the Fifth Amendment privilege is concerned”); *Mitchell v. United States*, 526 U.S. 314 (1999) (non-capital sentencing).

¹⁵ *Allen v. Illinois*, 478 U.S. 364 (1986) (declaration that person is “sexually dangerous” under Illinois law is not a criminal proceeding); *Minnesota v. Murphy*, 465 U.S. 420, 435 n.7 (1984) (revocation of probation is not a criminal proceeding, hence “there can be no valid claim of the privilege on the ground that the information sought can be used in revocation proceedings”). In *Murphy*, the Court went on to explain that “a State may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer’s ‘right to immunity as a result of his compelled testimony would not be at stake,’ and nothing in the Federal Constitution would prevent a State from revoking probation for a refusal to answer” *Id.* (citations omitted).

¹⁶ *Chavez v. Martinez*, 538 U.S. 760 (2003) (rejecting damages claim brought by suspect interrogated in hospital but not prosecuted).

¹⁷ *Miranda v. Arizona*, 384 U.S. 436 (1966).

¹⁸ *Schmerber v. California*, 384 U.S. 757, 764 (1966); *United States v. Wade*, 388 U.S. 218, 221–23 (1967); *Holt v. United States*, 218 U.S. 245, 252 (1910). In *California v. Byers*, 402 U.S. 424 (1971), four Justices believed that requiring any person involved in a traffic accident to stop and give his name and address did not involve testimonial compulsion and therefore the privilege was inapplicable, *id.* at 431–34 (Chief Justice Burger and Justices Stewart, White, and Blackmun), but Justice Harlan, *id.* at 434 (concurring), and Justices Hugo Black, William O. Douglas, Brennan, and Marshall, *id.* at 459, 464 (dissenting), disagreed. In *South Dakota v. Neville*, 459 U.S. 553 (1983), the Court indicated as well that a state may compel a motorist suspected of drunk driving to submit to a blood alcohol test, and may also give the suspect a choice about whether to submit, but use his refusal to submit to the test as evidence against him. The Court rested its evidentiary ruling on the absence of coercion, preferring not to apply the sometimes difficult distinction between testimonial and physical evidence. In another case, involving roadside videotaping of a drunk driving suspect, the Court found that the slurred nature of the suspect’s speech, as well as his answers to routine booking questions as to name, address, weight, height, eye color, date of birth, and current age, were not testimonial in nature. *Pennsylvania v. Muniz*, 496 U.S. 582 (1990). On the other hand, the suspect’s answer to a request to identify the date of his sixth birthday was considered testimonial. *Id.* Two Justices challenged the interpretation limiting application to “testimonial” disclosures, claiming that the original understanding of the word “witness” was not limited to someone who gives testimony, but included someone who gives any kind of evidence. *United States v. Hubbell*, 530 U.S. 27, 49 (2000) (Justice Thomas, joined by Justice Scalia, concurring).

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specific documents even though they contain incriminating information.¹⁹ If, however, the existence of specific documents is not known to the government, and the act of production informs the government about the existence, custody, or authenticity of the documents, then the privilege is implicated.²⁰ Application of these principles resulted in a holding that the Independent Counsel could not base a prosecution on incriminating evidence identified and produced as the result of compliance with a broad subpoena for all information relating to the individual's income, employment, and professional relationships.²¹

The protection is against “compulsory” incrimination, and traditionally the Court has treated within the Clause only those compulsions which arise from legally enforceable obligations, culminating in imprisonment for refusal to testify or to produce documents.²² The compulsion need not be imprisonment, but can also be termination of public employment²³ or disbarment of a lawyer²⁴ as a legal consequence of a refusal to make incriminating admissions. The degree of coercion may also prove decisive, the Court having ruled that moving a prisoner from a medium security unit to a maximum security unit was insufficient to compel him to incriminate himself in spite of the attendant loss of privileges and the harsher living conditions.²⁵ However, although it appears that prisoners²⁶ and probationers²⁷ have less

¹⁹ *Fisher v. United States*, 425 U.S. 391 (1976). Compelling a taxpayer by subpoena to produce documents produced by his accountants from his own papers does not involve testimonial self-incrimination and is not barred by the privilege. “[T]he Fifth Amendment does not independently proscribe the compelled production of every sort of incriminating evidence but applies only when the accused is compelled to make a *testimonial* communication that is incriminating.” *Id.* at 408 (emphasis by Court). Even further removed from the protection of the privilege is seizure pursuant to a search warrant of business records in the handwriting of the defendant. *Andresen v. Maryland*, 427 U.S. 463 (1976). A court order compelling a target of a grand jury investigation to sign a consent directive authorizing foreign banks to disclose records of any and all accounts over which he had a right of withdrawal is not testimonial in nature, since the factual assertions are required of the banks and not of the target. *Doe v. United States*, 487 U.S. 201 (1988).

²⁰ In *United States v. Doe*, 465 U.S. 605 (1984), the Court distinguished *Fisher*, upholding lower courts’ findings that the act of producing tax records implicates the privilege because it would compel admission that the records exist, that they were in the taxpayer’s possession, and that they are authentic. Similarly, a juvenile court’s order to produce a child implicates the privilege, because the act of compliance “would amount to testimony regarding [the subject’s] control over and possession of [the child].” *Baltimore Dep’t of Social Services v. Bouknight*, 493 U.S. 549, 555 (1990).

²¹ *United States v. Hubbell*, 530 U.S. 27 (2000).

²² *E.g.*, *Marchetti v. United States*, 390 U.S. 39 (1968) (criminal penalties attached to failure to register and make incriminating admissions); *Malloy v. Hogan*, 378 U.S. 1 (1964) (contempt citation on refusal to testify). *See also* *South Dakota v. Neville*, 459 U.S. 553 (1983) (no compulsion in introducing evidence of suspect’s refusal to submit to blood alcohol test, since state could have forced suspect to take test and need not have offered him a choice); *Selective Service System v. Minnesota PIRG*, 468 U.S. 841 (1984) (no coercion in requirement that applicants for federal financial assistance for higher education reveal whether they have registered for draft).

²³ *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass’n v. Commissioner of Sanitation*, 392 U.S. 280 (1968). *See also* *Lefkowitz v. Turley*, 414 U.S. 70 (1973), holding unconstitutional state statutes requiring the disqualification for five years of contractors doing business with the state if at any time they refused to waive immunity and answer questions respecting their transactions with the state. The state may require employees or contractors to respond to inquiries, but only if it offers them immunity sufficient to supplant the privilege against self-incrimination. *See also* *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977).

²⁴ *Spevack v. Klein*, 385 U.S. 511 (1967).

²⁵ *McKune v. Lile*, 536 U.S. 24 (2002). The transfer was mandated for refusal to participate in a sexual abuse treatment program that required revelation of sexual history and admission of responsibility. The plurality declared that rehabilitation programs are permissible if the adverse consequences for non-participation are “related to the program objectives and do not constitute atypical and significant hardships in relation to the ordinary incidents of prison life.” 536 U.S. at 38 (opinion of Justice Anthony Kennedy). Concurring Justice Sandra Day O’Connor stated her belief that the “minor” change in living conditions seemed “very unlikely to actually compel [the prisoner] to [participate].” *Id.* at 51.

²⁶ *See*, in addition to *McKune v. Lile*, *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (adverse inference from inmate’s silence at prison disciplinary hearing); and *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) (adverse inference from inmate’s silence at clemency hearing).

²⁷ *Minnesota v. Murphy*, 465 U.S. 420 (1984) (the possibility of revocation of probation was not so coercive as to compel a probationer to provide incriminating answers to probation officer’s questions).

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protection than others do, the Court has not developed a clear doctrinal explanation to identify the differences between permissible and impermissible coercion.²⁸

It has long been the rule that a defendant who takes the stand on his own behalf does so voluntarily and cannot then claim the privilege to defeat cross-examination on matters reasonably related to the subject matter of his direct examination,²⁹ and that such a defendant may be impeached by proof of prior convictions.³⁰ But, in *Griffin v. California*,³¹ the Court refused to permit prosecutorial or judicial comment to the jury upon a defendant's refusal to take the stand on his own behalf, because such comment was a "penalty imposed by courts for exercising a constitutional privilege" and "[i]t cuts down on the privilege by making its assertion costly."³² Prosecutors' comments violating the *Griffin* rule can nonetheless constitute harmless error.³³ Nor may a prosecutor impeach a defendant's trial testimony through use of the fact that upon his arrest and receipt of a *Miranda* warning he remained silent and did not give the police the exculpatory story he told at trial.³⁴ But where the defendant took the stand and testified, the Court permitted the impeachment use of his pre-arrest silence when that silence had in no way been officially encouraged, through a *Miranda* warning or otherwise.³⁵

Further, the Court held inadmissible at the subsequent trial a defendant's testimony at a hearing to suppress evidence wrongfully seized, because use of the testimony would put the defendant to an impermissible choice between asserting his right to remain silent and invoking his right to be free of illegal searches and seizures.³⁶ The Court also proscribed the

²⁸ The Court in *McKune v. Lile* split 5-4, with no opinion of the Court.

²⁹ *Brown v. Walker*, 161 U.S. 591, 597–98 (1896); *Fitzpatrick v. United States*, 178 U.S. 304, 314–16 (1900); *Brown v. United States*, 356 U.S. 148 (1958). See also *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 286 (1998) (testimony at a clemency interview is voluntary, and cannot be compelled).

³⁰ *Spencer v. Texas*, 385 U.S. 554, 561 (1967); cf. *Michelson v. United States*, 335 U.S. 469 (1948).

³¹ 380 U.S. 609, 614 (1965). The result had been achieved in federal court through statutory enactment. 18 U.S.C. § 3481. See *Wilson v. United States*, 149 U.S. 60 (1893). In *Carter v. Kentucky*, 450 U.S. 288 (1981), the Court held that the Self-Incrimination Clause required a state, upon defendant's request, to give a cautionary instruction to the jurors that they must disregard defendant's failure to testify and not draw any adverse inferences from it. This result, too, had been accomplished in the federal courts through statutory construction. *Bruno v. United States*, 308 U.S. 287 (1939). In *Lakeside v. Oregon*, 435 U.S. 333 (1978), the Court held that a court may give such an instruction, even over defendant's objection. *Carter v. Kentucky* was applied in *James v. Kentucky*, 466 U.S. 341 (1983) (request for jury "admonition" sufficient to invoke right to "instruction").

³² Although the *Griffin* rule continues to apply when the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, it does not apply to a prosecutor's "fair response" to a defense counsel's allegation that the government had denied his client the opportunity to explain his actions. *United States v. Robinson*, 485 U.S. 25, 32 (1988).

³³ *Chapman v. California*, 386 U.S. 18 (1967); *United States v. Hasting*, 461 U.S. 499 (1983).

³⁴ *Doyle v. Ohio*, 426 U.S. 610 (1976). Post-arrest silence, the Court stated, is inherently ambiguous, and to permit use of the silence would be unfair since the *Miranda* warning told the defendant he could be silent. The same result had earlier been achieved under the Court's supervisory power over federal trials in *United States v. Hale*, 422 U.S. 171 (1975). The same principles apply to bar a prosecutor's use of *Miranda* silence as evidence of an arrestee's sanity. *Wainwright v. Greenfield*, 474 U.S. 284 (1986). In determining whether a state prisoner is entitled to federal habeas corpus relief because the prosecution violated due process by using his post-*Miranda* silence for impeachment purposes at trial, the proper standard for harmless-error review is that announced in *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)—whether the due process error had substantial and injurious effect or influence in determining the jury's verdict—not the stricter "harmless beyond a reasonable doubt" standard of *Chapman v. California*, 386 U.S. 18, 24 (1967), applicable on direct review. *Brecht v. Abrahamson*, 507 U.S. 619 (1993). See also *Fry v. Pliier*, 551 U.S. 112, 114 (2007) (the "substantial and injurious effect" standard is to be applied in federal habeas proceedings even "when the state appellate court failed to recognize the error and did not review it for harmlessness under the 'harmless beyond a reasonable doubt' standard set forth in *Chapman v. California*").

³⁵ *Jenkins v. Anderson*, 447 U.S. 231 (1980). Cf. *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (prison disciplinary hearing may draw adverse inferences from inmate's assertion of privilege so long as this was not the sole basis of decision against him).

³⁶ *Simmons v. United States*, 390 U.S. 377 (1968). The rationale of the case was subsequently limited to Fourth Amendment grounds in *McGautha v. California*, 402 U.S. 183, 210–13 (1971).

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introduction at a second trial of the defendant's testimony at his first trial, given to rebut a confession which was subsequently held inadmissible, since the testimony was in effect "fruit of the poisonous tree" and had been "coerced" from the defendant through use of the confession.³⁷ Potentially most far-reaching was a holding that invalidated the penalty structure of a statute under which defendants could escape a possible death sentence by entering a guilty plea; the statute "needlessly encourage[d]" waivers of defendant's Fifth Amendment right to plead not guilty and his Sixth Amendment right to a jury trial.³⁸

Although this "needless encouragement" test assessed the nature of the choice required to be made by defendants against the strength of the governmental interest in the system requiring the choice, the Court soon developed another test stressing the voluntariness of the choice. A guilty plea entered by a defendant who correctly understands the consequences of the plea is voluntary unless coerced or obtained under false pretenses; moreover, there is no impermissible coercion where the defendant has the effective assistance of counsel.³⁹ The Court in an opinion by Justice John Marshall Harlan then formulated still another test in holding that a defendant in a capital case in which the jury in one process decides both guilt and sentence could be put to a choice between remaining silent on guilt or admitting guilt and being able to put on evidence designed to mitigate the possible sentence. The pressure to take the stand in response to the sentencing issue, said the Court, was not so great as to impair the policies underlying the Self-Incrimination Clause, policies described in this instance as proscription of coercion and of cruelty in putting the defendant to an undeniably "hard" choice.⁴⁰ Similarly, the Court held that requiring a defendant to give notice to the prosecution before trial of his intention to rely on an alibi defense and to give the names and addresses of witnesses who will support it does not violate the Clause.⁴¹ Nor does it violate a defendant's self-incrimination privilege to create a presumption upon the establishment of certain basic facts from which the jury may infer the defendant's guilt unless he rebuts the presumption.⁴²

³⁷ *Harrison v. United States*, 392 U.S. 219 (1968).

³⁸ *Jackson v. United States*, 390 U.S. 570, 583 (1968).

³⁹ *Parker v. North Carolina*, 397 U.S. 790 (1970); *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970). *Parker* and *Brady* entered guilty pleas to avoid the death penalty when it became clear that the prosecution had solid evidence of their guilt; *Richardson* pled guilty because of his fear that an allegedly coerced confession would be introduced into evidence.

⁴⁰ *McGautha v. California*, 402 U.S. 183, 210–20 (1971). When the Court subsequently required bifurcated trials in capital cases, it was on the basis of the Eighth Amendment, and represented no withdrawal from the position described here. *Cf. Corbitt v. New Jersey*, 439 U.S. 212 (1978); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

⁴¹ *Williams v. Florida*, 399 U.S. 78, 80–86 (1970). The compulsion of choice, Justice Byron White argued for the Court, proceeded from the strength of the state's case and not from the disclosure requirement. That is, the rule did not affect whether or not the defendant chose to make an alibi defense and to call witnesses, but merely required him to accelerate the timing. It appears, however, that in *Brooks v. Tennessee*, 406 U.S. 605 (1972), the Court used the "needless encouragement" test in striking down a state rule requiring the defendant to testify before any other defense witness or to forfeit the right to testify at all. In the Court's view, this impermissibly burdened the defendant's choice whether to testify or not. Another prosecution discovery effort was approved in *United States v. Nobles*, 422 U.S. 233 (1975), in which a defense investigator's notes of interviews with prosecution witnesses were ordered disclosed to the prosecutor for use in cross-examination of the investigator. The Court discerned no compulsion upon defendant to incriminate himself.

⁴² "The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." *Yee Hem v. United States*, 268 U.S. 178, 185 (1925), quoted with approval in *Turner v. United States*, 396 U.S. 398, 418 n.35 (1970). Justices Black and Douglas dissented on self-incrimination grounds. *Id.* at 425. *See also United States v. Gainey*, 380 U.S. 63, 71, 74 (1965) (dissenting opinions). For due process limitations on such presumptions, *see* discussion under the Fourteenth Amendment, Amdt14.S1.5.4.9 Burdens of Proof and Presumptions.

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The obligation to testify is not relieved by this Clause, if, regardless of whether incriminating answers are given, a prosecution is precluded,⁴³ or if the result of the answers is not incrimination but rather harm to reputation or exposure to infamy or disgrace.⁴⁴ The Clause does not prevent a public employer from discharging an employee who, in an investigation specifically and narrowly directed at the performance of the employee's official duties, refuses to cooperate and to provide the employer with the desired information on grounds of self-incrimination.⁴⁵ But it is unclear under what other circumstances a public employer may discharge an employee who has claimed his privilege before another investigating agency.⁴⁶

Finally, the rules established by the Clause and the judicial interpretations apply against the states to the same degree that they apply against the Federal Government,⁴⁷ and neither sovereign can compel discriminatory admissions that would incriminate the person in the other jurisdiction.⁴⁸ There is no "cooperative internationalism" that parallels the cooperative federalism and cooperative prosecution on which application against states is premised, and consequently concern with foreign prosecution is beyond the scope of the Self-Incrimination Clause.⁴⁹

⁴³ Prosecution may be precluded by tender of immunity (see next topic for discussion of immunity), or by pardon, *Brown v. Walker*, 161 U.S. 591, 598–99 (1896). The effect of a mere tender of pardon by the President remains uncertain. *Cf. Burdick v. United States*, 236 U.S. 79 (1915) (acceptance necessary, and self-incrimination is possible in absence of acceptance); *Biddle v. Perovich*, 274 U.S. 480 (1927) (acceptance not necessary to validate commutation of death sentence to life imprisonment).

⁴⁴ *Brown v. Walker*, 161 U.S. 591, 605–06 (1896); *Ullmann v. United States*, 350 U.S. 422, 430–31 (1956). Minorities in both cases had contended for a broader rule. *Walker*, 161 U.S. at 631 (Field, J., dissenting); *Ullmann*, 350 U.S. at 454 (Douglas, J., dissenting).

⁴⁵ *Gardner v. Broderick*, 392 U.S. 273, 278 (1968). Testimony compelled under such circumstances is, even in the absence of statutory immunity, barred from use in a subsequent criminal trial by force of the Fifth Amendment itself. *Garrity v. New Jersey*, 385 U.S. 493 (1967). However, unlike public employees, persons subject to professional licensing by government appear to be able to assert their privilege and retain their licenses. *Cf. Spevack v. Klein*, 385 U.S. 511 (1967) (lawyer may not be disbarred solely because he refused on self-incrimination grounds to testify at a disciplinary proceeding), *approved in Gardner v. Broderick*, 392 U.S. at 277–78. Justices Harlan, Clark, Stewart, and White dissented generally. 385 U.S. 500, 520, 530.

⁴⁶ *See Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), *limited by Lerner v. Casey*, 357 U.S. 468 (1958), and *Nelson v. County of Los Angeles*, 362 U.S. 1 (1960), which were in turn apparently limited by *Garrity* and *Gardner*.

⁴⁷ *Malloy v. Hogan*, 378 U.S. 1 (1964) (overruling *Twining v. New Jersey*, 211 U.S. 78 (1908), and *Adamson v. California*, 332 U.S. 46 (1947)).

⁴⁸ *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964), (overruling *United States v. Murdock*, 284 U.S. 141 (1931) (Federal Government could compel a witness to give testimony that might incriminate him under state law), *Knapp v. Schweitzer*, 357 U.S. 371 (1958) (state may compel a witness to give testimony that might incriminate him under federal law), and *Feldman v. United States*, 322 U.S. 487 (1944) (testimony compelled by a state may be introduced into evidence in the federal courts)). *Murphy* held that a state could compel testimony under a grant of immunity but that, because the state could not extend the immunity to federal courts, the Supreme Court would not permit the introduction of evidence into federal courts that had been compelled by a state or that had been discovered because of state compelled testimony. The result was apparently a constitutionally compelled one arising from the Fifth Amendment itself, 378 U.S. at 75–80, rather than one taken pursuant to the Court's supervisory power as Justice John Marshall Harlan would have preferred. *Id.* at 80 (concurring). Congress has power to confer immunity in state courts as well as in federal in order to elicit information, *Adams v. Maryland*, 347 U.S. 179 (1954), but whether Congress must do so or whether the immunity would be conferred simply through the act of compelling the testimony *Murphy* did not say.

Whether testimony could be compelled by either the Federal Government or a state that could incriminate a witness in a foreign jurisdiction is unsettled. *See Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 480, 481 (1972) (reserving question), but an affirmative answer seems unlikely. *Cf. Murphy*, 378 U.S. at 58–63, 77.

⁴⁹ *United States v. Balsys*, 524 U.S. 666 (1998).

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Amdt5.4.4
Required Records Doctrine

Amdt5.4.4 Required Records Doctrine

Fifth Amendment:

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

Although the privilege is applicable to an individual's papers and effects,¹ it does not extend to corporate persons; hence corporate records, as has been noted, are subject to compelled production.² In fact, however, the Court has greatly narrowed the protection afforded in this area to natural persons by developing the "required records" doctrine. That is, it has held "that the privilege which exists as to private papers cannot be maintained in relation to 'records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established.'"³ This exception developed out of, as Justice Felix Frankfurter showed in dissent, the rule that documents which are part of the official records of government are wholly outside the scope of the privilege; public records are the property of government and are always accessible to inspection. Because government requires certain records to be kept to facilitate the regulation of the business being conducted, so the reasoning goes, the records become public at least to the degree that government could always scrutinize them without hindrance from the record-keeper. "If records merely because required to be kept by law ipso facto become public records, we are indeed living in glass houses. Virtually every major public law enactment—to say nothing of State and local legislation—has record-keeping provisions. In addition to record-keeping requirements, is the network of provisions for filing reports. Exhaustive efforts would be needed to track down all the statutory authority, let alone the administrative regulations, for record-keeping and reporting requirements. Unquestionably they are enormous in volume."⁴

"It may be assumed at the outset that there are limits which the government cannot constitutionally exceed in requiring the keeping of records which may be inspected by an administrative agency and may be used in prosecuting statutory violations committed by the record-keeper himself."⁵ But the only limit that the Court suggested in *Shapiro* was that there must be "a sufficient relation between the activity sought to be regulated and the public concern so that the Government can constitutionally regulate or forbid the basic activity concerned, and can constitutionally require the keeping of particular records, subject to inspection by the Administrator."⁶ That there are limits established by the Self-Incrimination

¹ *Boyd v. United States*, 116 U.S. 616 (1886). *But see* *Fisher v. United States*, 425 U.S. 391 (1976).

² See discussion under Amdt4.7.2 Adoption of Exclusionary Rule.

³ *Shapiro v. United States*, 335 U.S. 1, 33 (1948) (quoting *Davis v. United States*, 328 U.S. 582, 589–90 (1946), which quoted *Wilson v. United States*, 221 U.S. 361, 380 (1911)). Dicta in *Wilson* is the source of the required-records doctrine, the holding of the case being the familiar one that a corporate officer cannot claim the privilege against self-incrimination to refuse to surrender corporate records in his custody. *Cf.* *Heike v. United States*, 227 U.S. 131 (1913). *Davis* was a search and seizure case and dealt with gasoline ration coupons which were government property even though in private possession. See *Shapiro*, 335 U.S. at 36, 56–70 (Frankfurter, J., dissenting).

⁴ 335 U.S. at 51.

⁵ 335 U.S. at 32.

⁶ 335 U.S. at 32.

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Self-Incrimination

Amdt5.4.5
Immunity

Clause itself rather than by a subject matter jurisdiction test is evident in the Court's consideration of reporting and disclosure requirements implicating but not directly involving the required-records doctrine.

Amdt5.4.5 Immunity

Fifth Amendment:

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

Under the Fifth Amendment, the government cannot compel a person to be “a witness against himself” although a person may waive the privilege against self-incrimination by declining to assert it, specifically disclaiming it, or testifying on the same matters prior to asserting the privilege.¹ In addition, Congress has passed immunity statutes, which allow “the person presiding over the proceeding” to compel a witness, who has asserted his or her privilege against self-incrimination, to testify, provided that “no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.”²

As the Supreme Court has recognized immunity statutes “seek a rational accommodation between the imperatives of the privilege [of self-incrimination] and the legitimate demands of government to compel citizens to testify.”³ Parliament appears to have enacted the first immunity statute in 1710,⁴ which, in turn, was widely copied in the colonies. Congress enacted the first federal immunity statute in 1857, providing for immunization of any person who testified before a congressional committee from prosecution for any matter “touching which” he had testified.⁵

The Supreme Court's decision in *Counselman v. Hitchcock* soon rendered Congress's immunity statute unenforceable.⁶ In *Counselman*, the Court held that an analogous limited-immunity statute was unconstitutional because it did not confer an immunity coextensive with the privilege it replaced. The Court's reasoning in *Counselman* was ambiguous; it identified two faults in the statute. First, the statute did not proscribe

¹ See Amdt5.4.3 General Protections Against Self-Incrimination Doctrine and Practice.

² 18 U.S.C. § 6002. See also 18 U.S.C. § 6003 (providing specifically for “any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States . . .”).

³ *Kastigar v. United States*, 406 U.S. 441, 445–46 (1972). The *Kastigar* Court further noted that “The existence of these [immunity] statutes reflects the importance of testimony, and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime.” *Id.* The Supreme Court has held that the Fifth Amendment precludes the use as criminal evidence of compelled admissions, *Garrity v. New Jersey*, 385 U.S. 493 (1967), but this case and dicta in others is unreconciled with the cases that find that one may “waive” though inadvertently the privilege and be required to testify and incriminate oneself. *Rogers v. United States*, 340 U.S. 367 (1951).

⁴ 9 Anne, c. 14, 3–4 (1710). See *Kastigar v. United States*, 406 U.S. 441, 445 n.13 (1972).

⁵ Ch. 19, 11 Stat. 155 (1857). There was an exception for perjury committed while testifying before Congress.

⁶ 142 U.S. 547 (1892). The statute struck down was ch. 13, 15 Stat. 37 (1868).

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Self-Incrimination

Amdt5.4.5
Immunity

“derivative” evidence.⁷ Second, it prohibited only future use of the compelled testimony.⁸ The latter language accentuated a division between adherents of “transactional” immunity and of “use” immunity which has continued to the present.⁹

Following *Counselman*, Congress enacted a statute that required transactional immunity in exchange for compelled testimony.¹⁰ The Court sustained this law in *Brown v. Walker*.¹¹ In 1956, the Court broadly reaffirmed *Walker*.¹² Because the immunity acts passed after *Walker* were generally transactional immunity statutes,¹³ the question of the constitutional sufficiency of use immunity did not arise. The dicta in cases dealing with immunity, the Court continued to assert the necessity of transactional immunity.¹⁴

The Court’s incorporation of the Self-Incrimination Clause against the states in 1964 raised new considerations. In particular, state officials lacked the power to confer immunity from federal prosecution.¹⁵ As a consequence, concerns arose that if states could not compel testimony because that they lacked authority to immunize a witness in a subsequent “foreign” prosecution, their law-enforcement efforts could suffer. To avoid this outcome, the Court emphasized the “use” restriction rationale of *Counselman* and announced that as a “constitutional rule, a state witness could not be compelled to incriminate himself under

⁷ *Counselman v. Hitchcock*, 142 U.S. 547, 564 (1892). See also *id.* at 586.

⁸ 142 U.S. at 585–86.

⁹ “Transactional” immunity means that once a witness has been compelled to testify about an offense, he may never be prosecuted for that offense, no matter how much independent evidence might come to light; “use” immunity means that no testimony compelled to be given and no evidence derived from or obtained because of the compelled testimony may be used if the person is subsequently prosecuted on independent evidence for the offense.

¹⁰ Ch. 83, 27 Stat. 443 (1893).

¹¹ *Brown v. Walker*, 161 U.S. 591 (1896). The majority reasoned that one was excused from testifying only if there could be legal detriment flowing from his act of testifying. If a statute of limitations had run out or if a pardon had been issued with regard to a particular offense, a witness could not claim the privilege and refuse to testify, no matter how much other detriment, such as loss of reputation, would attach to his admissions. Therefore, because the statute acted as a pardon or amnesty and relieved the witness of all legal detriment, he must testify. The four dissenters contended essentially that the privilege protected against being compelled to incriminate oneself regardless of any subsequent prosecutorial effort, *id.* at 610, and that a witness was protected against infamy and disparagement as much as prosecution. *Id.* at 628.

¹² “[The] sole concern [of the privilege] is . . . with the danger to a witness forced to give testimony leading to the infliction of ‘penalties affixed to the criminal acts’. . . . Immunity displaces the danger. Once the reason for the privilege ceases, the privilege ceases.” 350 U.S. at 438–39. The internal quotation is from *Boyd v. United States*, 116 U.S. 616, 634 (1886). *E.g.*, *Hale v. Henkel*, 201 U.S. 43, 67 (1906); *United States v. Monia*, 317 U.S. 424, 425, 428 (1943); *Smith v. United States*, 337 U.S. 137, 141, 146 (1949); *United States v. Murdock*, 284 U.S. 141, 149 (1931); *Adams v. Maryland*, 347 U.S. 179, 182 (1954). In *Ullmann v. United States*, 350 U.S. 422, 436–37 (1956), Justice Felix Frankfurter described the holding of *Counselman* as relating to the absence of a prohibition on the use of derivative evidence.

¹³ *Kastigar v. United States*, 406 U.S. 441, 457–58 (1972); *Piccirillo v. New York*, 400 U.S. 548, 571 (1971) (Brennan, J., dissenting). The exception was an immunity provision of the bankruptcy laws, 30 Stat. 548 (1898), 11 U.S.C. § 25(a)(10), repealed by 84 Stat. 931 (1970). The right of a bankrupt to insist on his privilege against self-incrimination as against this statute was recognized in *McCarthy v. Arndstein*, 266 U.S. 34, 42 (1924), “because the present statute fails to afford complete immunity from a prosecution.” The statute also failed to prohibit the use of derivative evidence. *Arndstein v. McCarthy*, 254 U.S. 71 (1920).

¹⁴ *E.g.*, *Hale v. Henkel*, 201 U.S. 43, 67 (1906); *United States v. Monia*, 317 U.S. 424, 425, 428 (1943); *Smith v. United States*, 337 U.S. 137, 141, 146 (1949); *United States v. Murdock*, 284 U.S. 141, 149 (1931); *Adams v. Maryland*, 347 U.S. 179, 182 (1954). In *Ullmann v. United States*, 350 U.S. 422, 436–37 (1956), Justice Frankfurter described the holding of *Counselman* as relating to the absence of a prohibition on the use of derivative evidence. *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 77–99 (1964). Concurring, Justices White and Stewart argued at length in support of the constitutional sufficiency of use immunity and the lack of a constitutional requirement of transactional immunity. *Id.* at 92. See also *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass’n v. Commissioner of Sanitation*, 392 U.S. 280 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967), recognizing the propriety of compelling testimony with a use restriction attached.

¹⁵ *Malloy v. Hogan*, 378 U.S. 1 (1964), extended the clause to the states. That Congress could immunize a federal witness from state prosecution and extend use immunity to state courts was held in *Adams v. Maryland*, 347 U.S. 179 (1954), and had been recognized in *Brown v. Walker*, 161 U.S. 591 (1896).

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federal law unless federal authorities were precluded from using either his testimony or evidence derived from it.”¹⁶ After this decision, Congress enacted a statute replacing all prior immunity statutes and adopting a use-immunity restriction only.¹⁷ The Supreme Court upheld this statute in *Kastigar v. United States*.¹⁸

Amdt5.4.6 Withdrawal of Government Benefits

Fifth Amendment:

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

The line of cases begins with *United States v. Sullivan*,¹ in which a unanimous Court held that the Fifth Amendment did not privilege a bootlegger in not filing an income tax return because the filing would have disclosed the illegality in which he was engaged. “It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime,” Justice Oliver Wendell Holmes stated for the Court.² However, “[i]f the form of return provided called for answers that the defendant was privileged from making he could have raised the objection in the return”³ Using its taxing power to reach gambling activities over which it might otherwise not have had jurisdiction,⁴ Congress enacted a complicated statute imposing an annual occupational tax on gamblers and an excise tax on all their wages, and coupled the tax with an annual registration requirement under which each gambler must file with the Internal Revenue Service (IRS) a declaration of his business with identification of his place of business and his employees and agents, filings which were made available to state and local law enforcement agencies. These requirements were upheld by the Court against self-incrimination challenges on the three grounds that (1) the privilege did not excuse a

¹⁶ *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 77–99 (1964). Concurring, Justices White and Stewart argued at length in support of the constitutional sufficiency of use immunity and the lack of a constitutional requirement of transactional immunity. *Id.* at 92. *See also* *Gardner v. Broderick*, 392 U.S. 273 (1968); *Uniformed Sanitation Men Ass’n v. Commissioner of Sanitation*, 392 U.S. 280 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967), recognizing the propriety of compelling testimony with a use restriction attached.

¹⁷ Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 201(a), 84 Stat. 922, 18 U.S.C. §§ 6002–6003. Justice Department officials have the authority under the Act to decide whether to seek immunity, and courts will not apply “constructive” use immunity absent compliance with the statute’s procedures. *United States v. Doe*, 465 U.S. 605 (1984).

¹⁸ 406 U.S. 441 (1972). A similar state statute was sustained in *Zicarelli v. New Jersey State Comm’n of Investigation*, 406 U.S. 472 (1972).

¹ 274 U.S. 259, 263, 264 (1927). *Sullivan* was reaffirmed in *Garner v. United States*, 424 U.S. 648 (1976), holding that a taxpayer’s privilege against self-incrimination was not violated when he failed to claim his privilege on his tax returns, and instead gave incriminating information leading to conviction. One must assert one’s privilege to alert the government to the possibility that it is seeking to obtain incriminating material. It is not coercion forbidden by the clause that upon a claim of the privilege the government could seek an indictment for failure to file, since a valid claim of privilege cannot be the basis of a conviction. The taxpayer was not entitled to a judicial ruling on the validity of his claim and an opportunity to reconsider if the ruling went against him, regardless of whether a good-faith erroneous assertion of the privilege could subject him to prosecution, a question not resolved.

² 274 U.S. at 263–64.

³ 274 U.S. at 263.

⁴ The expansion of the commerce power would now obviate reliance on the taxing power.

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complete failure to file, (2) because the threshold decision to gamble was voluntary, the required disclosures were not compulsory, and (3) because registration required disclosure only of prospective conduct, the privilege, limited to past or present acts, did not apply.⁵

Constitutional limitations appeared, however, in *Albertson v. SACB*,⁶ which struck down under the Self-Incrimination Clause an order pursuant to statute requiring registration by individual members of the Communist Party or associated organizations. “In *Sullivan* the questions in the income tax return were neutral on their face and directed at the public at large, but here they are directed at a highly selective group inherently suspect of criminal activities. Petitioners’ claims are not asserted in an essentially noncriminal and regulatory area of inquiry, but against an inquiry in an area permeated with criminal statutes, where response to any of the form’s questions in context might involve the petitioners in the admission of a crucial element of a crime.”⁷

The gambling tax reporting scheme was next struck down by the Court.⁸ Because of the pervasiveness of state laws prohibiting gambling, said Justice John Marshall Harlan for the Court, “the obligations to register and to pay the occupational tax created for petitioner ‘real and appreciable,’ and not merely ‘imaginary and unsubstantial,’ hazards of self-incrimination.”⁹ Overruling *Kahriger* and *Lewis*, the Court rejected its earlier rationales. Registering per se would have exposed a gambler to dangers of state prosecution, so *Sullivan* did not apply.¹⁰ Any contention that the voluntary engagement in gambling “waived” the self-incrimination claim, because there is “no constitutional right to gamble,” would nullify the privilege.¹¹ And the privilege was not governed by a “rigid chronological distinction” so that it protected only past or present conduct, but also reached future self-incrimination the danger of which is not speculative and insubstantial.¹² Significantly, then, Justice Harlan turned to distinguishing the statutory requirements here from the “required records” doctrine of

⁵ *United States v. Kahriger*, 345 U.S. 22 (1953); *Lewis v. United States*, 348 U.S. 419 (1955).

⁶ 382 U.S. 70 (1965).

⁷ 382 U.S. at 79. The decision was unanimous, with Justice Byron White not participating. The same issue had been held not ripe for adjudication in *Communist Party v. SACB*, 367 U.S. 1, 105–10 (1961).

⁸ *Marchetti v. United States*, 390 U.S. 39 (1968) (occupational tax); *Grosso v. United States*, 390 U.S. 62 (1968) (wagering excise tax). In *Haynes v. United States*, 390 U.S. 85 (1968), the Court struck down a requirement that one register a firearm that it was illegal to possess. The following Term on the same grounds the Court voided a statute prohibiting the possession of marijuana without having paid a transfer tax and registering. *Leary v. United States*, 395 U.S. 6 (1969); *United States v. Covington*, 395 U.S. 57 (1969). However, a statute was upheld which prohibited the sale of narcotics to a person who did not have a written order on a prescribed form, since the requirement caused the self-incrimination of the buyer but not the seller, the Court viewing the statute as actually a flat proscription on sale rather than a regulatory measure. *Minor v. United States*, 396 U.S. 87 (1969). The congressional response was reenactment of the requirements, coupled with use immunity. *United States v. Freed*, 401 U.S. 601 (1971).

⁹ *Marchetti v. United States*, 390 U.S. 39, 48 (1968).

¹⁰ “Every element of these requirements would have served to incriminate petitioners; to have required him to present his claim to Treasury officers would have obliged him ‘to prove guilt to avoid admitting it.’” 390 U.S. at 50.

¹¹ “The question is not whether petitioner holds a ‘right’ to violate state law, but whether, having done so, he may be compelled to give evidence against himself. The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; if such an inference of antecedent choice were alone enough to abrogate the privilege’s protection, it would be excluded from the situations in which it has historically been guaranteed, and withheld from those who most require it.” 390 U.S. at 51. *But cf.* *California v. Byers*, 402 U.S. 424, 434 (1971) (plurality opinion), in which it is suggested that because there is no “right” to leave the scene of an accident a requirement that a person involved in an accident stop and identify himself does not violate the Self-Incrimination Clause.

¹² *Marchetti v. United States*, 390 U.S. 39, 52–54 (1968). “The central standard for the privilege’s application has been whether the claimant is confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination This principle does not permit the rigid chronological distinctions adopted in *Kahriger* and *Lewis*. We see no reason to suppose that the force of the constitutional prohibition is diminished merely because confession of a guilty purpose precedes the act which it is subsequently employed to evidence.” *Id.* at 53–54. *Cf.* *United States v. Freed*, 401 U.S. 601, 605–07 (1971).

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Shapiro. “First, petitioner . . . was not . . . obliged to keep and preserve records ‘of the same kind as he has customarily kept’; he was required simply to provide information, unrelated to any records which he may have maintained, about his wagering activities. This requirement is not significantly different from a demand that he provide oral testimony Second, whatever ‘public aspects’ there were to the records at issue in *Shapiro*, there are none to the information demanded from Marchetti. The Government’s anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the government has formalized its demands in the attire of a statute; if this alone were sufficient, the constitutional privilege could be entirely abrogated by any Act of Congress. Third, the requirements at issue in *Shapiro* were imposed in ‘an essentially non-criminal and regulatory area of inquiry’ while those here are directed to a ‘selective group inherently suspect of criminal activities.’ . . . The United States’ principal interest is evidently the collection of revenue, and not the punishment of gamblers, . . . but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*.”¹³

Most recent in this line of cases is *California v. Byers*,¹⁴ which indicates that the Court has yet to settle on an ascertainable standard for judging self-incrimination claims in cases where government is asserting an interest other than criminal law enforcement. *Byers* sustained the constitutionality of a statute which required the driver of any automobile involved in an accident to stop and give his name and address. The state court had held that a driver who reasonably believed that compliance with the statute would result in self-incrimination could refuse to comply. A plurality of the Court, however, determined that *Sullivan* and *Shapiro* applied and not the *Albertson-Marchetti* line of cases, because the purpose of the statute was to promote the satisfaction of civil liabilities resulting from automobile accidents and not criminal prosecutions, and because the statute was directed to all drivers and not to a group which was either “highly selective” or “inherently suspect of criminal activities.” The combination of a noncriminal motive with the general character of the requirement made too slight for reliance the possibility of incrimination.¹⁵ Justice Harlan concurred to make up the majority on the disposition of the case, disagreeing with the plurality’s conclusion that the stop and identification requirement did not compel incrimination.¹⁶ However, the Justice thought that, where there is no governmental purpose to enforce a criminal law and instead government is pursuing other legitimate regulatory interests, it is permissible to apply a balancing test between the government’s interest and the individual’s interest. When he balanced the interests protected by the Amendment—protection of privacy and maintenance of an accusatorial system—with the noncriminal purpose, the necessity for self-reporting as a means of securing information, and the nature of the disclosures required, Justice Harlan

¹³ *Marchetti v. United States*, 390 U.S. 39, 57 (1968).

¹⁴ 402 U.S. 424 (1971).

¹⁵ 402 U.S. at 427–31 (Chief Justice Burger and Justices Stewart, White, and Blackmun).

¹⁶ “The California Supreme Court was surely correct in considering that the decisions of this Court have made it clear that invocation of the privilege is not limited to situations where the purpose of the inquiry is to get an incriminating answer. . . . [I]t must be recognized that a reading of our more recent cases . . . suggests the conclusion that the applicability of the privilege depends exclusively on a determination that, from the individual’s point of view, there are ‘real’ and not ‘imaginary’ risks of self-incrimination in yielding to state compulsion. Thus, *Marchetti* and *Grosso* . . . start from an assumption of a non-prosecutorial governmental purpose in the decision to tax gambling revenue; those cases go on to apply what in another context I have called the ‘real danger v. imaginary possibility standard’ A judicial tribunal whose position with respect to the elaboration of constitutional doctrine is subordinate to that of this Court certainly cannot be faulted for reading these opinions as indicating that the ‘inherently-suspect-class’ factor is relevant only as an indicium of genuine incriminating risk as assessed from the individual’s point of view.” 402 U.S. at 437–38.

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voted to sustain the statute.¹⁷ *Byers* was applied in *Baltimore Dep't of Social Services v. Bouknight*¹⁸ to uphold a juvenile court's order that the mother of a child under the court's supervision produce the child. Although in this case the mother was suspected of having abused or murdered her child, the order was justified out of concern for the child's safety—a “compelling reason[] unrelated to criminal law enforcement.”¹⁹ Moreover, because the mother had custody of her previously abused child only as a result of the juvenile court's order, the Court analogized to the required records cases to conclude that the mother had submitted to the requirements of the civil regulatory regime as the child's “custodian.”

Amdt5.4.7 Custodial Interrogation

Amdt5.4.7.1 Early Doctrine and Custodial Interrogation

Fifth Amendment:

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

By the latter part of the eighteenth century English and early American courts had developed a rule that coerced confessions were potentially excludable from admission at trial because they were testimonially untrustworthy.¹ The Supreme Court at times continued to ground exclusion of involuntary confessions on this common law foundation of unreliability without any mention of the constitutional bar against self-incrimination. Consider this dictum from an 1884 opinion: “[V]oluntary confession of guilt is among the most effectual proofs in the law, . . . [b]ut the presumption upon which weight is given to such evidence, namely, that one who is innocent will not imperil his safety or prejudice his interests by an untrue statement, ceases when the confession appears to have been made either in consequence of inducements of a temporal nature, held out by one in authority, touching the charge preferred, or because of a threat or promise by or in the presence of such person, which, operating upon the fears or hopes of the accused, in reference to the charge, deprives him of that freedom of will or self-control essential to make his confession voluntary within the meaning of the law.”² Subsequent cases followed essentially the same line of thought.³

Then, language in the 1897 case of *Bram v. United States* opened the door to eventually extending the doctrinal basis for analyzing the admissibility of a confession beyond the

¹⁷ 402 U.S. at 448–58. The four dissenters argued that it was unquestionable that *Byers* would have faced real risks of self-incrimination by compliance with the statute and that this risk was sufficient to invoke the privilege. *Id.* at 459, 464 (Justices Black, Douglas, Brennan, and Marshall).

¹⁸ 493 U.S. 549 (1990).

¹⁹ 493 U.S. at 561. By the same token, the Court concluded that the targeted group—persons who care for children pursuant to a juvenile court's custody order—is not a group “inherently suspect of criminal activities” in the *Albertson-Marchetti* sense.

¹ 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 823 (3d ed. 1940); *Developments in the Law—Confessions*, 79 HARV. L. REV. 935, 954–59 (1966).

² *Hopt v. Utah*, 110 U.S. 574, 584–85 (1884). Utah at this time was a territory and subject to direct federal judicial supervision.

³ *Pierce v. United States*, 160 U.S. 335 (1896); *Sparf and Hansen v. United States*, 156 U.S. 51 (1895). In *Wilson v. United States*, 162 U.S. 613 (1896), failure to provide counsel or to warn the suspect of his right to remain silent was held to have no effect on the admissibility of a confession but was only to be considered in assessing its credibility.

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Amdt5.4.7.2
Pre-Miranda Self-Incrimination Doctrine (1940s to 1960s)

common-law test that focused on voluntariness as an indicator of the confession's trustworthiness as evidence. "In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"⁴ However, though this approach⁵ and the case itself were subsequently approved in several cases,⁶ the Court would still hold in 1912 that a confession should not be excluded merely because the authorities had not warned a suspect of his right to remain silent,⁷ and more than once later opinions could doubt "whether involuntary confessions are excluded from federal criminal trials on the ground of a violation of the Fifth Amendment's protection against self-incrimination, or from a rule that forced confessions are untrustworthy. . . ."⁸ One reason for this was that the Self-Incrimination Clause had not yet been made applicable to the states, thereby requiring that the admissibility of confessions in state courts be determined under due process standards developed from common-law principles. It was only after the Court extended the Self-Incrimination Clause to the states that a divided Court reaffirmed and extended the 1897 *Bram* ruling and imposed on both federal and state trial courts new rules for admitting or excluding confessions and other admissions made to police during custodial interrogation.⁹

Amdt5.4.7.2 Pre-Miranda Self-Incrimination Doctrine (1940s to 1960s)

Fifth Amendment:

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

From the 1940s to the 1960s, the Supreme Court decided a series of cases that explained when a confession's admission in a criminal trial violates the Fifth Amendment's self-incrimination doctrine. In its 1943 decision in *McNabb v. United States*,¹ the Supreme Court held that confessions obtained after an "unnecessary delay" in presenting a suspect for

⁴ *Bram v. United States*, 168 U.S. 532, 542 (1897).

⁵ *Ziang Sun Wan v. United States*, 266 U.S. 1, 14–15 (1924). This case first held that the circumstances of detention and interrogation were relevant and perhaps controlling on the question of admissibility of a confession.

⁶ *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921); *Powers v. United States*, 223 U.S. 303, 313 (1912); *Shotwell Mfg. Co. v. United States*, 371 U.S. 342, 347 (1963).

⁷ *Powers v. United States*, 223 U.S. 303 (1912).

⁸ *United States v. Carignan*, 342 U.S. 36, 41 (1951). *See also* *McNabb v. United States*, 318 U.S. 332, 346 (1943); *Brown v. Mississippi*, 297 U.S. 278, 285 (1936); *Stein v. New York*, 346 U.S. 156, 191 n.35 (1953).

⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966). According to Wigmore, "there never was any historical connection . . . between the constitutional [self-incrimination] clause and the [common law] confession-doctrine," 3 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 823, at 250 n.5 (3d ed. 1940); *see also* vol. 8 *id.* at § 2266 (McNaughton rev. 1961). It appears that while the two rules did develop separately—the bar against self-incrimination deriving primarily from notions of liberty and fairness, proscriptions against involuntary confessions deriving primarily from notions of reliability — they did stem from some of the same considerations, and, in fact, the confession rule may be considered in important respects to be an off-shoot of the privilege against self-incrimination. *See* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION 325–32, 495 n.43 (1968). *See also* *Culombe v. Connecticut*, 367 U.S. 568, 581–84, especially 583 n.25 (1961) (Justice Frankfurter announcing judgment of the Court).

¹ 318 U.S. 332 (1943). *See also* *Anderson v. United States*, 318 U.S. 350 (1943).

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arraignment after arrest could not be admitted in criminal trials.² This rule, developed pursuant to the Court's supervisory power over the lower federal courts³ and hence not applicable to the states,⁴ was designed to implement guarantees that the Federal Rules of Criminal Procedure provides to defendants.⁵ The rule was informed by concern over incommunicado interrogation and coerced confessions.⁶ Although the Court never specified a minimum time after which delay in presenting a suspect for arraignment could invalidate a confession, Congress in 1968 legislated a six-hour period for interrogation following arrest before the suspect must be presented.⁷

Supreme Court cases from this time period addressed when a confession would become inadmissible because it had been obtained through coercive interrogation tactics. Many of the early cases disclosed clear instances of coercion that the Court determined had produced involuntary confessions. For example, the Court had little difficulty concluding that physical torture was coercive.⁸ Moreover, in its first confession case arising from a state court proceeding, the Supreme Court set aside a conviction based solely on confessions obtained through repeated whippings of the defendant with ropes and studded belts.⁹ However, the Court also condemned other overtly coercive tactics that did not amount to physical torture. For example, in *Chambers v. Florida*,¹⁰ the Court held that five days of prolonged questioning and incommunicado detention made subsequent confessions involuntary.

Although the Court did not hold that prolonged questioning by itself made a resulting confession involuntary,¹¹ it increasingly found coercion present even in intermittent questioning over a period of days of incommunicado detention.¹² In *Ashcraft v. Tennessee*,¹³ the

² In *Upshaw v. United States*, 335 U.S. 410 (1948), the Court held that a confession obtained after a thirty-hour delay was inadmissible per se. *Mallory v. United States*, 354 U.S. 449 (1957), held that any confession obtained during an unnecessary delay in arraignment was inadmissible. A confession obtained during a lawful delay before arraignment was admissible. *United States v. Mitchell*, 322 U.S. 65 (1944).

³ *McNabb v. United States*, 318 U.S. 332, 340 (1943); *Upshaw v. United States*, 335 U.S. 410, 414 n.2 (1948). *Burns v. Wilson*, 346 U.S. 137, 145 n.12 (1953), indicated that because the Court had no supervisory power over courts-martial, the rule did not apply in military courts.

⁴ *Gallegos v. Nebraska*, 342 U.S. 55, 60, 63–64, 71–73 (1951); *Stein v. New York*, 346 U.S. 156, 187–88 (1953); *Culombe v. Connecticut*, 367 U.S. 568, 599–602 (1961).

⁵ Rule 5(a) requiring prompt arraignment was promulgated in 1946, but the Court in *McNabb* relied on predecessor statutes, some of which required prompt arraignment. Cf. *Mallory v. United States*, 354 U.S. 449, 451–54 (1957). Rule 5(b) requires that the magistrate at arraignment must inform the suspect of the charge against him; must warn him that what he says may be used against him; must tell him of his right to counsel and his right to remain silent; and must also provide for the terms of bail.

⁶ *McNabb v. United States*, 318 U.S. 332, 343 (1943); *Mallory v. United States*, 354 U.S. 449, 452–53 (1957).

⁷ The provision was part of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 210, 18 U.S.C. § 3501(c).

⁸ *Brown v. Mississippi*, 297 U.S. 278 (1936).

⁹ *Id.* The *Brown* Court stated: “[T]he question of the right of the State to withdraw the privilege against self-incrimination is not here involved. The compulsion to which the quoted statements refer is that of the processes of justice by which the accused may be called as a witness and required to testify. Compulsion by torture to a confession is a different matter It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.” *Id.* at 285, 286.

¹⁰ 309 U.S. 227 (1940)

¹¹ *Lisenba v. California*, 314 U.S. 219 (1941).

¹² *Watts v. Indiana*, 338 U.S. 49 (1949) (suspect held incommunicado without arraignment for seven days without being advised of his rights in solitary confinement in a cell with no place to sleep but the floor and subject to questioning each day except Sunday by relays of police officers for periods ranging in duration from three to nine-and-one-half hours); *Turner v. Pennsylvania*, 338 U.S. 62 (1949) (suspect held on suspicion for five days without arraignment and without being advised of his rights and subject to questioning by relays of officers for periods briefer than in *Watts* during both days and nights); *Harris v. South Carolina*, 338 U.S. 68 (1949) (suspect in murder case arrested in Tennessee on theft warrant, taken to South Carolina, held incommunicado, and subject to questioning for

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Amdt5.4.7.2

Pre-Miranda Self-Incrimination Doctrine (1940s to 1960s)

Court held that a confession was inadmissible when it was obtained after almost 36 hours of continuous questioning under powerful electric lights by multiple officers, experienced investigators, and highly trained lawyers. Similarly, *Ward v. Texas* voided a conviction based on a confession obtained after three days of questioning during which the defendant was driven from county to county and told falsely of a danger of lynching.¹⁴ In *Stein v. New York*,¹⁵ however, the Court affirmed convictions of experienced criminals who had confessed after twelve hours of intermittent questioning over a period of 32 hours of incommunicado detention. The majority stressed that the correct approach was to balance “the circumstances of pressure against the power of resistance of the person confessing. What would be overpowering to the weak of will or mind might be utterly ineffective against an experienced criminal.”¹⁶

In resolving cases involving confessions during interrogation, the Court attempted by considering the “totality of the circumstances” to determine whether a confession was “voluntary” and admissible or “coerced” and inadmissible. The Court attempted to balance law enforcement’s need to question suspects against concerns about undue coercion.¹⁷ Although the Court has often focused on the nature of the coercion without regard to the individual characteristics of the suspect,¹⁸ the Court has occasionally determined that some suspects are susceptible to even mild coercion because of their age or intelligence.¹⁹ In some cases, a single factor indicated that the confession was involuntary.²⁰ However, in other cases, the Court recited a number of contributing factors without ranking any factor above the others, including the defendant’s age and intelligence; whether the defendant was held incommunicado, denied requested counsel, or deprived of access to friends; and whether the authorities employed

three days for periods as long as 12 hours, not advised of his rights, not told of the murder charge, and denied access to friends and family while being told his mother might be arrested for theft).

¹³ 322 U.S. 143 (1944).

¹⁴ 316 U.S. 547 (1942). *See also* *Canty v. Alabama*, 309 U.S. 629 (1940); *White v. Texas*, 310 U.S. 530 (1940); *Lomax v. Texas*, 313 U.S. 544 (1941); *Vernon v. Alabama*, 313 U.S. 540 (1941).

¹⁵ 346 U.S. 156 (1953).

¹⁶ *Id.* at 185.

¹⁷ *Culombe v. Connecticut*, 367 U.S. 568, 570–602 (1961).

¹⁸ 373 U.S. at 514. *See also* *Spano v. New York*, 360 U.S. 315 (1959). (after eight hours of almost continuous questioning, suspect was induced to confess by rookie policeman who was a childhood friend and who played on the suspect’s sympathies by falsely stating that his job as a policeman and the welfare of his family was at stake); *Rogers v. Richmond*, 365 U.S. 534 (1961) (suspect resisted questioning for six hours but yielded when officers threatened to bring his wife to headquarters). More recent cases include *Davis v. North Carolina*, 384 U.S. 737 (1966) (escaped convict held incommunicado sixteen days but periods of interrogation each day were about an hour); *Greenwald v. Wisconsin*, 390 U.S. 519 (1968); *Darwin v. Connecticut*, 391 U.S. 346 (1968).

¹⁹ *Gallegos v. Colorado*, 370 U.S. 49 (1962); *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Fikes v. Alabama*, 352 U.S. 191 (1957); *Payne v. Arkansas*, 356 U.S. 560 (1958); *Reck v. Pate*, 367 U.S. 433 (1961); *Culombe v. Connecticut*, 367 U.S. 568 (1961). The suspect in *Spano v. New York*, 360 U.S. 315 (1959), was a 25-year-old with a history of emotional instability. The fact that the suspect was a woman was apparently significant in *Lynnum v. Illinois*, 372 U.S. 528 (1963), in which officers threatened to have the suspect’s children taken from her and to have her taken off the welfare relief rolls. But a suspect’s mental state alone—even schizophrenia—is insufficient to establish involuntariness absent some coercive police activity. *Colorado v. Connelly*, 479 U.S. 157 (1986).

²⁰ *E.g.*, *Leyra v. Denno*, 347 U.S. 556 (1954) (confession obtained by psychiatrist trained in hypnosis from a physically and emotionally exhausted suspect who had already been subjected to three days of interrogation); *Townsend v. Sain*, 372 U.S. 293 (1963) (suspect was administered drug with properties of “truth serum” to relieve withdrawal pains of narcotics addiction, although police probably were not aware of drug’s side effects).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Self-Incrimination, Custodial Interrogation

Amdt5.4.7.2

Pre-Miranda Self-Incrimination Doctrine (1940s to 1960s)

trickery in obtaining a confession.²¹ The Court also held that confessions induced through the exploitation of some illegal action, such as an illegal arrest²² or an unlawful search and seizure,²³ were inadmissible.

Amdt5.4.7.3 Miranda and Its Aftermath

Fifth Amendment:

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

In *Miranda v. Arizona*, the Supreme Court held that prosecutors may not use statements obtained during a custodial interrogation unless the interrogation was conducted pursuant to certain procedural safeguards. Specifically, the Court concluded that such statements are inadmissible at trial unless the individual subject to interrogation was informed of his or her right to remain silent, that any statements could be used against the subject in subsequent proceedings, and of his or her right to an attorney.¹ The *Miranda* Court regarded police interrogation as inherently coercive. The Court explained that the relevant “*Miranda* warnings” were necessary to ensure that suspects were not stripped of their ability to make a free and rational choice between speaking and not speaking.² Although the *Miranda* decision became highly controversial, the Court has continued to adhere to it.³ However, the Court has created exceptions to the *Miranda* warnings over the years, and referred to the warnings as “prophylactic”⁴ and “not themselves rights protected by the Constitution.”⁵

In *Dickerson v. United States*,⁶ the Court addressed a foundational issue, finding that *Miranda* was a “constitutional decision” that could not be overturned by statute, and consequently that 18 U.S.C. § 3501, which provided for a less strict “voluntariness” standard for the admissibility of confessions, could not be sustained.

Consistent application of *Miranda*’s holding on warnings to state proceedings necessarily implied a constitutional basis for *Miranda*, the Court explained, because federal courts “hold

²¹ *E.g.*, *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Davis v. North Carolina*, 384 U.S. 737 (1966); *Ashdown v. Utah*, 357 U.S. 426 (1958); *Thomas v. Arizona*, 356 U.S. 390 (1958)

²² *Wong Sun v. United States*, 371 U.S. 471 (1963).

²³ *Fahy v. Connecticut*, 375 U.S. 85 (1963).

¹ 384 U.S. at 444–445.

² Justices Tom Clark, John Harlan, Potter Stewart, and Byron White dissented, finding no historical support for the application of the Clause to police interrogation and rejecting the policy considerations for the extension put forward by the majority. *Miranda v. Arizona*, 384 U.S. 436, 499, 504, 526 (1966). Justice White argued that while the Court’s decision was not compelled or even strongly suggested by the Fifth Amendment, its history, and the judicial precedents, this did not preclude the Court from making new law and new public policy grounded in reason and experience. However, he contended that the change made in *Miranda* was ill-conceived because it arose from a view of interrogation as inherently coercive and because the decision did not adequately protect society’s interest in detecting and punishing criminal behavior. *Id.* at 531–45.

³ *See, e.g.*, *Rhode Island v. Innis*, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) (“The meaning of *Miranda* has become reasonably clear and law enforcement practices have adjusted to its strictures; I would neither overrule *Miranda*, disparage it, nor extend it at this late date.”)

⁴ *New York v. Quarles*, 467 U.S. 549, 653 (1984).

⁵ *Michigan v. Tucker*, 417 U.S. 433, 444 (1974).

⁶ 530 U.S. 428 (2000).

FIFTH AMENDMENT—RIGHTS OF PERSONS
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Amdt5.4.7.3
Miranda and Its Aftermath

no supervisory authority over state judicial proceedings.”⁷ Moreover, *Miranda* itself had purported to guide law enforcement agencies and courts.⁸ However, even if *Miranda* is rooted in the Constitution, the Court has indicated that this does not mean a precise articulation of its required warnings is “immutable.”⁹

In addition to finding that *Miranda* had “constitutional underpinnings,” the *Dickerson* Court also rejected a request to overrule *Miranda*. “Whether or not we would agree with *Miranda*’s reasoning and its resulting rule, were we addressing the issue in the first instance,” Chief Justice William Rehnquist wrote for the seven-Justice majority, “the principles of *stare decisis* weigh heavily against overruling it now.” There was no special justification for overruling the decision; subsequent cases had not undermined the decision’s doctrinal underpinnings, but rather had “reaffirm[ed]” its “core ruling.” Moreover, *Miranda* warnings had “become so embedded in routine police practice [that they] have become part of our national culture.”¹⁰

As to the viability of *Miranda* claims in federal habeas corpus cases, the Court suggested in 1974 that most claims could be disallowed¹¹ but reversed course in 1993. The Court ruled in *Withrow v. Williams* that *Miranda* protects a fundamental trial right of the defendant, unlike the Fourth Amendment exclusionary rule addressed in *Stone v. Powell*.¹² Thus, claimed violations of *Miranda* merited federal habeas corpus review because they related to the correct ascertainment of guilt.¹³ The *Miranda* rule differed from the *Mapp v. Ohio*¹⁴ exclusionary rule because *Mapp*’s primary purpose was to deter future Fourth Amendment violations, which the Court opined would only be marginally advanced by allowing collateral review.¹⁵ A further consideration was that eliminating review of *Miranda* claims would not significantly reduce federal habeas review of state convictions, because most *Miranda* claims could be recast in terms of due process denials resulting from admission of involuntary confessions.¹⁶

The Court further explored the constitutional nature of *Miranda* in its 2022 case *Vega v. Tekoh*.¹⁷ In *Vega*, the Court reiterated that while *Miranda* was a constitutional decision that adopted constitutional rules, those rules were set forth by the Court as a way to safeguard

⁷ 530 U.S. at 438.

⁸ 530 U.S. at 439 (quoting from *Miranda*, 384 U.S. at 441–42).

⁹ See, e.g., *Florida v. Powell*, 559 U.S. 50, 60, 63–64 (2010).

¹⁰ 530 U.S. at 443.

¹¹ In *Michigan v. Tucker*, 417 U.S. 433, 439 (1974), the Court suggested a distinction between a constitutional violation and a violation of “the prophylactic rules developed to protect that right.” The holding in *Tucker*, however, turned on the fact that the interrogation had preceded the *Miranda* decision and that warnings—albeit not full *Miranda* warnings—had been given.

¹² 428 U.S. 465 (1976)

¹³ 507 U.S. 680 (1993). Even though a state prisoner’s *Miranda* claim may be considered in federal habeas review, the scope of federal habeas review is narrow. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a state court judgment may be set aside on habeas review only if the judgment is found to be contrary to, or an unreasonable application of, clearly established Supreme Court precedent. By contrast, a federal court reviewing a state court judgment on direct review considers federal legal questions de novo and can overturn a state court holding based on its own independent assessment of federal legal issues. This difference in scope of review can be critical. Compare *Yarborough v. Alvarado*, 541 U.S. 652 (2004) (habeas petition denied because state court’s refusal to take a juvenile’s age into account in applying *Miranda* was not an unreasonable application of clearly established Supreme Court precedent), with *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (on the Court’s de novo review of the age issue, a state court’s refusal to take a juvenile’s age into account in applying *Miranda* held to be in error, and case remanded).

¹⁴ 367 U.S. 643 (1961).

¹⁵ 507 U.S. at 686–93.

¹⁶ 507 U.S. at 693.

¹⁷ No. 21-499 (U.S. June 23, 2022).

FIFTH AMENDMENT—RIGHTS OF PERSONS
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Amdt5.4.7.3
Miranda and Its Aftermath

constitutional rights under the Fifth Amendment.¹⁸ Therefore, a *Miranda* violation does not necessarily constitute a violation of the Constitution.¹⁹ The Court concluded that because a *Miranda* violation is not a violation of a constitutional right, it is not actionable under 42 U.S.C. § 1983, which requires someone suffer the deprivation of [a] right . . . secured by the Constitution.²⁰

Amdt5.4.7.4 Custodial Interrogation Standard

Fifth Amendment:

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

Law enforcement officers must give *Miranda* warnings prior to “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”¹ Such warnings are thus required when a person is (1) taken into custody, and (2) subject to interrogation. The Supreme Court has explained that whether a person is “in custody” depends on the results of a two-part test that considers whether a reasonable person in the suspect’s shoes would feel that he could freely exercise his right against self-incrimination and the degree to which the suspect’s freedom of action is restricted.

First, whether a person is “in custody” during questioning depends on the degree of coercive pressure imposed on him. The Court applies an objective, context-specific test that considers the degree of intimidation that a reasonable person in the suspect’s shoes would feel if he were to freely exercise his right against self-incrimination. A police officer’s subjective and undisclosed view that a person being interrogated is a criminal suspect is not relevant for *Miranda* purposes, nor is the subjective view of the person being questioned.² However, age may weigh in favor of requiring *Miranda* warnings if the detainee is a juvenile.³

Second, the Supreme Court has considered whether various restrictions on a person’s freedom of action constitute taking that person into custody for purposes of *Miranda*. The Court has determined that, for example, an ordinary traffic stop does not amount to *Miranda* “custody.”⁴ Moreover, interrogating a prison inmate about previous outside conduct does not necessarily amount to custody, even if the inmate is isolated from the general prison

¹⁸ *Id.* at 11.

¹⁹ *Id.* at 13.

²⁰ *Id.*

¹ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (emphasis added).

² *Stansbury v. California*, 511 U.S. 318 (1994).

³ *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (case remanded to evaluate whether a 13-year-old student questioned by a uniformed police officer and school administrators on school grounds was in custody).

⁴ *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) (roadside questioning of motorist stopped for traffic violation not custodial interrogation until “freedom of action is curtailed to a ‘degree associated with formal arrest’”). Thus, “custody” for self-incrimination purposes under the Fifth Amendment does not necessarily cover all detentions that are “seizures” under the Fourth Amendment. *Id.*

FIFTH AMENDMENT—RIGHTS OF PERSONS
Self-Incrimination, Custodial Interrogation

Amdt5.4.7.4
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population for questioning.⁵ The fact that a suspect may be present in a police station does not necessarily mean, absent further restrictions, that questioning is custodial.⁶ By itself, the fact that the suspect is in his home or other familiar surroundings will not ordinarily lead to a conclusion that the inquiry was custodial.⁷ However, questioning a person upon arrest in his home may be custodial.⁸ When a person has been subjected to *Miranda* custody that custody ends when he is free to resume his normal life activities after questioning.⁹ Nevertheless, a break in custody may not end all *Miranda* implications for subsequent custodial interrogations.¹⁰

In addition to requiring that a person be taken into custody to trigger *Miranda* warnings, such warnings must precede custodial *interrogation*. It is not necessary under *Miranda* that the police ask a question in order to “interrogate” the suspect, as demonstrated in *Rhode Island v. Innis*.¹¹ There, police had apprehended the defendant as a murder suspect but had not found the weapon used. While he was being transported to police headquarters in a squad car, the officers did not question the defendant, who after receiving *Miranda* warnings had wanted to consult a lawyer. However, the officers discussed among themselves that a school for children with disabilities was near the crime scene, and that they hoped to find the weapon before it injured a child. The defendant then took them to the weapon’s hiding place.

Unanimously rejecting a contention that only express questioning violates *Miranda*, the Court said: We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term ‘interrogation’ under *Miranda* refers not only to express questioning, but also to any

⁵ *Howes v. Fields*, 565 U.S. 499 (2012) (taking a prisoner incarcerated for disorderly conduct aside for questioning about an unrelated child molestation incident held, 6-3, not to constitute custodial interrogation under the totality of the circumstances), distinguishing *Mathis v. United States*, 391 U.S. 1 (1968) (questioning state prisoner about unrelated federal tax violation held to be custodial interrogation). While the *Howes* Court split 6-3 on whether a custodial interrogation had taken place for Fifth Amendment purposes, the case was before it on habeas review, which requires that a clearly established Supreme Court precedent mandates a contrary result. All the *Howes* Justices agreed that *Mathis* had not, for purposes of habeas review of a state case, “clearly established” that all private questioning of an inmate about previous, outside conduct was “custodial” per se. Rather, *Howes* explained that a broader assessment of all relevant factors in each case was necessary to establish coercive pressure amounting to “custody.” Cf. *Maryland v. Shatzer*, 559 U.S. 98 (2010) (extended release of interrogated inmate back into the general prison population broke “custody” for purposes of later questioning); see also *Illinois v. Perkins*, 496 U.S. 292 (1990) (inmate’s conversation with an undercover agent does not create a coercive, police-dominated environment and does not implicate *Miranda* if the suspect does not know that he is conversing with a government agent).

⁶ *Oregon v. Mathiason*, 429 U.S. 492 (1977) (suspect came voluntarily to police station to be questioned, he was not placed under arrest while there, and he was allowed to leave at end of interview, even though he was named by victim as culprit; questioning took place behind closed doors, and he was falsely informed his fingerprints had been found at scene of crime); *Salinas v. Texas*, 570 U.S. 178 (2013) (plurality opinion) (voluntarily accompanying police to station for questioning). Cf. *Stansbury v. California*, 511 U.S. 318 (1994). See also *Minnesota v. Murphy*, 465 U.S. 420 (1984) (required reporting to probationary officer is not custodial situation); *Yarborough v. Alvarado*, 541 U.S. 652 (2004) (state court determination that a teenager brought to police station by his parents was not “in custody” was not “unreasonable” for purposes of federal habeas review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)).

⁷ *Beckwith v. United States*, 425 U.S. 341 (1976) (IRS agents’ interview with taxpayer in private residence was not a custodial interrogation, although inquiry had “focused” on him).

⁸ *Orozco v. Texas*, 394 U.S. 324 (1969) (police entered suspect’s bedroom at 4 a.m., told him he was under arrest, and questioned him; four of the eight Justices who took part in the case, including three dissenters, voiced concern about “broadening” *Miranda* beyond the police station).

⁹ This holds even in the case of a convict who is released after interrogation back into the general population. *Maryland v. Shatzer*, 559 U.S. 98 (2010).

¹⁰ *Edwards v. Arizona*, 451 U.S. 477 (1981).

¹¹ 446 U.S. 291 (1980). A similar factual situation was presented in *Brewer v. Williams*, 430 U.S. 387 (1977), which the Court decided under the Sixth Amendment. In *Brewer*, *Massiah v. United States*, 377 U.S. 201 (1964), and *United States v. Henry*, 447 U.S. 264 (1980), the Court had difficulty explaining what constitutes interrogation for Sixth Amendment counsel purposes. The *Innis* Court indicated that the definitions are not the same for each Amendment. 446 U.S. at 300 n.4.

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Self-Incrimination, Custodial Interrogation

Amdt5.4.7.4
Custodial Interrogation Standard

words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police.¹²

The Court, however, concluded that the officers' conversation was not the functional equivalent of questioning and the evidence was admissible.¹³ A later Court applied *Innis* in *Arizona v. Mauro*¹⁴ to hold that a suspect who had requested an attorney was not "interrogated" when the police instead brought the suspect's wife, who also was a suspect, to speak with him in the police's presence. The majority emphasized that the suspect's wife had asked to speak with her husband; therefore, the meeting was not a police-initiated ruse designed to elicit a response from the suspect. Furthermore, the meeting could not be characterized as a police attempt to use the coercive nature of confinement to extract a confession that would not have been given in an unrestricted environment.

In *Estelle v. Smith*,¹⁵ the Court held that a court-ordered jailhouse interview by a psychiatrist seeking to determine the defendant's competency to stand trial constituted "interrogation" with respect to testimony on issues of guilt and punishment. Thus, the psychiatrist's conclusions about the defendant's dangerousness were inadmissible at the capital sentencing phase of the trial because the defendant had not received his *Miranda* warnings prior to the interview. That a psychiatrist designated to conduct a neutral competency examination had questioned the defendant, rather than a police officer, was "immaterial," the Court concluded, because the psychiatrist's testimony at the penalty phase changed his role from one of neutrality to that of the prosecution's agent.¹⁶

Amdt5.4.7.5 Miranda Requirements

Fifth Amendment:

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

Miranda requires that before a suspect in custody is interrogated, he must be given full warnings (or the equivalent) of his rights. Specifically, the suspect must receive express warnings of his right to remain silent; that anything he says may be used as evidence against him; that he has a right to counsel; and that, if he cannot afford counsel, he is entitled to an appointed attorney.¹ In a later decision, the Court held that it is unnecessary for the police to

¹² Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

¹³ 446 U.S. at 302–04. See also Illinois v. Perkins, 496 U.S. 292 (1990) (absence of coercive environment makes *Miranda* inapplicable to jail cell conversation between suspect and police undercover agent).

¹⁴ 481 U.S. 520 (1987).

¹⁵ 451 U.S. 454 (1981).

¹⁶ 451 U.S. 454 (1981).

¹ *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

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Amdt5.4.7.5
Miranda Requirements

give the warnings as a verbatim recital of the words in the *Miranda* opinion itself, so long as the words used “fully conveyed” to a defendant his rights.²

Once a warned suspect asserts his right to silence and requests counsel, the police must scrupulously respect this assertion. The *Miranda* Court stated that once a warned suspect “indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” Further, if the suspect requests the assistance of counsel during interrogation, questioning must cease until he has counsel.³

Subsequently, the Court has often barred the police from continuing (or reinitiating) interrogation with a suspect requesting counsel until counsel is present, except when the suspect himself initiates further communications. In *Edwards v. Arizona*,⁴ initial questioning ceased as soon as the suspect requested counsel, and the police returned the suspect to his cell. Questioning resumed the following day only after different police officers had confronted the suspect and again warned him of his rights; the suspect agreed to talk and thereafter incriminated himself. Nonetheless, the Court held, “when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused . . . , having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”⁵ The *Edwards* rule bars police-initiated questioning stemming from a separate investigation as well as questioning relating to the crime for which the suspect was arrested.⁶ It also applies to interrogation by officers of a different law enforcement authority.⁷

² *California v. Prysock*, 453 U.S. 355 (1981). Rephrased, the test is whether the warnings “reasonably conveyed” a suspect’s rights. The Court added that reviewing courts “need not examine *Miranda* warnings as if construing a will or defining the terms of an easement.” *Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (upholding warning that included possibly misleading statement that a lawyer would be appointed “if and when you go to court”). Even when warnings were not the “clearest possible formulation of *Miranda*’s right-to-counsel advisement,” the Court found them acceptable as “sufficiently comprehensive and comprehensible when given a commonsense reading.” *Florida v. Powell*, 559 U.S. 50, 63–64 (2010) (upholding warning of a right to talk to a lawyer before answering any questions, coupled with advice that the right could be invoked at any time during police questioning, as adequate to inform a suspect of his right to have a lawyer present during questioning).

³ *Miranda v. Arizona*, 384 U.S. 436, 472, 473–74 (1966). While a request for a lawyer is a per se invocation of Fifth Amendment rights, a request for another advisor, such as a probation officer or family member, may be taken into account in determining whether a suspect has evidenced an intent to claim his right to remain silent. *Fare v. Michael C.*, 442 U.S. 707 (1979) (juvenile who requested to see his probation officer, rather than counsel, found under the totality-of-the-circumstances to have not invoked a right to remain silent).

⁴ 451 U.S. 477 (1981).

⁵ 451 U.S. at 484–85. The decision was unanimous, but three concurrences objected to a special rule limiting waivers with respect to counsel to suspect-initiated further exchanges. *Id.* at 487, 488 (Chief Justice Warren Burger and Justices Lewis Powell and William Rehnquist). In *Oregon v. Bradshaw*, 462 U.S. 1039 (1983), the Court held, albeit without a majority of Justices in complete agreement as to rationale, that an accused who had initiated further conversations with police had knowingly and intelligently waived his right to have counsel present. So too, an accused who expressed a willingness to talk to police, but who refused to make a written statement without presence of counsel, was held to have waived his rights with respect to his oral statements. *Connecticut v. Barrett*, 479 U.S. 523 (1987). In *Minnick v. Mississippi*, 498 U.S. 146 (1990), the Court interpreted *Edwards* to bar interrogation without counsel present of a suspect who had earlier consulted with an attorney on the accusation at issue. “[W]hen counsel is requested, interrogation must cease, and officials may not reinstate interrogation without counsel present, whether or not the accused has consulted with his attorney.” *Id.* at 153. The Court held that *Edwards* should not be applied retroactively to a conviction that had become final. *Solem v. Stumes*, 465 U.S. 638 (1984), but that *Edwards* applied to cases pending on appeal at the time it was decided. *Shea v. Louisiana*, 470 U.S. 51 (1985).

⁶ *Arizona v. Roberson*, 486 U.S. 675 (1988). By contrast, the Sixth Amendment right to counsel is offense-specific, and does not bar questioning about a crime unrelated to the crime for which the suspect has been charged. *See McNeil v. Wisconsin*, 501 U.S. 171 (1991).

⁷ *Minnick v. Mississippi*, 498 U.S. 146 (1990).

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Amdt5.4.7.5
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On the other hand, the *Edwards* rule requiring that a lawyer be provided to a suspect who had requested one in an earlier interrogation does not apply once there has been a meaningful break in custody. The Court in *Maryland v. Shatzer*⁸ characterized the *Edwards* rule as a judicially prescribed precaution against using the coercive pressure of prolonged custody to badger a suspect who has previously requested counsel into talking without one. However, after a suspect has been released to resume his normal routine for a sufficient period to dissipate the coercive effects of custody, a period set at 14 days by the *Shatzer* Court, the rationale for solicitous treatment ceases. If the police take the suspect into custody again, the options for questioning him are no longer limited to suspect-initiated talks or providing counsel. Rather, the police may issue new *Miranda* warnings and proceed accordingly.⁹ The Court has not extended the *Edwards* rule explicitly to other aspects of the *Miranda* warnings.¹⁰

Amdt5.4.7.6 Miranda Exceptions

Fifth Amendment:

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

A properly warned suspect may waive his *Miranda* rights and submit to custodial interrogation. *Miranda* recognized that a suspect may voluntarily and knowingly give up his rights and respond to questioning, but the Court also cautioned that the prosecution bore a “heavy burden” to establish that a valid waiver had occurred.¹ The Court continued: “[a] valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.”² Subsequent cases indicated that determining whether a suspect has waived his *Miranda* rights is a fact-specific inquiry not easily susceptible to per se rules. According to these cases, resolution of the issue of waiver “must be determined on ‘the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.’”³ Under this line of cases, a waiver need not always be express, nor does *Miranda* impose a formalistic waiver procedure.⁴

⁸ 559 U.S. 98 (2010).

⁹ *Id.*

¹⁰ For a pre-*Edwards* case on the right to remain silent, see *Michigan v. Mosley*, 423 U.S. 96 (1975) (suspect given *Miranda* warnings at questioning for robbery, requested cessation of interrogation, and police complied; some two hours later, a different policeman interrogated suspect about a murder, gave him a new *Miranda* warning, and suspect made incriminating admission; since police “scrupulously honored” suspect’s request, admission was valid).

¹ *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). See also *Tague v. Louisiana*, 444 U.S. 469 (1980). A knowing and intelligent waiver need not be predicated on complete disclosure by police of the intended line of questioning. Thus, an accused’s signed waiver following arrest for one crime is not invalidated by police having failed to inform him of their intent to question him about another crime. *Colorado v. Spring*, 479 U.S. 564 (1987).

² *Miranda*, 384 U.S. at 475.

³ *North Carolina v. Butler*, 441 U.S. 369, 374–75 (1979) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). In *Oregon v. Elstad*, 470 U.S. 298 (1985), the Court held that a confession following a *Miranda* warning is not necessarily tainted by an earlier confession obtained without a warning, as long as the earlier confession had been voluntary. See *Bobby v. Dixon*, 565 U.S. 23 (2012). See also *Moran v. Burbine*, 475 U.S. 412 (1986) (signed waivers following *Miranda* warnings not vitiated by police having kept from suspect information that attorney had been retained for him by a

FIFTH AMENDMENT—RIGHTS OF PERSONS
Self-Incrimination, Custodial Interrogation

Amdt5.4.7.6
Miranda Exceptions

In *Berghuis v. Thompkins*, citing the societal benefit of requiring an accused to invoke *Miranda* rights unambiguously, the Court refocused its *Miranda* waiver analysis on whether a suspect understood his rights.⁵ There, a suspect refused to sign a waiver form, remained largely silent during the ensuing 2-hour and 45-minute interrogation, but then made an incriminating statement. The five-Justice majority found that the suspect had failed to invoke his right to remain silent and had also implicitly waived the right. According to the Court, although a statement following silence alone may be inadequate to waive *Miranda* rights, the prosecution may show an implied waiver by demonstrating that a suspect understood the *Miranda* warnings given to him and subsequently made an uncoerced statement.⁶ Furthermore, once a suspect has knowingly and voluntarily waived his *Miranda* rights, police officers may continue questioning until and unless the suspect clearly invokes his rights later.⁷

The admissions of an unwarned or improperly warned suspect *may not be used* directly against him at trial, but the Court has permitted some use for other purposes, such as impeachment. Prosecutors cannot introduce a defendant’s confession or other incriminating admissions obtained in violation of *Miranda* against him at trial to establish guilt⁸ or determine the sentence, at least in bifurcated trials in capital cases.⁹ On the other hand, the “fruits” of such an unwarned confession or admission may be used in some circumstances if the statement was voluntary.¹⁰

The Court, in opinions that more narrowly construe *Miranda*, has broadened the permissible impeachment purposes for which unlawful confessions and admissions may be used.¹¹ Thus, in *Harris v. New York*,¹² the Court held that the prosecution could use statements, obtained in violation of *Miranda*, to impeach the defendant’s testimony if he voluntarily took the stand and denied commission of the offense. Subsequently, in *Oregon v.*

relative); *Fare v. Michael C.*, 442 U.S. 707 (1979) (juvenile who consented to interrogation after his request to consult with his probation officer was denied found to have waived rights; totality-of-the-circumstances analysis held to apply). *Elstad* was distinguished in *Missouri v. Seibert*, 542 U.S. 600 (2004), however, when the authorities’ failure to warn the suspect prior to the initial questioning was a deliberate attempt to circumvent *Miranda* by use of a two-step interrogation technique, and the police, prior to eliciting the statement for the second time, did not alert the suspect that the first statement was likely inadmissible.

⁴ *North Carolina v. Butler*, 441 U.S. 369 (1979). In *Butler*, the defendant had refused to sign a waiver but agreed to talk with FBI agents nonetheless. On considering whether the defendant had thereby waived his right to counsel (his right to remain silent aside), the Court held that no express oral or written statement was required. Though the defendant never directly indicated whether he desired counsel, the Court found that a waiver could be inferred from his actions and words.

⁵ 560 U.S. 370 (2010).

⁶ *Id.* at 384–85.

⁷ *Davis v. United States*, 512 U.S. 452 (1994) (suspect’s statement that “maybe I should talk to a lawyer,” uttered after *Miranda* waiver and after an hour and a half of questioning, did not constitute such a clear request for an attorney when, in response to a direct follow-up question, he said “no, I don’t want a lawyer”).

⁸ *Miranda v. Arizona*, 384 U.S. 436, 479 (1966). *See also* *Harrison v. United States*, 392 U.S. 219 (1968) (rejecting as tainted the prosecution’s use at the second trial of defendant’s testimony at his first trial rebutting confessions obtained in violation of *McNabb-Mallory*).

⁹ *Estelle v. Smith*, 451 U.S. 454 (1981). The Court has yet to consider the applicability of the ruling in a noncapital, nonbifurcated trial case.

¹⁰ *United States v. Patane*, 542 U.S. 630 (2004) (allowing introduction of a pistol, described as a “nontestimonial fruit” of an unwarned statement). *See also* *Michigan v. Tucker*, 417 U.S. 433 (1974) (upholding use of a witness revealed by defendant’s statement elicited without proper *Miranda* warning). Note, too, that confessions may be the poisonous fruit of other constitutional violations, such as illegal searches or arrests. *E.g.*, *Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); *Taylor v. Alabama*, 457 U.S. 687 (1982).

¹¹ Under *Walter v. United States*, 347 U.S. 62 (1954), the defendant denied the offense of which he was accused (sale of drugs) and asserted he had never dealt in drugs. The prosecution was permitted to impeach the defendant concerning heroin seized illegally from his home two years before. The Court observed that the defendant could have denied the offense without making the “sweeping” assertions, as to which the government could impeach him.

¹² 401 U.S. 222 (1971). *See also* *United States v. Havens*, 446 U.S. 620 (1980) (Fourth Amendment).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Self-Incrimination, Custodial Interrogation

Amdt5.4.7.6
Miranda Exceptions

Hass,¹³ the Court permitted prosecutors to impeach the defendant using a statement the defendant made after police had ignored his request for counsel following his *Miranda* warning. Such impeachment material, however, must still meet the standard of voluntariness associated with the pre-*Miranda* tests for the admission of confessions and statements.¹⁴

The Court has created a “public safety” exception to the *Miranda* warning requirement for serious offenses. In *New York v. Quarles*,¹⁵ the Court held admissible a recently apprehended suspect’s response in a public supermarket to the arresting officer’s demand to know the location of a gun that the officer had reason to believe the suspect had just discarded or hidden in the supermarket. The Court, in an opinion by Justice William Rehnquist,¹⁶ declined to place officers in the “untenable position” of having to make instant decisions as to whether to proceed with *Miranda* warnings and thereby increase the risk to themselves or to the public or whether to dispense with the warnings and run the risk that resulting evidence will be excluded at trial. While acknowledging that the exception itself would “lessen the desirable clarity of the rule,” the Court predicted that confusion would be slight: “[w]e think that police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect.”¹⁷ However, no such compelling justification was offered for a *Miranda* exception for lesser offenses, and protecting the rule’s “simplicity and clarity” counseled against creating one.¹⁸ The Court stated: “[A] person subjected to custodial interrogation is entitled to the benefit of the procedural safeguards enunciated in *Miranda*, regardless of the nature or severity of the offense of which he is suspected or for which he was arrested.”¹⁹

Amdt5.5 Due Process

Amdt5.5.1 Overview of Due Process

Fifth Amendment:

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

The Fifth Amendment provides that “no person” shall be deprived of “life, liberty, or property, without due process of law.”¹ Generally, “due process” guarantees protect individual

¹³ 420 U.S. 714 (1975). By contrast, a defendant may not be impeached by evidence of his silence after police have warned him of his right to remain silent. *Doyle v. Ohio*, 426 U.S. 610 (1976).

¹⁴ *E.g.*, *Mincey v. Arizona*, 437 U.S. 385 (1978); *New Jersey v. Portash*, 440 U.S. 450 (1979)

¹⁵ 467 U.S. 649 (1984).

¹⁶ The Court’s opinion was joined by Chief Justice Warren Burger and by Justices Byron White, Harry Blackmun, and Lewis Powell. Justice Sandra Day O’Connor would have ruled inadmissible the suspect’s response, but not the gun retrieved as a result of the response. Justices Thurgood Marshall, William Brennan, and John Paul Stevens dissented.

¹⁷ 467 U.S. at 658–59.

¹⁸ *Berkemer v. McCarty*, 468 U.S. 420, 432 (1984).

¹⁹ 468 U.S. at 434.

¹ U.S. CONST. amend. V.

FIFTH AMENDMENT—RIGHTS OF PERSONS
Due Process

Amdt5.5.1
Overview of Due Process

rights by limiting the exercise of government power.² The Supreme Court has held that the Fifth Amendment, which applies to federal government action, provides persons with both procedural and substantive due process guarantees. If the federal government seeks to deprive a person of a protected life, liberty, or property interest, the Fifth Amendment's Due Process Clause requires that the government first provide certain procedural protections.³ Procedural due process often requires the government to provide a person with notice and an opportunity for a hearing before such a deprivation.⁴ In addition, the Supreme Court has interpreted the Fifth Amendment's Due Process Clause to include substantive due process guarantees that protect certain fundamental constitutional rights from federal government interference, regardless of the procedures that the government follows when enforcing the law.⁵ Substantive due process has generally dealt with specific subject areas, such as liberty of contract, marriage, or privacy.

The Fifth Amendment's Due Process Clause protects all persons within U.S. territory, including corporations,⁶ aliens,⁷ and, presumptively, citizens seeking readmission to the United States.⁸ However, the states are not entitled to due process protections against the federal government.⁹ The clause is effective in the District of Columbia¹⁰ and in territories that are part of the United States,¹¹ but it does not apply of its own force to unincorporated territories.¹² Nor does it reach enemy alien belligerents tried by military tribunals outside the territorial jurisdiction of the United States.¹³ The Clause restrains Congress in addition to the Executive and Judicial Branches and “cannot be so construed as to leave Congress free to make any process ‘due process of law’ by enacting legislation to that effect.”¹⁴

Due process cases may arise under both the Fifth and Fourteenth Amendments. Both amendments use the same language but have a different history.¹⁵ The Supreme Court has construed the Fourteenth Amendment's Due Process Clause to impose the same due process limitations on the states as the Fifth Amendment does on the federal government.¹⁶ Fourteenth Amendment due process case law is therefore relevant to the interpretation of the Fifth Amendment. Except for areas in which the federal government is the actor, much of the *Constitution Annotated's* discussion of due process appears in the Fourteenth Amendment essays.¹⁷

² *Due Process*, BLACK'S LAW DICTIONARY 610 (10th ed. 2014).

³ See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (citing *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

⁴ *Twining v. New Jersey*, 211 U.S. 78, 110 (1908); *Jacob v. Roberts*, 223 U.S. 261, 265 (1912).

⁵ *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

⁶ *Sinking Fund Cases*, 99 U.S. 700, 719 (1879).

⁷ *Wong Wing v. United States*, 163 U.S. 228, 238 (1896).

⁸ *United States v. Ju Toy*, 198 U.S. 253, 263 (1905); *cf.* *Quon Quon Poy v. Johnson*, 273 U.S. 352 (1927).

⁹ *South Carolina v. Katzenbach*, 383 U.S. 301, 323–24 (1966).

¹⁰ *Wight v. Davidson*, 181 U.S. 371, 384 (1901).

¹¹ *Lovato v. New Mexico*, 242 U.S. 199, 201 (1916).

¹² *Public Utility Comm'rs v. Ynchausti & Co.*, 251 U.S. 401, 406 (1920).

¹³ *Johnson v. Eisentrager*, 339 U.S. 763 (1950); *In re Yamashita*, 327 U.S. 1 (1946).

¹⁴ *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1856). See also Massachusetts Supreme Judicial Court Chief Justice Lemuel Shaw's opinion in *Jones v. Robbins*, 74 Mass. (8 Gray) 329 (1857).

¹⁵ *French v. Barber Asphalt Paving Co.*, 181 U.S. 324, 328 (1901).

¹⁶ *Cf.* *Arnett v. Kennedy*, 416 U.S. 134 (1974); *Heiner v. Donnan*, 285 U.S. 312, 326 (1932) (“The restraint imposed upon legislation by the due process clauses of the two amendments is the same.”); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 610 (1936).

¹⁷ See Amdt14.S1.3 Due Process Generally.

FIFTH AMENDMENT—RIGHTS OF PERSONS
Due Process

Amdt5.5.2
Historical Background on Due Process

Amdt5.5.2 Historical Background on Due Process

Fifth Amendment:

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

The concept of due process developed long before the Framers met in Philadelphia to draft the Constitution. Due process is a “historical product”¹ of the 1215 Magna Carta, in which King John of England promised his barons that “[n]o free man” would be deprived of his life, liberty, or property “except by the lawful judgment of his peers or by the law of the land.”² The phrase “due process of law” first appeared in a 1354 statutory rendition of Magna Carta provisions: “No man of what state or condition he be, shall be put out of his lands or tenements nor taken, nor disinherited, nor put to death, without he be brought to answer by due process of law.”³

Although the Magna Carta resulted from a struggle between the King and his barons,⁴ its language influenced the writings of English jurists relied upon by the Constitution’s Framers.⁵ The Framers’ understanding of due process derived in major part from Sir Edward Coke, who in his *Second Institutes* explained that the term “by law of the land” was equivalent to “due process of law.”⁶ Coke’s writings described aspects of both procedural and substantive due process,⁷ which the drafters of colonial charters and declarations of rights relied upon when incorporating due process rights into those instruments, particularly in provisions safeguarding accused persons’ rights.⁸

¹ *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

² Text and commentary on this chapter may be found in W. McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 375–95* (Glasgow, 2d rev. ed. 1914). The chapter became chapter 29 in the Third Reissue of Henry III in 1225. *Id.* at 504, 139–59. As expanded, it read: “No free man shall be taken or imprisoned or deprived of his freehold or his liberties or free customs, or outlawed or exiled, or in any manner destroyed, nor shall we come upon him or send against him, except by a legal judgment of his peers or by the law of the land.” *See also* J. HOLT, *MAGNA CARTA 226–29* (1965). The 1225 reissue also added to chapter 29 the language of chapter 40 of the original text: “To no one will we sell, to no one will we deny or delay right or justice.” This 1225 reissue became the standard text thereafter.

³ 28 Edw. III, c. 3. *See* F. THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629*, 86–97 (1948), recounting several statutory reconfirmations.

⁴ W. McKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN* (Glasgow, 2d rev. ed. 1914); J. HOLT, *MAGNA CARTA* (1965).

⁵ F. THOMPSON, *MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629* (1948).

⁶ SIR EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND*, Part II, 50–51 (1641). For a review of the influence of Magna Carta and Coke on the colonies and the new nation, *see, e.g.*, A. HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* (1968).

⁷ *See* sources cited *supra* note 23.

⁸ The 1776 Constitution of Maryland, for example, in its declaration of rights, used the language of Magna Carta including the “law of the land” phrase in a separate article, 3 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS*, H. Doc. No. 357, 59th Congress, 2d Sess. 1688 (1909), whereas Virginia used the clause in a section guaranteeing procedural rights in criminal cases. 7 *id.* at 3813. New York, in its constitution of 1821, was the first state to incorporate the phrase “due process of law” with inspiration from the United States Constitution. 5 *id.* at 2648.

FIFTH AMENDMENT—RIGHTS OF PERSONS
Procedural Due Process and Federal Government

Amdt5.6.1

Overview of Due Process Procedural Requirements

Amdt5.6 Procedural Due Process and Federal Government

Amdt5.6.1 Overview of Due Process Procedural Requirements

Fifth Amendment:

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

If the federal government seeks to deprive a person of a protected life, liberty, or property interest, the Fifth Amendment’s Due Process Clause requires that the government first provide certain procedural protections.¹ The Supreme Court has construed the Fourteenth Amendment’s Due Process Clause to impose the same procedural due process limitations on the states as the Fifth Amendment does on the Federal Government.² Fourteenth Amendment due process case law is therefore relevant to the interpretation of the Fifth Amendment.³

The Court first addressed due process in the 1855 Fifth Amendment case *Murray’s Lessee v. Hoboken Land and Improvement Co.*⁴ In *Murray’s Lessee*, the Court held that it would determine (independently from Congress) whether the government had provided due process by evaluating whether the statutory process conflicted with the Constitution and, if not, whether it comported with “those settled usages and modes of proceedings existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country.”⁵

In the 1884 Fourteenth Amendment case *Hurtado v. California*, the Court held that a process could be judged based on whether it had attained “the sanction of settled usage both in England and in this country; but it by no means follows that nothing else can be due process of law.”⁶ To hold that only historical, traditional procedures can constitute due process, the Court said, would render the law “incapable of progress or improvement.”⁷

Due process often requires the government to provide a person with notice and an opportunity for a hearing before depriving the person of a protected interest.⁸ However, there are some circumstances in which the Court has held those procedural protections are not required. For instance, persons adversely affected by a law cannot challenge the law’s validity on the ground that the legislative body that enacted it gave no notice of proposed legislation, held no hearings at which the person could have presented his arguments, and gave no

¹ See *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (citing *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

² Cf. *Arnett v. Kennedy*, 416 U.S. 134 (1974).

³ See Amdt14.S1.3 Due Process Generally.

⁴ *Murray’s Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 276–77, 280 (1856). The Court took a similar approach in Fourteenth Amendment due process interpretation in *Davidson v. City of New Orleans*, 96 U.S. 97 (1878), and *Munn v. Illinois*, 94 U.S. 113 (1877).

⁵ *Murray’s Lessee*, 59 U.S. (18 How.) at 276–77, 280.

⁶ *Hurtado v. California*, 110 U.S. 516, 528–29 (1884).

⁷ 110 U.S. at 529, 532–37. The Court has followed this flexible approach. *E.g.*, *Twining v. New Jersey*, 211 U.S. 78 (1908); *Powell v. Alabama*, 287 U.S. 45 (1932); *Palko v. Connecticut*, 302 U.S. 319 (1937); *Snyder v. Massachusetts*, 291 U.S. 97 (1934).

⁸ *Twining v. New Jersey*, 211 U.S. 78, 110 (1908); *Jacob v. Roberts*, 223 U.S. 261, 265 (1912).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Procedural Due Process and Federal Government

Amdt5.6.1

Overview of Due Process Procedural Requirements

consideration to particular points of view.⁹ Similarly, when an administrative agency engages in a legislative function, for example by drafting regulations of general application, it need not hold a hearing prior to promulgation.¹⁰ On the other hand, if a regulation would affect an identifiable class of persons, the Court employs a multi-factor analysis to determine whether notice and hearing is required and, if so, whether it must precede such action.¹¹

The Supreme Court articulated the modern test for what process is required before the government may invade a protected interest in a civil proceeding in the 1976 case *Mathews v. Eldridge*.¹² Because most of the cases applying *Mathews* have arisen under the Fourteenth Amendment, the *Constitution Annotated* discusses *Mathews* and subsequent cases applying the *Mathews* test in essays on Fourteenth Amendment procedural due process requirements.¹³ Other Fourteenth Amendment essays discuss Supreme Court cases involving key components of procedural due process, including notice, the opportunity for a hearing, and other procedural requirements.¹⁴

Because the Court has decided relatively few due process cases applying the Fifth Amendment in cases involving criminal procedure, the Fourteenth Amendment essays address the narrower due process inquiry that the Court has often applied in this context.¹⁵ In civil contexts, the Court has applied a broad balancing test that evaluates the government's chosen procedure with respect to the private interest affected, the risk of erroneous deprivation of that interest under the chosen procedure, and the government interest at stake.¹⁶ By contrast, the Court has held that the "appropriate framework" for due process analysis of criminal procedures is a narrow inquiry into whether a procedure is offensive to the concept of fundamental fairness.¹⁷

Amdt5.6.2 Deportation and Exclusion Proceedings

Amdt5.6.2.1 Exclusion and Removal of Non-U.S. Nationals

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be

⁹ *Bi-Metallic Investment Co. v. State Bd. of Equalization*, 239 U.S. 441, 445–46 (1915). *See also* *Bragg v. Weaver*, 251 U.S. 57, 58 (1919). *Cf.* *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432–33 (1982).

¹⁰ *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973).

¹¹ 410 U.S. at 245 (distinguishing between rule-making, in which legislative facts are at issue, and adjudication, in which adjudicative facts are at issue, and requiring a hearing in the latter proceedings but not in the former). *See* *Londoner v. City of Denver*, 210 U.S. 373 (1908).

¹² 424 U.S. 319, 333 (1976).

¹³ *See* Amdt14.S1.5.4.2 Due Process Test in *Mathews v. Eldridge*.

¹⁴ *See, e.g.*, Amdt14.S1.5.4.3 Notice of Charge and Due Process and Amdt14.S1.5.4.4 Opportunity for Meaningful Hearing.

¹⁵ Amdt14.S1.5.5.1 Overview of Procedural Due Process in Criminal Cases.

¹⁶ *See* *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). In *Nelson v. Colorado*, the Supreme Court held that the *Mathews* test controls when evaluating state procedures governing the continuing deprivation of property *after* a criminal conviction has been reversed or vacated, with no prospect of re prosecution. *See* No. 15-1256, slip op. at 1, 5 (April 19, 2017).

¹⁷ *See* *Medina v. California*, 505 U.S. 437, 443 (1992).

FIFTH AMENDMENT—RIGHTS OF PERSONS

Procedural Due Process and Federal Government, Deportation and Exclusion Proceedings

Amdt5.6.2.2

Exclusion of Aliens Seeking Entry into the United States

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.

The Supreme Court has long recognized that Congress has “plenary” power over immigration, giving the legislature almost complete authority to decide whether foreign nationals (“aliens,” under governing statutes and case law) may enter or remain in the United States.¹ The Court has predicated this broad power on the government’s inherent sovereign authority to control its borders and its relations with foreign nations.² In exercising its power over immigration, Congress can make laws concerning aliens that would be unconstitutional if applied to citizens.³ The Court has interpreted this power to apply with most force to the admission and exclusion of aliens seeking to enter the United States.⁴ Accordingly, the Court has held, aliens seeking initial entry into the United States have no due process protections regarding their applications for admission.⁵ With regard to aliens physically present in the United States, however, the Court has recognized that due process protections may constrain the government’s exercise of its immigration power.⁶

Amdt5.6.2.2 Exclusion of Aliens Seeking Entry into the United States

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be

¹ *Kleindienst v. Mandel*, 408 U.S. 753, 766 (1972) (“The Court without exception has sustained Congress’s ‘plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden.’”) (quoting *Boutilier v. INS*, 387 U.S. 118, 123 (1967)); *Ocean Steam Navigation Co. v. Stranahan*, 214 U.S. 320, 343 (1909) (noting the “plenary power of Congress as to the admission of aliens” and the “complete and absolute power of Congress over the subject” of immigration); see also *Galvan v. Press*, 347 U.S. 522, 531 (1954) (“Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government But that the formulation of these policies is entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.”). For additional discussion about Congress’s plenary power over immigration, see ArtI.S8.C18.8.1 Overview of Congress’s Immigration Powers.

² See *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[T]he power to admit or exclude aliens is a sovereign prerogative.”); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542 (1950) (“The exclusion of aliens is a fundamental act of sovereignty. The right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation.”).

³ *Demore v. Kim*, 538 U.S. 510, 522 (2003) (“[T]his Court has firmly and repeatedly endorsed the proposition that Congress may make rules as to aliens that would be unacceptable if applied to citizens.”).

⁴ See *Zadvydas v. Davis*, 533 U.S. 678, 693, 695–96 (2001) (noting that the “distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law” and equating “the political branches’ authority to control entry” with “the Nation’s armor”); *Fiallo v. Bell*, 430 U.S. 787, 792 (1977); *Jean v. Nelson*, 472 U.S. 846, 875 (1985) (Marshall, J., dissenting) (declaring that it is “in the narrow area of entry decisions” that “the Government’s interest in protecting our sovereignty is at its strongest and that individual claims to constitutional entitlement are the least compelling”).

⁵ See *Landon*, 459 U.S. at 32 (“This Court has long held that an alien seeking initial admission to the United States requests a privilege and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative.”).

⁶ See *Zadvydas*, 533 U.S. at 693 (“It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders. But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”); *Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”).

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Amdt5.6.2.2

Exclusion of Aliens Seeking Entry into the United States

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.

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 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

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.”).

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 intrusted 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”).

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Amdt5.6.2.2
Exclusion of Aliens Seeking Entry into the United States

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 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

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.*

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).

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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 stated government objective of protecting national security by excluding aliens from countries with deficient information-sharing practices.¹⁶

Amdt5.6.2.3 Removal of Aliens Who Have Entered the United States

Fifth Amendment:

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

Despite the government’s broad power over immigration, the Supreme Court has recognized that aliens who have physically entered the United States generally come under the protective scope of the Due Process Clause, which applies “to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.”¹ Consequently, there are greater due process protections in formal removal proceedings brought against aliens already present within the United States.² These due process protections generally include the right to a hearing and a meaningful opportunity to be heard before deprivation of a liberty interest.³

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.

¹⁶ *Id.* at 38–39.

¹ *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001); *see also Mathews v. Diaz*, 426 U.S. 67, 77 (1976) (“Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”); *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212 (1953) (“It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law.”) (citations omitted), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546.

² Removal proceedings are civil in nature and are not criminal prosecutions. *Harisiades v. Shaughnessy*, 342 U.S. 580, 594–95 (1952); *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912). This fact, however, does not mean that a person may be removed from the United States on the basis of a judgment reached under the civil standard of proof, that is, by a preponderance of the evidence. Rather, the Supreme Court has held, an order of removal may be entered only if the government presents clear, unequivocal, and convincing evidence that the facts alleged as grounds for deportation are true. *Woodby v. INS*, 385 U.S. 276, 286 (1966). However, an alien in formal removal proceedings has the burden of proving his or her eligibility for discretionary relief from removal. *Kimm v. Rosenberg*, 363 U.S. 405, 408 (1960); *see also Jay v. Boyd*, 351 U.S. 345, 359 (1956) (holding that a special inquiry officer could rely upon undisclosed, confidential information in deciding to deny an alien’s application for suspension of deportation as a matter of discretion).

³ *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *see also Shaughnessy v. Pedreiro*, 349 U.S. 48, 52 (1955) (holding that an alien had the right to full judicial review of his deportation order and that such review was not limited to habeas corpus proceedings), *superseded by statute*, 8 U.S.C. § 1105a; *Wong Yang Sung v. McGrath*, 339 U.S. 33, 50–51

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Procedural Due Process and Federal Government, Deportation and Exclusion Proceedings

Amdt5.6.2.3

Removal of Aliens Who Have Entered the United States

The Supreme Court, however, has suggested that the extent of due process for aliens present in the United States “may vary depending upon [the alien’s] status and circumstance.”⁴ For instance, at times the Court has indicated that at least some of the constitutional protections to which an alien is entitled may turn upon whether the alien has been admitted into the United States or developed substantial ties to this country.⁵ Thus, there is some uncertainty regarding the extent to which due process considerations constrain Congress’s exercise of its immigration power with respect to aliens within the United States.

The Supreme Court has considered due process challenges raised by aliens within the United States who are detained and subject to removal. In *Zadvydas v. Davis* the Supreme Court in 2001 construed a statute authorizing the detention of aliens with final orders of removal as having implicit temporal limitations.⁶ According to the Court, construing the statute in a manner that would allow the indefinite detention of lawfully admitted aliens who had been ordered removed would raise “serious constitutional concerns.”⁷ In the Court’s view, because aliens within the United States are protected by due process, Congress must give “clear indication” of an intent to authorize the indefinite detention of removable aliens, and the Court indicated there must be some “special justification” for that detention (e.g., to protect the community from “suspected terrorists”).⁸

(1950) (holding that deportation proceedings were subject to certain procedural requirements under the Administrative Procedure Act, including the right to a hearing), *superseded by statute*, Immigration and Nationality Act, ch. 477, § 242, 66 Stat. 163, 208–12 (1952) (codified at 8 U.S.C. § 1252); *United States ex rel. Vajtauer v. Comm’r of Immigr.*, 273 U.S. 103, 106 (1927) (“Deportation without a fair hearing or on charges unsupported by any evidence is a denial of due process which may be corrected on *habeas corpus*.”); *Mahler v. Eby*, 264 U.S. 32, 43 (1924) (“There is no authority given to the Secretary [of Labor] to deport, except upon his finding after a hearing that the petitioners were undesirable residents.”); *Zakonaite*, 226 U.S. at 275 (observing that executive officials may decide whether to deport an alien “after a fair though summary hearing”); *cf.* *United States v. Mendoza-Lopez*, 481 U.S. 828, 838–39 (1987) (ruling that an alien who is criminally prosecuted for unlawful reentry after removal may collaterally challenge the underlying removal order during the criminal proceedings if the alien had no prior opportunity to seek judicial review of that order), *superseded by statute*, 8 U.S.C. § 1326(d). Under provisions of the Immigration and Nationality Act, aliens apprehended within the interior of the United States are generally subject to formal removal proceedings, and have a number of procedural protections in those proceedings, including the right to seek counsel at no expense to the government, the right to present evidence at a hearing, the ability to apply for any available relief from removal, the right to administratively appeal an adverse decision, and (to the extent permitted by statute) the right to petition for judicial review of a final order of removal. 8 U.S.C. §§ 1229a(a)(1), (b)(1), (b)(4), (c)(1)(A), (c)(4)(A), (c)(5); 1252(a)(1), (b).

⁴ *Zadvydas*, 533 U.S. at 694.

⁵ See *Dep’t of Homeland Sec. v. Thuraissigiam*, No. 19-161, slip op. at 2, 34–36 (U.S. June 25, 2020) (holding that, while “aliens who have established connections in this country have due process rights in deportation proceedings,” an alien “at the threshold of initial entry,” including a person who is detained shortly after unlawful entry, has only those protections regarding admission that Congress provided by statute); *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990) (“These cases, however, establish only that aliens receive constitutional protections when they have come within the territory of the United States and developed substantial connections with this country.”); *Landon v. Plasencia*, 459 U.S. 21, 32 (1982) (“[O]nce an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly.”); *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950) (“The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society.”).

⁶ *Zadvydas*, 533 U.S. at 701.

⁷ *Id.* at 682 (“We deal here with aliens who were admitted to the United States but subsequently ordered removed. Aliens who have not yet gained initial admission to this country would present a very different question. Based on our conclusion that indefinite detention of aliens in the former category would raise serious constitutional concerns, we construe the statute to contain an implicit ‘reasonable time’ limitation, the application of which is subject to federal-court review.”). *But see Clark v. Martinez*, 543 U.S. 371, 378–79 (2005) (construing the presumptive time limitation established in *Zadvydas* as also applying to *unadmitted* aliens who were being detained after their removal orders became final because the statute authorizing post-order of removal detention made no distinction between admitted and nonadmitted aliens, and should have the same meaning for both categories).

⁸ *Zadvydas*, 533 U.S. at 690–92, 697, 701 (construing a statute so as to avoid a “serious constitutional problem,” and recognizing a “presumptively reasonable” detention period of six months for aliens subject to final orders of removal).

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Amdt5.6.2.3

Removal of Aliens Who Have Entered the United States

In *Demore v. Kim*, however, the Supreme Court in 2003 held that the mandatory detention during the pendency of formal removal proceedings of certain aliens who had committed specified crimes was constitutionally permissible.⁹ The Court observed that “Congress may make rules as to aliens that would be unacceptable if applied to citizens,” while also citing its “longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings”¹⁰ While recognizing that, under *Zadvydas*, “serious constitutional concerns” were raised by the indefinite detention of lawfully admitted aliens who have been ordered removed, the *Demore* Court reasoned that mandatory detention during the pendency of formal removal proceedings was distinguishable because it served the purpose of preventing criminal aliens from absconding during those proceedings and generally lasted for relatively short periods of time.¹¹

Some lower courts construed *Demore*’s holding as applying only to relatively “brief periods” of detention, rather than cases where the alien’s detention lasts for extended periods of time.¹² To avoid constitutional concerns, some courts read federal statutes governing the detention of unlawfully present aliens during the pendency of their removal proceedings as containing implicit time limitations and requiring periodic bond hearings.¹³ In 2018, the Supreme Court in *Jennings v. Rodriguez* rejected that interpretation, holding that the statutes were textually clear in mandating or authorizing the detention of certain aliens during their removal proceedings, and that nothing in those provisions limited the length of detention or required periodic bond hearings.¹⁴ The Court held that the government has the statutory authority to detain aliens potentially indefinitely during their removal proceedings, but left open the question of whether such indefinite detention is unconstitutional.¹⁵

Additionally, in *Department of Homeland Security v. Thuraissigiam*, the Supreme Court in 2020 held that an alien detained shortly after entering the United States could not constitutionally challenge a federal statute limiting judicial review of his “expedited removal” proceedings (a streamlined removal process applicable to aliens apprehended at or near the

⁹ 538 U.S. 510, 513, 531 (2003).

¹⁰ *Id.* at 522, 526. *See also id.* at 528 (“[W]hen the Government deals with deportable aliens, the Due Process Clause does not require it to employ the least burdensome means to accomplish its goal.”). A closely divided Court had earlier ruled that, in time of war, the deportation of an enemy alien may be ordered summarily by executive action, and that due process of law did not require the courts to determine the sufficiency of any hearing that was provided. *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). Conversely, three of the four dissenting Justices argued that even an enemy alien could not be deported without a fair hearing. *Id.* at 186–87 (Douglas, J., dissenting).

¹¹ *Demore*, 538 U.S. at 527–29. Although the Supreme Court in *Demore* ruled that mandatory detention during the pendency of formal removal proceedings is not unconstitutional per se, the Court did not address whether there are any constitutional limits to the *duration* of such detention. *See Tijani v. Willis*, 430 F.3d 1241, 1252 (9th Cir. 2005) (Callahan, J., dissenting) (“The constitutional limit, if any, to the duration of an alien’s detention under § 1226, however, was left open by the Supreme Court in *Demore*.”).

¹² *See, e.g., Rodriguez v. Robbins*, 804 F.3d 1060, 1079, 1088 (9th Cir. 2015), *rev’d sub nom. Jennings v. Rodriguez*, No. 15-1204 (U.S. Feb. 27, 2018).

¹³ *Id.* at 1074.

¹⁴ *Jennings*, slip op. at 12–23. *See also Johnson v. Chavez*, No. 19-897, slip op. at 1–2 (U.S. June 29, 2021) (construing federal statutes as plainly authorizing the detention without bond hearings of aliens whose prior removal orders were reinstated following their unlawful reentry into the United States, and who were placed in proceedings to determine whether they would be subject to persecution in their countries of removal).

¹⁵ Although the Supreme Court has not yet addressed the constitutionality of indefinite detention during the pendency of removal proceedings, the Court has previously suggested in *Demore v. Kim* that aliens may be “detained for the brief period necessary for their removal proceedings.” 538 U.S. at 513; *see also id.* at 526 (noting the “longstanding view that the Government may constitutionally detain deportable aliens during the limited period necessary for their removal proceedings”). Additionally, in a concurring opinion in *Demore*, Justice Anthony Kennedy declared that a detained alien “could be entitled to an individualized determination as to his risk of flight and dangerousness if the continued detention became unreasonable or unjustified.” *Id.* at 532 (Kennedy, J., concurring) (citing *Zadvydas v. Davis*, 533 U.S. 678, 684–86 (2001)).

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Procedural Due Process and Federal Government

Amdt5.6.3

Military Proceedings and Procedural Due Process

border).¹⁶ Although the alien had physically entered the United States, the Court determined that he could be “‘treated’ for due process purposes ‘as if stopped at the border’” because he was encountered only twenty-five yards inside the United States and essentially remained “on the threshold” of entry.¹⁷ According to the Court, the “century-old rule” that aliens seeking initial entry into the United States lack due process rights “would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil.”¹⁸ The Court observed, moreover, that only aliens “who have established connections in this country” have due process protections in their removal proceedings.¹⁹

The Supreme Court’s jurisprudence indicates that, although aliens present within the United States generally have due process protections, the extent of those constitutional protections may depend on certain factors, including whether the alien has been lawfully admitted or developed ties to the United States, and whether the alien has engaged in specified criminal activity. Therefore, even with regard to aliens present within the United States, the Court has sometimes deferred to Congress’s policy judgments that limit the ability of some classes of aliens to contest their detention or removal.

Amdt5.6.3 Military Proceedings and Procedural Due Process

Fifth Amendment:

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

The Supreme Court has considered the extent to which the courts should review proceedings before military tribunals for the purpose of determining compliance with the Due Process Clause. In *In re Yamashita*,¹ the majority denied a petition for certiorari and petitions for writs of habeas corpus to review the conviction of a Japanese war criminal by a military commission sitting in the Philippine Islands. The Court held that, because the military commission, in admitting evidence to which objection had been made, had not violated any act of Congress, a treaty, or a military command defining its authority, its rulings on evidence and on the mode of conducting the proceedings were not reviewable by the courts. Furthermore, in *Johnson v. Eisentrager*,² the Court overruled a lower court decision that, in reliance upon the dissenting opinion in *Yamashita*, had held that the Due Process Clause required that the legality of the conviction of enemy alien belligerents by military tribunals should be tested by the writ of habeas corpus.

The Executive Branch’s failure to provide any type of proceeding for prisoners alleged to be “enemy combatants,” whether in a military tribunal or a federal court, was at issue in *Hamdi*

¹⁶ No. 19-161, slip op. at 1 (U.S. June 25, 2020) (Thomas, J., concurring).

¹⁷ *Id.* at 35–36 (quoting *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 212, 215 (1953), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009–546).

¹⁸ *Id.* at 35

¹⁹ *Id.* at 2.

¹ 327 U.S. 1 (1946).

² 339 U.S. 763 (1950).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Procedural Due Process and Federal Government

Amdt5.6.3

Military Proceedings and Procedural Due Process

v. Rumsfeld.³ During a military action in Afghanistan,⁴ a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had the authority to hold such an “enemy combatant” while providing him with limited recourse to the federal courts. The Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan.⁵ However, the Court ruled that the government could not detain the petitioner indefinitely for purposes of interrogation, but must give him the opportunity to offer evidence that he is not an enemy combatant. At a minimum, the petitioner must be given notice of the asserted factual basis for holding him, must be given a fair chance to rebut that evidence before a neutral decision-maker, and must be allowed to consult an attorney.⁶

Without dissent, in *Hiatt v. Brown*,⁷ the Court reversed the judgment of a lower court that had discharged a prisoner serving a sentence imposed by a court-martial because of errors that had deprived the prisoner of due process of law. The Court held that the court below had erred in extending its review, for the purpose of determining compliance with the Due Process Clause, to such matters as the propositions of law set forth in the staff judge advocate’s report, the sufficiency of the evidence to sustain a conviction, the adequacy of the pre-trial investigation, and the competence of the law member and defense counsel. In summary, Justice Tom Clark wrote: “In this case the court-martial had jurisdiction of the person accused and the offense charged, and acted within its lawful powers. The correction of any errors it may have committed is for the military authorities which are alone authorized to review its decision.”⁸ Similarly, in *Burns v. Wilson*,⁹ the Court denied a petition for the writ to review a conviction by a military tribunal on the Island of Guam in which the petitioners asserted that their imprisonment resulted from proceedings that violated their constitutional rights. Four Justices, with whom Justice Sherman Minton concurred, maintained that judicial review is limited to determining whether the military tribunal, or court-martial, had given fair consideration to each of petitioners’ allegations, and does not embrace an opportunity “to prove de novo” what petitioners had “failed to prove in the military courts.” According to Justice Minton, however, if the military court had jurisdiction, its action is not reviewable.

³ 542 U.S. 507 (2004).

⁴ In response to the September 11, 2001 terrorist attacks on New York City’s World Trade Center and the Pentagon in Washington, D.C., Congress passed the “Authorization for Use of Military Force,” Pub. L. No. 107-40, which served as the basis for military action against the Taliban government of Afghanistan and the al Qaeda forces that were harbored there.

⁵ There was no opinion of the Court in *Hamdi*. Rather, a plurality opinion, authored by Justice Sandra Day O’Connor (joined by Chief Justice William Rehnquist, Justice Anthony Kennedy, and Justice Stephen Breyer) relied on the “Authorization for Use of Military Force” passed by Congress to support the detention. Justice Clarence Thomas also found that the Executive Branch had the power to detain the petitioner, but he based his conclusion on Article II of the Constitution.

⁶ 542 U.S. at 533, 539 (2004). Although only a plurality of the Court voted for both continued detention of the petitioner and for providing these due process rights, four other Justices would have extended due process at least this far. Justice David Souter, joined by Justice Ruth Bader Ginsburg, while rejecting the argument that Congress had authorized such detention, agreed with the plurality as to the requirement of providing minimal due process. *Id.* at 553 (concurring in part, dissenting in part, and concurring in judgment). Justice Antonin Scalia, joined by Justice John Paul Stevens, denied that such congressional authorization was possible without a suspension of the writ of habeas corpus, and thus would have required a criminal prosecution of the petitioner. *Id.* at 554 (dissenting).

⁷ 339 U.S. 103 (1950).

⁸ 339 U.S. at 111.

⁹ 346 U.S. 137 (1953).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Substantive Due Process and the Federal Government

Amdt5.7.1

Overview of Substantive Due Process Requirements

Amdt5.7 Substantive Due Process and the Federal Government

Amdt5.7.1 Overview of Substantive Due Process Requirements

Fifth Amendment:

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

The Supreme Court has interpreted the Fifth and Fourteenth Amendments' Due Process Clauses—which prohibit the government from depriving any person of “life, liberty, or property, without due process of law”—to protect certain fundamental constitutional rights from federal government interference, regardless of the procedures that the government follows when enforcing the law.¹ Substantive due process has generally dealt with specific subject areas, such as liberty of contract, marriage, or privacy.

The judicial notion of substantive due process developed early in U.S. history. State court judges attempted to formulate a theory of “natural rights” to limit government interference with private property rights.² These “vested rights” jurists found in the “law of the land” and the “due process” clauses of the states’ constitutions a restriction upon the substantive content of legislation.³ Other jurists opposed this “vested rights” theory of property protection, arguing that the state’s written constitution was its supreme law, and that judges should not look beyond the constitution to the “unwritten law” of “natural rights” when scrutinizing state legislation.⁴ Some opponents of this theory argued that the government’s “police power” allowed the state to regulate the use and holding of property in the public interest, subject only to the specific prohibitions of the state’s written constitution.⁵

The Supreme Court recognized that the Fifth Amendment guaranteed some form of substantive due process in the years leading up to the Civil War. In its 1857 opinion in *Scott v. Sanford*, the Court declared that the Missouri Compromise, which prohibited slavery in some U.S. territories, had been an unconstitutional deprivation of slaveholders’ property.⁶ The Court wrote that an act of Congress that deprived “a citizen of the United States of his liberty or property, merely because he came himself or brought his property into a particular territory of the United States, and who had committed no offence against the laws, could hardly be dignified with the name of due process of law.”⁷ After the Civil War and the ratification of the Fourteenth Amendment’s Due Process Clause, the Supreme Court recognized due process

¹ *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

² Compare the remarks of Justices Samuel Chase and James Iredell in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388–89, 398–99 (1798).

³ The full account is related in E. CORWIN, *LIBERTY AGAINST GOVERNMENT* ch. 3 (1948). The pathbreaking decision of the era was *Wynhamer v. The People*, 13 N.Y. 378 (1856).

⁴ See Edward S. Corwin, *Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 247–48 (1914).

⁵ See *id.*

⁶ 60 U.S. (19 How.) 393, 451–52 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV.

⁷ *Scott*, 60 U.S. (19 How.) at 450.

FIFTH AMENDMENT—RIGHTS OF PERSONS

Substantive Due Process and the Federal Government

Amdt5.7.1

Overview of Substantive Due Process Requirements

guarantees with regard to state legislation.⁸ The Court applied a robust notion of substantive due process to strike down economic legislation prior to the Great Depression Era.⁹

Beginning in the twentieth century, the Court developed the doctrine of noneconomic substantive due process under the Fifth and Fourteenth Amendments, beginning with cases in which the Court recognized a constitutional right to privacy.¹⁰ The Court recognized that the Constitution's due process guarantees protected additional fundamental rights from government interference, including the right to use contraceptives, to marry, and to engage in certain adult consensual intimate conduct.¹¹ However, since the 1980s, the Court has generally declined to invalidate government actions on substantive due process grounds, with a few exceptions.¹² In 2022, the Court further signaled a potential retreat from noneconomic substantive due process when it reversed the position it had held for nearly five decades to hold that the right to abortion is not a constitutionally protected fundamental right.¹³

Amdt5.7.2 Economic Substantive Due Process

Fifth Amendment:

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

The Supreme Court has sustained several federal laws and regulations addressing economic matters, imposed under powers specifically granted to the Federal Government, over objections based on the Due Process Clause. For example, Congress may require the owner of a vessel entering United States ports, and on which alien seamen are afflicted with specified diseases, to bear the cost of hospitalizing such persons.¹ Congress may prohibit the transportation in interstate commerce of filled milk² or the importation of convict-made goods into any state where their receipt, possession, or sale is a violation of local law.³ It may require employers to bargain collectively with representatives of their employees chosen in a manner prescribed by law; to reinstate employees discharged in violation of law; and to permit use of a

⁸ Amdt14.S1.3 Due Process Generally.

⁹ Amdt14.S1.6.2.2 Liberty of Contract and *Lochner v. New York*.

¹⁰ Warren and Brandeis, *THE RIGHT OF PRIVACY*, 4 *Harv. L. Rev.* 193 (1890). See *Olmstead v. United States*, 277 U.S. 438 (1928) (Brandeis, J., dissenting) (arguing against the admissibility in criminal trials of secretly taped telephone conversations). In *Olmstead*, Justice Louis Brandeis wrote:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. . . . They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.

277 U.S. at 478. Amdt14.S1.6.3.2 Historical Background on Noneconomic Substantive Due Process.

¹¹ Amdt14.S1.6.1 Overview of Substantive Due Process.

¹² See *id.*

¹³ See *id.*

¹ *United States v. New York S.S. Co.*, 269 U.S. 304 (1925).

² *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Carolene Products Co. v. United States*, 323 U.S. 18 (1944).

³ *Kentucky Whip & Collar Co. v. Illinois Cent. R.R.*, 299 U.S. 334 (1937).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Substantive Due Process and the Federal Government

Amdt5.7.3
Equal Protection

company-owned hall for union meetings.⁴ Subject to First Amendment considerations, Congress may regulate the postal service to deny its facilities to persons who would use them for purposes contrary to public policy.⁵

Amdt5.7.3 Equal Protection

Fifth Amendment:

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

Unlike the Fourteenth Amendment, the Fifth Amendment “contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress.”¹ Nevertheless, the Supreme Court has held that “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”² Even before the Court reached this position, it had assumed that “discrimination, if gross enough, is equivalent to confiscation and subject under the Fifth Amendment to challenge and annulment.”³ It appears that Chief Justice William Howard Taft first described this theory when he observed that the Due Process and Equal Protection Clauses are “associated” and that “[i]t may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. . . . [Due process] tends to secure equality of law in the sense that it makes a required minimum of protection for every one’s right of life, liberty and property, which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law.”⁴

Thus, in *Bolling v. Sharpe*,⁵ a companion case to *Brown v. Board of Education*,⁶ the Court struck down racial segregation in D.C. public schools as a violation of the Fifth Amendment’s Due Process Clause, determining that due process guarantees implicitly include a guarantee of equal protection. The Court wrote, “The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both

⁴ *E.g.*, *Virginian Ry. v. System Federation No. 40*, 300 U.S. 515 (1937); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *Railway Employes’ Dep’t v. Hanson*, 351 U.S. 225 (1956); *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949); *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333 (1938).

⁵ *Ex parte Jackson*, 96 U.S. 727 (1878); *Rowan v. Post Office Dep’t*, 397 U.S. 728 (1970).

¹ *Detroit Bank v. United States*, 317 U.S. 329, 337 (1943); *Helvering v. Lerner Stores Corp.*, 314 U.S. 463, 468 (1941).

² *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 214–18 (1995).

³ *Steward Machine Co. v. Davis*, 301 U.S. 548, 585 (1937). *See also* *Currin v. Wallace*, 306 U.S. 1, 13–14 (1939).

⁴ *Truax v. Corrigan*, 257 U.S. 312, 331 (1921). *See also* *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

⁵ 347 U.S. 497, 499–500 (1954).

⁶ 347 U.S. 483 (1954). With respect to race discrimination, the Court had earlier utilized its supervisory authority over the lower federal courts and its power to construe statutes to reach results that the Court might have grounded in the Fourteenth Amendment’s Equal Protection Clause if the cases had come from the states. *E.g.*, *Hurd v. Hodge*, 334 U.S. 24 (1948); *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192 (1944); *Railroad Trainmen v. Howard*, 343 U.S. 768 (1952). *See also* *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946).

FIFTH AMENDMENT—RIGHTS OF PERSONS
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stemming from our American ideal of fairness, are not mutually exclusive. . . . [A]s this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.”⁷

In subsequent cases, the Court has applied its Fourteenth Amendment jurisprudence to federal legislation that contained classifications based on sex⁸ and whether a person was born to married parents,⁹ and that set standards of eligibility for food stamps.¹⁰ However, almost all legislation involves some degree of classification among particular categories of persons, things, or events, and, just as the Equal Protection Clause itself does not outlaw “reasonable” classifications, neither does the Due Process Clause necessarily forbid social and economic legislation that contains arbitrary line-drawing.¹¹ Thus, for example, the Court has sustained a law imposing greater punishment for an offense involving rights of property of the United States than for a like offense involving a private person’s right of privacy.¹² A veterans law that extended certain educational benefits to all veterans who had served “on active duty” and thereby excluded conscientious objectors from eligibility was held to be sustainable. The Court held that Congress could reasonably conclude that the disruption caused by military service was qualitatively and quantitatively different from that caused by alternative service, and that the educational benefits would make military service more attractive.¹³

Although the “federal sovereign, like the States, must govern impartially,” there may be “overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.”¹⁴ One example is the paramount federal power over immigration and naturalization, which allows the federal government to classify among

⁷ *Bolling*, 347 U.S. at 499. *See also* *United States v. Windsor*, 570 U.S. 744, 769–70 (2013) (holding that Section 3 of the Defense of Marriage Act—a provision that restricted federal recognition of same-sex marriages by specifying that, for any federal statute, ruling, regulation, or interpretation by an administrative agency, the word “spouse” would mean a husband or wife of the opposite sex—violated the Fifth Amendment’s due process and equal protection components).

⁸ *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Califano v. Goldfarb*, 430 U.S. 199 (1977). *But see* *Rostker v. Goldberg*, 453 U.S. 57 (1981); *Califano v. Jobst*, 434 U.S. 47 (1977).

⁹ *Compare* *Jiminez v. Weinberger*, 417 U.S. 628 (1974), *with* *Mathews v. Lucas*, 427 U.S. 495 (1976).

¹⁰ *Dep’t of Agriculture v. Murry*, 413 U.S. 508 (1973). *See also* *Dep’t of Agriculture v. Moreno*, 413 U.S. 528 (1973).

¹¹ *Richardson v. Belcher*, 404 U.S. 78, 81 (1971); *FCC v. Beach Commc’ns*, 508 U.S. 307 (1993) (exemption from cable TV regulation of facilities that serve only dwelling units under common ownership); *Lyng v. Castillo*, 477 U.S. 635 (1986) (Food Stamp Act limitation of benefits to households of related persons who prepare meals together). With respect to courts and criminal legislation, *see* *Hurtado v. United States*, 410 U.S. 578 (1973); *Marshall v. United States*, 414 U.S. 417 (1974); *United States v. MacCollom*, 426 U.S. 317 (1976).

¹² *Hill v. United States ex rel. Weiner*, 300 U.S. 105, 109 (1937). *See also* *District of Columbia v. Brooke*, 214 U.S. 138 (1909); *Panama R.R. v. Johnson*, 264 U.S. 375 (1924); *Detroit Bank v. United States*, 317 U.S. 329 (1943).

¹³ *Johnson v. Robison*, 415 U.S. 361 (1974). *See also* *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (military law that classified men more adversely than women deemed rational because it had the effect of compensating for prior discrimination against women). *Wayte v. United States*, 470 U.S. 598 (1985) (selective prosecution of persons who turned themselves in or were reported by others as having failed to register for the draft does not deny equal protection because there was no showing that these men were selected for prosecution because of their protest activities). *See also* *Bowen v. Owens*, 476 U.S. 340, 341, 350 (1986) (Social Security Act provision that authorized payment of survivor’s benefits to a “widowed spouse who remarried after age 60, but not to a similarly situated divorced widowed spouse” does not deny equal protection); *Califano v. Jobst*, 434 U.S. 47, 48–52 (1977) (sustaining a Social Security Act provision that revoked “disabled dependents’ benefits” of any person who married unless that person married someone who was also entitled to receive disabled dependents’ benefits).

¹⁴ *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1976). *See also* *United States v. Vaello-Madero*, No. 20-303, slip op. at 1 (U.S. Apr. 21, 2022) (holding that the Fifth Amendment’s equal protection component did not require Congress to extend Supplemental Security Income benefits to residents of Puerto Rico to the same extent as it made those benefits available to residents of the states).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Substantive Due Process and the Federal Government, Federal Taxation

Amdt5.7.4.1
Restrictions on Federal Government Taxation

categories of persons upon some grounds—alienage, naturally, but also other suspect and quasi-suspect categories¹⁵—in ways that states cannot.¹⁶

Amdt5.7.4 Federal Taxation

Amdt5.7.4.1 Restrictions on Federal Government Taxation

Fifth Amendment:

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

In laying taxes, the federal government is less narrowly restricted by the Fifth Amendment than are the states by the Fourteenth.¹ The federal government may tax property belonging to its citizens, even if such property is never situated within the jurisdiction of the United States,² and it may tax the income of a citizen resident abroad that is derived from property located at his residence.³ The difference is explained by the fact that protection of the federal government follows the citizen wherever he goes, whereas the benefits of state government accrue only to persons and property within the state’s borders. The Supreme Court has said that, in the absence of an equal protection clause, “a claim of unreasonable classification or inequality in the incidence or application of a tax raises no question under the Fifth Amendment”⁴

Consistent with this holding, the Supreme Court has sustained, over charges of unfair differentiation between persons: a graduated income tax;⁵ a higher tax on oleomargarine than on butter;⁶ an excise tax on “puts” but not on “calls”;⁷ a tax on the income of businesses operated by corporations but not on similar enterprises operated by individuals;⁸ an income

¹⁵ See, e.g., *Reno v. Flores*, 507 U.S. 292, 315 (1993) (upholding regulations generally providing for the release of detained alien juveniles only to parents, close relatives, or legal guardians during pendency of deportation proceedings but not exclusion proceedings against a Fifth Amendment equal protection challenge).

¹⁶ For example, the power to regulate immigration has permitted the federal government to discriminate on the basis of alienage, at least so long as the discrimination satisfies the rational basis standard of review. See *Mathews v. Diaz*, 426 U.S. 67, 79–80, 83 (1976) (holding that federal conditions upon alien eligibility for public assistance were not “wholly irrational,” and observing that “[in] the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens The fact that an Act of Congress treats aliens differently from citizens does not in itself imply that such disparate treatment is ‘invidious.’”). Nonetheless, with regard to statutes that touch upon immigration-related matters but do not address the entry or exclusion of aliens, the Court has suggested that if such a law discriminates on the basis of suspect factors other than alienage or national origin a more “exacting standard of review” may be required. See *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1693–94 (2017); *Sessions v. Morales-Santana*, No. 15-1191, slip op. at 2 (2017) (distinguishing between immigration and citizenship contexts, and applying heightened scrutiny to hold that a derivative citizenship statute that discriminated by gender violated equal protection principles).

¹ For more information on due process and state taxation, see Amdt14.S1.5.7.1 State Taxes and Due Process Generally to Amdt14.S1.5.7.4 Collection of State Taxes and Due Process.

² *United States v. Bennett*, 232 U.S. 299, 307 (1914).

³ *Cook v. Tait*, 265 U.S. 47 (1924).

⁴ *Helvering v. Lerner Stores Co.*, 314 U.S. 463, 468 (1941).

⁵ *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 24 (1916).

⁶ *McCray v. United States*, 195 U.S. 27, 61 (1904).

⁷ *Treat v. White*, 181 U.S. 264 (1901).

⁸ *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Substantive Due Process and the Federal Government, Federal Taxation

Amdt5.7.4.1

Restrictions on Federal Government Taxation

tax on foreign corporations, based on their income from sources within the United States, even though domestic corporations were taxed on income from all sources;⁹ a tax on foreign-built yachts but not upon domestic yachts;¹⁰ a tax on employers of eight or more persons, with exemptions for agricultural labor and domestic service;¹¹ a gift tax law embodying a plan of graduations and exemptions under which donors of the same amount might be liable for different sums;¹² an Alaska statute imposing license taxes only on nonresident fishermen;¹³ an act that taxed the manufacture of oil and fertilizer from herring at a higher rate than similar processing of other fish or fish offal;¹⁴ an excess profits tax that defined “invested capital” with reference to the original cost of the property rather than to its present value;¹⁵ an undistributed profits tax in the computation of which special credits were allowed to certain taxpayers;¹⁶ an estate tax upon the estate of a deceased spouse in respect of the moiety of the surviving spouse where the effect of the dissolution of the community is to enhance the value of the survivor’s moiety;¹⁷ and a tax on nonprofit mutual insurers, even though such insurers organized before a certain date were exempt, as there was a rational basis for the discrimination.¹⁸

Amdt5.7.4.2 Retroactive Federal Taxes

Fifth Amendment:

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

Congress has sometimes given retroactive effect to its tax laws by, for example, making them effective from the tax year’s beginning or from the date that the bill that became the tax law was introduced.¹ Absent some peculiar circumstance, the Supreme Court has never determined that application of an income tax statute to the entire calendar year in which enactment took place has denied a person due process.² The Court has reasoned that a tax is not a penalty or contractual liability but rather “a way of apportioning the cost of government among those who in some measure are privileged to enjoy its benefits and must bear its

⁹ Nat’l Paper Co. v. Bowers, 266 U.S. 373 (1924).

¹⁰ Billings v. United States, 232 U.S. 261, 282 (1914).

¹¹ Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); Helvering v. Davis, 301 U.S. 619 (1937).

¹² Bromley v. McCaughn, 280 U.S. 124 (1929).

¹³ Haavik v. Alaska Packers Ass’n, 263 U.S. 510 (1924).

¹⁴ Alaska Fish Co. v. Smith, 255 U.S. 44 (1921).

¹⁵ LaBelle Iron Works v. United States, 256 U.S. 377 (1921).

¹⁶ Helvering v. Nw. Steel Mills, 311 U.S. 46 (1940).

¹⁷ Fernandez v. Wiener, 326 U.S. 340 (1945); cf. Coolidge v. Long, 282 U.S. 582 (1931).

¹⁸ United States v. Maryland Savings-Share Ins. Corp., 400 U.S. 4 (1970) (per curiam).

¹ United States v. Darusmont, 449 U.S. 292, 296–97 (1981).

² Stockdale v. Ins. Companies, 87 U.S. (20 Wall.) 323, 331, 332 (1874); Brushaber v. Union Pac. R.R., 240 U.S. 1, 20 (1916); Cooper v. United States, 280 U.S. 409, 411 (1930); Milliken v. United States, 283 U.S. 15, 21 (1931); Reinecke v. Smith, 289 U.S. 172, 175 (1933); United States v. Hudson, 299 U.S. 498, 500–01 (1937); Welch v. Henry, 305 U.S. 134, 146, 148–50 (1938); Fernandez v. Wiener, 326 U.S. 340, 355 (1945); United States v. Darusmont, 449 U.S. 292, 297 (1981).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Substantive Due Process and the Federal Government, Federal Taxation

Amdt5.7.4.2
Retroactive Federal Taxes

burdens.”³ Because “no citizen enjoys immunity from that burden, its retroactive imposition does not necessarily infringe due process.”⁴ The Court held valid a special income tax on profits realized from the sale of silver, retroactive for 35 days, which was approximately the period during which the silver purchase bill was before Congress.⁵ An income tax law, made retroactive to the beginning of the calendar year in which it was adopted, was found constitutional as applied to the gain from the sale, shortly before its enactment, of property received as a gift during the year.⁶ Retroactive assessment of penalties for fraud or negligence,⁷ or of an additional tax on the income of a corporation used to avoid a surtax on its shareholder,⁸ does not deprive the taxpayer of property without due process of law. Moreover, an additional excise tax imposed upon property still held for sale, after one excise tax had been paid by a previous owner, does not violate the Due Process Clause.⁹ The Court similarly upheld a transfer tax measured in part by the value of property held jointly by a husband and wife, including that which came to the joint tenancy as a gift from the decedent spouse.¹⁰ It also upheld the inclusion in a trust settlor’s gross income of income accruing to a revocable trust during any period when the settlor had the power to revoke or modify the trust.¹¹

Although the Supreme Court during the 1920s struck down gift taxes imposed retroactively upon gifts that were made and completely vested before the enactment of the taxing statute,¹² it later distinguished those decisions and limited their precedential value.¹³ In *United States v. Carlton*, the Court declared that “[t]he due process standard to be applied to tax statutes with retroactive effect . . . is the same as that generally applicable to retroactive economic legislation”—retroactive application of legislation must be shown to be “justified by a rational legislative purpose.”¹⁴ Applying that principle, the Court upheld retroactive application of a 1987 amendment limiting application of a federal estate tax deduction originally enacted in 1986. Congress’s purpose was “neither illegitimate nor arbitrary,” the Court noted, since Congress had acted “to correct what it reasonably viewed as a mistake in the original 1986 provision that would have created a significant and unanticipated revenue loss.” Also, “Congress acted promptly and established only a modest period of retroactivity.”

³ *Welch v. Henry*, 305 U.S. 134, 146–47 (1938).

⁴ *Id.*

⁵ *United States v. Hudson*, 299 U.S. 498 (1937). *See also* *Stockdale v. Ins. Companies*, 87 U.S. (20 Wall.) 323, 331, 341 (1874); *Brushaber v. Union Pac. R.R.*, 240 U.S. 1, 20 (1916); *Lynch v. Hornby*, 247 U.S. 339, 343 (1918).

⁶ *Cooper v. United States*, 280 U.S. 409 (1930); *see also* *Reinecke v. Smith*, 289 U.S. 172 (1933).

⁷ *Helvering v. Mitchell*, 303 U.S. 391 (1938).

⁸ *Helvering v. Nat’l Grocery Co.*, 304 U.S. 282 (1938).

⁹ *Patton v. Brady*, 184 U.S. 608 (1902).

¹⁰ *Tyler v. United States*, 281 U.S. 497 (1930); *United States v. Jacobs*, 306 U.S. 363 (1939).

¹¹ *Reinecke v. Smith*, 289 U.S. 172 (1933).

¹² *Untermeyer v. Anderson*, 276 U.S. 440 (1928); *Blodgett v. Holden*, 275 U.S. 142 (1927), *modified*, 276 U.S. 594 (1928); *Nichols v. Coolidge*, 274 U.S. 531 (1927). *See also* *Heiner v. Donnan*, 285 U.S. 312 (1932) (invalidating as arbitrary and capricious a conclusive presumption that gifts made within two years of death were made in contemplation of death).

¹³ *Untermeyer* was distinguished in *United States v. Hemme*, 476 U.S. 558, 568 (1986), upholding retroactive application of unified estate and gift taxation to a taxpayer as to whom the overall impact was minimal and not oppressive. All three cases were distinguished in *United States v. Carlton*, 512 U.S. 26, 30 (1994), as having been “decided during an era characterized by exacting review of economic legislation under an approach that ‘has long since been discarded.’” The Court noted further that *Untermeyer* and *Blodgett* had been limited to situations involving creation of a wholly new tax, and that *Nichols* had involved a retroactivity period of 12 years. *Id.*

¹⁴ 512 U.S. 26, 30, 31 (1994) (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16–17 (1976)). These principles apply to estate and gift taxes as well as to income taxes, the Court added. 512 U.S. at 34.

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Substantive Due Process and the Federal Government, Federal Taxation

Amdt5.7.4.2
Retroactive Federal Taxes

The fact that the taxpayer had transferred stock in reliance on the original enactment was not dispositive, since “[t]ax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.”¹⁵

Amdt5.7.5 Marriage and Substantive Due Process

In a series of Fourteenth Amendment due process and equal protection cases, the Supreme Court has identified the right to marry as a “fundamental” interest that necessitates “critical examination” of governmental restrictions that “interfere directly and substantially” with the right.¹ However, the Court has rejected some Fifth Amendment Due Process Clause challenges to federal laws that regulate the incidents of, or prerequisites for, marriage, determining that such laws were not entitled to rigorous scrutiny.² For example, in *Califano v. Jobst*,³ a unanimous Court sustained a Social Security Act provision that revoked “disabled dependents’ benefits” of any person who married unless that person married someone who was also entitled to receive disabled dependents’ benefits.⁴ Plaintiff, a recipient of such benefits, married another person with a disability who was not qualified for the benefits, and the plaintiff’s benefits were terminated.⁵ The plaintiff alleged that distinguishing between classes of “persons who married eligible persons” and “persons who married ineligible persons” infringed upon his right to marry in violation of the equal protection component of the Fifth Amendment’s Due Process Clause.⁶

The Court rejected the plaintiff’s argument, finding that benefit entitlement was not based upon need but rather upon actual dependency upon the insured wage earner; marriage, Congress could have assumed, generally terminates the dependency upon a parent-wage earner.⁷ Therefore, Congress could, as an administrative convenience, designate marriage as the benefits’ terminating point, except when both marriage partners were receiving benefits, in order to lessen hardship and recognize that dependency was likely to continue.⁸ The marriage rule was therefore not to be strictly scrutinized or invalidated “simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby.”⁹

¹⁵ 512 U.S. at 33.

¹ *E.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 386–87 (1978) (citing *Loving v. Virginia*, 388 U.S. 1 (1967)). *See also, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 664 (2015) (collecting cases).

² 434 U.S. at 383–87.

³ 434 U.S. 47 (1977).

⁴ *Id.* at 48–52.

⁵ *Id.*

⁶ *Id.* at 53–58. For additional information on the Supreme Court’s interpretations of the equal protection component of the Fifth Amendment’s Due Process Clause, see Amdt5.7.3 Equal Protection.

⁷ *Califano*, 434 U.S. at 53–58.

⁸ *Id.*

⁹ *Id.* at 54. *See also* *Bowen v. Owens*, 476 U.S. 340, 341, 350 (1986) (Social Security Act provision that authorized payment of survivor’s benefits to a “widowed spouse who remarried after age 60, but not to a similarly situated divorced widowed spouse” does not deny equal protection); *Mathews v. De Castro*, 429 U.S. 181 (1976) (Social Security Act provision providing benefits to a married woman under 62 with dependent children in her care whose husband retires or becomes disabled but denying such benefits to a divorced woman under 62 with dependents represents Congress’s rational judgment about the likely dependency of married but not divorced women and does not deny equal protection); *Califano v. Boles*, 443 U.S. 282 (1979) (limitation of certain Social Security benefits to widows and divorced wives of wage earners does not deprive mother of a child born out of wedlock who was never married to wage earner of equal protection).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Substantive Due Process and the Federal Government

Amdt5.7.6
Abortion and Substantive Due Process

Amdt5.7.6 Abortion and Substantive Due Process

Fifth Amendment:

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

In 1973, the Supreme Court determined in *Roe v. Wade* that the U.S. Constitution protects a woman’s decision whether or not to terminate her pregnancy.¹ The constitutional basis for the decision rested upon the conclusion that the right of privacy “founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action” encompassed a woman’s decision to carry a pregnancy to term.² Following *Roe*, several federal abortion restrictions were challenged as infringing the analogous right guaranteed by the Fifth Amendment’s Due Process Clause.³ In 2022, a majority of the Court in *Dobbs v. Jackson Women’s Health Organization*⁴ overruled *Roe* and a 1992 abortion decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵ In the following cases, which upheld federal abortion restrictions, the overruling of *Roe* and *Casey* would probably not affect the restrictions’ continued enforcement.

In *Harris v. McRae*, the Court upheld the Hyde Amendment, an annual appropriations provision that restricts the use of federal funds to pay for abortions provided through the Medicaid program.⁶ The Court found that the Hyde Amendment did not violate either the Due Process or Equal Protection Clauses of the Fifth Amendment, and did not violate the Establishment Clause of the First Amendment.⁷ While the Court acknowledged that the liberty guaranteed by the Fifth Amendment’s Due Process Clause, in particular, protects a woman’s freedom of choice for certain personal decisions, it does not “confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom.”⁸ In *Harris*, the Court also recognized the right of a state participating in the Medicaid program to fund only those medically necessary abortions for which it received federal reimbursement.⁹

In 1991, the Court upheld on both statutory and constitutional grounds the Department of Health and Human Services’ regulations restricting recipients of federal family planning funding from using federal funds to counsel women about abortion.¹⁰ In *Rust v. Sullivan*, the

¹ 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, No. 19-1392 (U.S. June 24, 2022). For further discussion on *Roe*, see Amdt14.S1.6.4.1 Abortion, *Roe v. Wade*, and Pre-Dobbs Doctrine.

² *Roe*, 410 U.S. at 152–53.

³ *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (upholding federal Partial-Birth Abortion Ban Act of 2003, 18 U.S.C. § 1531).

⁴ *Dobbs*, No. 19-1392.

⁵ 505 U.S. 833 (1992), *overruled by* *Dobbs*, No. 19-1392.

⁶ 448 U.S. 297 (1980). In 1976, Representative Henry J. Hyde first offered the amendment to the Departments of Labor and Health, Education, and Welfare Appropriation Act, 1977, that restricted the use of appropriated funds to pay for abortions provided through the Medicaid program. *See* Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (“None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.”).

⁷ *Harris*, 448 U.S. at 326.

⁸ *Id.* at 318.

⁹ *Id.* at 310.

¹⁰ *Rust v. Sullivan*, 500 U.S. 173 (1991).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Substantive Due Process and the Federal Government

Amdt5.7.6
Abortion and Substantive Due Process

Court determined that a woman’s right to an abortion was not burdened by the regulations, which implement Title X of the Public Health Service Act.¹¹ The Court reasoned that there was no constitutional violation because the government has no duty to subsidize an activity simply because it is constitutionally protected and because a woman is “in no worse position than if Congress had never enacted Title X.”¹²

In 2007, the Court applied the “undue burden” standard¹³ adopted in *Casey* to evaluate abortion regulations to the Partial-Birth Abortion Ban Act of 2003.¹⁴ In *Gonzales v. Carhart*, the Court considered whether the federal law was overbroad, prohibiting both the standard dilation and evacuation (D&E) abortion method—the most common method during the second trimester of pregnancy—and the intact D&E method, described by some as “partial-birth” abortion because the fetus is more fully developed at the time the procedure is performed. Relying on the law’s plain language, the Court determined that it could not be interpreted to encompass the standard D&E method.¹⁵ The Court noted that the standard D&E method involves the removal of the fetus in pieces.¹⁶ In contrast, the federal law uses the phrase “delivers a living fetus.”¹⁷ The Court explained that the standard D&E method “does not involve the delivery of a fetus because it requires the removal of fetal parts that are ripped from the fetus as they are pulled through the cervix.”¹⁸ The Court also identified the law’s specific requirement of an “overt act” that kills the fetus as evidence of its inapplicability to the standard D&E method, maintaining that the “distinction matters because, unlike intact D&E, standard D&E does not involve a delivery followed by a fatal act.”¹⁹ Ultimately, the Court determined that the law did not impose an undue burden on a woman’s ability to obtain an abortion because it prohibited only the less frequently performed intact D&E abortion method.

In *Gonzales*, the Court also concluded that the Partial-Birth Abortion Ban Act was not unconstitutionally vague because it provides doctors with a reasonable opportunity to know what conduct is prohibited.²⁰ Unlike the Nebraska partial-birth abortion law invalidated by the Court in *Stenberg v. Carhart*,²¹ which prohibited the delivery of a “substantial portion” of the fetus,²² the federal law includes “anatomical landmarks” that identify when an abortion procedure will be subject to the act’s prohibitions.²³ Thus, the Court observed: “[I]f an abortion procedure does not involve the delivery of a living fetus to one of these ‘anatomical landmarks’—where, depending on the presentation, either the fetal head or the fetal trunk past the navel is outside the body of the mother—the prohibitions of the Act do not apply.”²⁴

¹¹ *Id.* at 201–02.

¹² *Id.* at 203.

¹³ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–77 (1992). In *Casey*, a plurality of the Court adopted an “undue burden” standard for examining abortion regulations, maintaining that this standard better recognized the need to reconcile the government’s interest in potential life with a woman’s right to decide whether to terminate her pregnancy. The plurality indicated that an undue burden exists if the purpose or effect of an abortion regulation is “to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.” *Id.* at 878.

¹⁴ *Gonzales v. Carhart*, 550 U.S. 124 (2007).

¹⁵ *Id.* at 150.

¹⁶ *Id.* at 152.

¹⁷ 18 U.S.C. § 1531(b)(1)(A).

¹⁸ *Gonzales*, 550 U.S. at 152.

¹⁹ *Id.* at 153.

²⁰ *Id.* at 149.

²¹ 530 U.S. 914 (2000).

²² *Stenberg*, 530 U.S. at 922. *See also* Neb. Rev. Stat. Ann. § 28-326(9) (Supp. 1999).

²³ *Gonzales*, 550 U.S. at 151. *See also* 18 U.S.C. § 1531(b)(1)(A).

²⁴ *Gonzales*, 550 U.S. at 148.

FIFTH AMENDMENT—RIGHTS OF PERSONS
Substantive Due Process and the Federal Government

Amdt5.7.8

Right to Travel Abroad and Substantive Due Process

The *Gonzales* Court further observed that the Partial-Birth Abortion Ban Act’s inclusion of a scienter or knowledge requirement alleviated any vagueness concerns. Because the law applies only when a doctor “deliberately and intentionally” delivers the fetus to an anatomical landmark, the Court determined that a doctor performing the standard D&E method would not face criminal liability if a fetus were delivered beyond the prohibited points by mistake.²⁵ According to the Court, the scienter requirement “narrow[s] the scope of the Act’s prohibition and limit[s] prosecutorial discretion.”²⁶

Amdt5.7.7 Informational Privacy and Substantive Due Process

Fifth Amendment:

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

In a few cases, the Supreme Court has upheld federal record keeping or disclosure requirements against objections that they violated a purported Fifth Amendment substantive due process right to informational privacy. In *California Bankers Association v. Schultz*, the Court determined that the federal Bank Secrecy Act’s transaction recordkeeping provisions did not violate the due process rights of banks or their depositors by subjecting them to arbitrary or burdensome requirements.¹ In its 2011 decision in *National Aeronautics & Space Administration (NASA) v. Nelson*, the Supreme Court unanimously ruled against NASA employees who argued that the extensive background checks required to work at NASA facilities violated their constitutional privacy rights.² The Court chose to “assume, without deciding,” that the Constitution protects a right to informational privacy.³ However, it held that such a right would not prevent the government from asking reasonable questions in light of the government’s interest as an employer and statutory protections that provide meaningful checks against unwarranted disclosures.⁴

Amdt5.7.8 Right to Travel Abroad and Substantive Due Process

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be

²⁵ *Id.*

²⁶ *Id.* at 150.

¹ 416 U.S. 21, 49 (1974).

² 562 U.S. 134, 138 (2011).

³ *Id.*

⁴ *Id.* See also *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 455–65 (1977) (determining that former President Richard Nixon lacked a significant privacy interest in presidential records that Congress had placed under the custody of an Executive Branch official, in part because of the public interest in the records and the statute’s protections against “undue dissemination” of intermingled private materials).

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Right to Travel Abroad and Substantive Due Process

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.

The Supreme Court has recognized that the Fifth Amendment's Due Process Clause protects an individual citizen's right to travel abroad from arbitrary and indiscriminate government restrictions.¹ The Court recognized such a right in *Kent v. Dulles* when it held that the Secretary of State had exceeded his statutory authority by denying passports to citizens solely because they declined to respond to an inquiry about their beliefs and associations.² Subsequently, the Court confirmed that the Fifth Amendment protects a right to travel when it struck down Section 6 of the Subversive Activities Act, which made it unlawful for certain members of Communist organizations to apply for, or use, a passport.³ The Court held that Section 6 "too broadly and indiscriminately restrict[ed] the right to travel and thereby abridge[d] the liberty guaranteed by the Fifth Amendment."⁴ However, the Court has acknowledged that the federal government may restrict citizens' travel abroad to particular areas of the world for national security reasons.⁵

Amdt5.7.9 Right of Access to Federal Courts and Substantive Due Process

Fifth Amendment:

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

Many of the Supreme Court's cases on due process and the right of access to courts have arisen under the Fourteenth Amendment.¹ The Court has held that, in limited circumstances, litigants have a substantive due process right of access to state courts under the Fourteenth Amendment.² For example, due process guarantees prohibit a state from denying welfare assistance recipients access to state courts to dissolve their marriage solely because they cannot afford to pay court fees and costs.³

In one case, the Court addressed whether the Fifth Amendment provides a similar right in federal bankruptcy proceedings.⁴ In *United States v. Kras*, the Court rejected an indigent bankruptcy petitioner's constitutional challenge to a requirement that a petitioner pay fees required under the Bankruptcy Act and a federal court order in order to obtain discharge of his

¹ *E.g.*, *Aptheker v. Sec'y of State*, 378 U.S. 500, 505 (1964). For information on the right to travel between states, see Amdt14.S1.2.1 Privileges or Immunities of Citizens and the Slaughter-House Cases to Amdt14.S1.2.2 Modern Doctrine on Privileges or Immunities Clause and Amdt5.7.3 Equal Protection.

² *Kent v. Dulles*, 357 U.S. 116, 130 (1958).

³ *See Aptheker*, 378 U.S. at 501–02.

⁴ *Id.* at 505.

⁵ *Zemel v. Rusk* 381 U.S. 1, 14 (1965).

¹ For more on the Fourteenth Amendment due process right, see Amdt14.S1.8.12.3 Access to Courts, Wealth, and Equal Protection. The Supreme Court has also recognized that the right of access to courts may implicate equal protection guarantees. *See* Amdt14.S1.8.12.3 Access to Courts, Wealth, and Equal Protection.

² *Boddie v. Connecticut*, 401 U.S. 371, 374 (1971).

³ *Id.*

⁴ *United States v. Kras*, 409 U.S. 434, 450 (1973).

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Substantive Due Process and the Federal Government

Amdt5.7.10

Congressional Regulation of Public Utilities and Substantive Due Process

debts in a non-asset bankruptcy proceeding.⁵ The Court noted that discharge of one's debts in bankruptcy was not a constitutional right and did not constitute the exclusive avenue for relief.⁶ It also determined that Congress had a rational basis for enacting the fee requirement.⁷

Amdt5.7.10 Congressional Regulation of Public Utilities and Substantive Due Process

Fifth Amendment:

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

When Congress has granted federal agencies jurisdiction over various public utilities, it has typically prescribed standards for fixing utility rates that are substantially identical to the constitutional standards by which the Supreme Court has tested the validity of state action. Consequently, the review of such agencies' orders has seldom turned on constitutional issues. In two cases, however, the Court sustained maximum rates that the Secretary of Agriculture prescribed for stockyard companies only after detailed consideration of numerous items excluded from the rate base or from operating expenses, apparently on the assumption that error with respect to any such item would render the rates confiscatory and void.¹ A few years later, in *FPC v. Hope Natural Gas Co.*,² the Court adopted an entirely different approach. It held that the validity of the Federal Power Commission's order depended upon whether the impact or total effect of the order was just and reasonable, rather than upon the method of computing the rate base. Rates that enable a company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed cannot be condemned as unjust and unreasonable even though they might produce only a meager return in a rate base computed by the "present fair value" method.

Orders prescribing the form and contents of accounts that public utility companies keep³—and statutes requiring a private carrier to furnish the Interstate Commerce Commission with information for valuing its property⁴—have been sustained against the objection that they were arbitrary and invalid. An order of the Secretary of Commerce directing a single common carrier by water to file a summary of its books and records pertaining to its rates was also held not to violate the Fifth Amendment.⁵

⁵ *Id.*

⁶ *Id.* at 444–49.

⁷ *Id.*

¹ *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38 (1936); *Denver Union Stock Yards Co. v. United States*, 304 U.S. 470 (1938).

² 320 U.S. 591 (1944). The result of this case had been foreshadowed by the opinion of Chief Justice Harlan Stone in *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942), to the effect that the Commission was not bound to use any single formula or combination of formulas when determining rates.

³ *A. T. & T. Co. v. United States*, 299 U.S. 232 (1936); *United States v. New York Tel. Co.*, 326 U.S. 638 (1946); *Northwestern Co. v. FPC*, 321 U.S. 119 (1944).

⁴ *Valvoline Oil Co. v. United States*, 308 U.S. 141 (1939); *Champlin Rfg. Co. v. United States*, 329 U.S. 29 (1946).

⁵ *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 146 (1937).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Void for Vagueness Doctrine

Amdt5.8.1
Overview of Void for Vagueness Doctrine

Amdt5.8 Void for Vagueness Doctrine

Amdt5.8.1 Overview of Void for Vagueness Doctrine

Fifth Amendment:

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

Criminal statutes that lack sufficient definiteness or specificity are commonly held “void for vagueness.”¹ Such legislation “may run afoul of the Due Process Clause because it fails to give adequate guidance to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those who are accused.”² The Supreme Court has observed that: “Men of common intelligence cannot be required to guess at the meaning of [an] enactment.”³ In other situations, a statute may be unconstitutionally vague because the statute is worded in a standardless way that invites arbitrary enforcement. In this vein, the Court has invalidated two kinds of laws as “void for vagueness”: (1) laws that define criminal offenses; and (2) laws that fix the permissible sentences for criminal offenses.⁴ With respect to laws that define criminal offenses, the Court has required that a penal statute define the offense with “sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”⁵ The Court may also apply the void-for-vagueness doctrine to analyze statutes governing civil immigration “removal cases,”⁶ “in view of the grave nature of deportation.”⁷

¹ *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940).

² *Musser v. Utah*, 333 U.S. 95, 97 (1948). The Court stated: “The vagueness may be from uncertainty in regard to persons within the scope of the act . . . or in regard to the applicable tests to ascertain guilt.” *Id.* at 97. In a different case, the Court observed: “Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warnings. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications.” *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972), *quoted in Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 498 (1982).

³ *Winters v. New York*, 333 U.S. 507, 515–16 (1948). *Cf. Colten v. Kentucky*, 407 U.S. 104, 110 (1972). Thus, a state statute imposing severe, cumulative punishments upon contractors with the state who pay their workers less than the “current rate of per diem wages in the locality where the work is performed” was held to be “so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.” *Connally v. General Const. Co.*, 269 U.S. 385 (1926). Similarly, a statute that allowed jurors to require an acquitted defendant to pay the costs of the prosecution, elucidated only by the judge’s instruction to the jury that the defendant should have to pay the costs only if it thought him guilty of “some misconduct” though innocent of the crime with which he was charged, was found to fall short of the requirements of due process. *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966).

⁴ *See United States v. Beckles*, 137 S. Ct. 886, 892 (2017).

⁵ *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

⁶ *Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) (plurality opinion).

⁷ *Jordan v. De George*, 341 U.S. 223, 231 (1951).

FIFTH AMENDMENT—RIGHTS OF PERSONS
Void for Vagueness Doctrine

Amdt5.8.2

Laws That Define Criminal Offenses and the Requirement of Definiteness

Amdt5.8.2 Laws That Define Criminal Offenses and the Requirement of Definiteness

Fifth Amendment:

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

The Supreme Court has held laws unconstitutional when they do not define offenses with enough specificity. For instance, the Court voided for vagueness a criminal statute providing that a person was a “gangster” and subject to fine or imprisonment if he was without lawful employment, had been either convicted at least three times for disorderly conduct or had been convicted of any other crime, and was “known to be a member of a gang of two or more persons.” The Court observed that neither common law nor the statute gave the words “gang” or “gangster” definite meaning, that the enforcing agencies and courts were free to construe the terms broadly or narrowly, and that the phrase “known to be a member” was ambiguous. The statute was held void, and the Court refused to allow specification of details in the particular indictment to save it because it was the statute, not the indictment, that prescribed the rules to govern conduct.¹

A statute may be so vague or threatening to constitutionally protected activity that it can be pronounced wholly unconstitutional; in other words, “unconstitutional on its face.”² Thus, for instance, a unanimous Court in *Papachristou v. City of Jacksonville*³ struck down as invalid on its face a vagrancy ordinance that punished “dissolute persons who go about begging, . . . common night walkers, . . . common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, . . . persons neglecting all lawful business and habitually spending their time by frequenting house of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but habitually living upon the earnings of their wives or minor children”⁴ The ordinance was found to be facially invalid, according to Justice William Douglas for the Court, because it did not give fair notice, it did not require specific intent to commit an unlawful act, it permitted and encouraged arbitrary and erratic arrests and convictions, it committed too much discretion to policemen, and it criminalized activities that by modern standards are normally innocent.⁵

¹ *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Edelman v. California*, 344 U.S. 357 (1953).

² *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972); *Smith v. Goguen*, 415 U.S. 566 (1974). Generally, the Court will pronounce wholly void a vague statute that regulates in the area of First Amendment guarantees. *Winters v. New York*, 333 U.S. 507, 509–10 (1948); *Thornhill v. Alabama*, 310 U.S. 88 (1940).

³ 405 U.S. 156 (1972).

⁴ 405 U.S. at 156 n.1. Similar concerns regarding vagrancy laws had been expressed previously. *See, e.g.*, *Winters v. New York*, 333 U.S. 507, 540 (1948) (Frankfurter, J., dissenting); *Edelman v. California*, 344 U.S. 357, 362 (1953) (Black, J., dissenting); *Hicks v. District of Columbia*, 383 U.S. 252 (1966) (Douglas, J., dissenting).

⁵ Similarly, an ordinance making it a criminal offense for three or more persons to assemble on a sidewalk and conduct themselves in a manner annoying to passers-by was found impermissibly vague and void on its face because it encroached on the freedom of assembly. *Coates v. City of Cincinnati*, 402 U.S. 611 (1971). *See* *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965) (conviction under statute imposing penalty for failure to “move on” voided); *Bouie v. City of Columbia*, 378 U.S. 347 (1964) (conviction on trespass charges arising out of a sit-in at a drugstore lunch counter voided because the trespass statute did not give fair notice that it was a crime to refuse to leave private

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Void for Vagueness Doctrine

Amdt5.8.2

Laws That Define Criminal Offenses and the Requirement of Definiteness

In *FCC v. Fox Television Stations, Inc.*,⁶ the Court held that the Federal Communications Commission (FCC) had violated the Fifth Amendment due process rights of Fox Television and ABC, Inc., because the FCC had not given fair notice that broadcasting isolated instances of expletives or brief nudity could lead to punishment. Although 18 U.S.C. § 1464 bans the broadcast of “any obscene, indecent, or profane language,” the FCC had a long-standing policy that it would not consider “fleeting” instances of indecency to be actionable, and had confirmed such a policy by issuing industry guidance. The FCC had not announced the new policy until after the instances at issue in the case (isolated utterances of expletives during two live broadcasts aired by Fox Television, and a brief exposure of the nude buttocks of an adult female character by ABC). The Commission policy in place at the time of the broadcasts, therefore, gave the broadcasters no notice that a fleeting instance of indecency could be actionable.

On the other hand, some less vague statutes may be held unconstitutional only in application to the defendant before the Court.⁷ For instance, when a statute’s terms could be applied both to innocent or protected conduct (such as free speech) and unprotected conduct, but the valuable effects of the law outweigh its potential general harm, such a statute will be held unconstitutional only as applied.⁸ Thus, in *Palmer v. City of Euclid*,⁹ an ordinance punishing “suspicious persons” defined as “[a]ny person who wanders about the streets or other public ways or who is found abroad at late or unusual hours in the night without any visible or lawful business and who does not give satisfactory account of himself” was found void only as applied to a particular defendant. In *Palmer*, the Court found that the defendant, who had dropped off a passenger and begun talking into a two-way radio, was engaging in conduct that could not reasonably be anticipated to fit within the “without any visible or lawful business” portion of the ordinance’s definition.

Loitering statutes that are triggered by failure to obey a police dispersal order are suspect, and may be struck down if they leave a police officer absolute discretion to give such orders.¹⁰ Thus, a Chicago ordinance that required police to disperse all persons in the company of “criminal street gang members” while in a public place with “no apparent purpose,” failed to meet the “requirement that a legislature establish minimal guidelines to govern law enforcement.”¹¹ The Court noted that the phrase “no apparent purpose” was inherently subjective because its application depended on whether some purpose was “apparent” to the officer, who would presumably have the discretion to ignore such apparent purposes as engaging in idle conversation or enjoying the evening air.¹² On the other hand, when such a statute additionally required a finding that the defendant was intent on causing inconvenience, annoyance, or alarm, it was upheld against facial challenge, at least as applied to a defendant who was interfering with the police’s ticketing of a car.¹³

premises after being requested to do so); *Kolender v. Lawson*, 461 U.S. 352 (1983) (requirement that person detained in valid *Terry* stop provide “credible and reliable” identification was facially void as encouraging arbitrary enforcement).

⁶ 567 U.S. 239, 258 (2012).

⁷ When the terms of a vague statute do not threaten a constitutionally protected right, and when the conduct at issue in a particular case is clearly proscribed, then a due process “void for vagueness” challenge is unlikely to be successful. However, when the conduct in question is at the margins of an unclear statute’s meaning, it may be struck down as applied. *E.g.*, *United States v. National Dairy Corp.*, 372 U.S. 29 (1963).

⁸ *Palmer v. City of Euclid*, 402 U.S. 544 (1971); *Village of Hoffman Estates v. The Flipside*, 455 U.S. 489, 494–95 (1982).

⁹ 402 U.S. 544 (1971).

¹⁰ *Kolender v. Lawson*, 461 U.S. 352, 358 (1983).

¹¹ *City of Chicago v. Morales*, 527 U.S. 41 (1999).

¹² 527 U.S. at 62.

¹³ *Colten v. Kentucky*, 407 U.S. 104 (1972).

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Void for Vagueness Doctrine

Amdt5.8.3

Laws that Define Criminal Offenses and Requirement of Notice

State statutes with vague standards may nonetheless be upheld if a state court has interpreted the text of the statute with sufficient clarity.¹⁴ Thus, the civil commitment of persons of “such conditions of emotional instability . . . as to render such person irresponsible for his conduct with respect to sexual matters and thereby dangerous to other persons” was upheld by the Supreme Court, based on a state court’s construction of the statute as applying only to persons who, by habitual course of misconduct in sexual matters, have evidenced utter lack of power to control their sexual impulses and are likely to inflict injury. The Court viewed the underlying conditions—habitual course of misconduct in sexual matters, lack of power to control impulses, and likelihood of attack on others—as calling for evidence of past conduct pointing to probable future consequences and, therefore, as being as susceptible of proof as many of the criteria consistently applied in criminal proceedings.¹⁵

Amdt5.8.3 Laws that Define Criminal Offenses and Requirement of Notice

Fifth Amendment:

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

Conceptually related to the problem of definiteness in criminal statutes is the problem of notice. Ordinarily, ignorance of the law affords no excuse, or, in other instances, the nature of the conduct may sufficiently alert a person that there are laws that he must observe.¹ On occasion the Court has approved otherwise vague statutes because the statute forbade only “willful” violations, which the Court construed as requiring knowledge of the illegal nature of the proscribed conduct.² When conduct is not inherently blameworthy, however, a criminal statute may not impose a legal duty without notice.³

The question of notice has also arisen in the context of “judge-made” law. Although the Ex Post Facto Clause forbids retroactive application of state and federal criminal laws, no such explicit restriction applies to the courts. Thus, when a state court abrogated the common law

¹⁴ See, e.g., *McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016) (narrowly interpreting the term “official act” to avoid a construction of the Hobbs Act and federal honest-services fraud statute that would allow public officials to be subject to prosecution without fair notice “for the most prosaic interactions” between officials and their constituents).

¹⁵ *Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940).

¹ E.g., *United States v. Freed*, 401 U.S. 601 (1971). Persons may be bound by a novel application of a statute, not supported by Supreme Court or other “fundamentally similar” case precedent, so long as the court can find that, under the circumstance, “unlawfulness . . . is apparent” to the defendant. *United States v. Lanier*, 520 U.S. 259, 271–72 (1997).

² E.g., *Boyce Motor Lines v. United States*, 342 U.S. 337 (1952); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Cf. *Screws v. United States*, 325 U.S. 91, 101–03 (1945) (plurality opinion). The Court has upheld some statutes that did not explicitly include such a mens rea requirement. E.g., *Morissette v. United States*, 342 U.S. 246 (1952).

³ See, e.g., *Lambert v. California*, 355 U.S. 225 (1957) (invalidating a municipal code that made it a crime for anyone who had ever been convicted of a felony to remain in the city for more than five days without registering.). In *Lambert*, the Court emphasized that the act of being in the city was not itself blameworthy, holding that the failure to register was quite “unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed.” “Where a person did not know of the duty to register and where there was no proof of the probability of such knowledge, he may not be convicted consistently with due process. Were it otherwise, the evil would be as great as it is when the law is written in print too fine to read or in a language foreign to the community.” *Id.* at 228, 229–30.

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Void for Vagueness Doctrine

Amdt5.8.3

Laws that Define Criminal Offenses and Requirement of Notice

rule that a victim must die within a “year and a day” in order for homicide charges to be brought in *Rogers v. Tennessee*,⁴ the question arose whether such rule could be applied to acts occurring before the court’s decision. The dissent argued vigorously that, unlike the traditional common law practice of adapting legal principles to fit new fact situations, the court’s decision was an outright reversal of existing law. Under this reasoning, the new “law” could not be applied retrospectively. The majority held, however, that only those holdings which were “unexpected and indefensible by reference to the law which had been express prior to the conduct in issue”⁵ could not be applied retroactively. The Court cited the relatively archaic nature of the “year and a day rule,” its abandonment by most jurisdictions, and its inapplicability to modern times as reasons that the defendant had fair warning of the possible abrogation of the common law rule.

Amdt5.8.4 Laws That Establish Permissible Criminal Sentences

Fifth Amendment:

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

With regard to statutes that fix criminal sentences,¹ the Supreme Court has explained that the law must specify the range of available sentences with “sufficient clarity.”² For example, in *Johnson v. United States*, after years of litigation on the meaning and scope of the “residual clause” of the Armed Career Criminal Act of 1984 (ACCA),³ the Court concluded that the clause in question was void for vagueness.⁴ In relevant part, the ACCA imposed an increased prison term upon a felon who was in possession of a firearm, if that felon had previously been convicted for a “violent felony,” a term that the statute defined to include “burglary, arson, or extortion, [a crime that] involves use of explosives, or” crimes that fell within the residual clause—that is, crimes that “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.”⁵ In *Johnson*, prosecutors sought an enhanced sentence for a

⁴ 532 U.S. 451 (2001).

⁵ *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

¹ In *United States v. Beckles*, the Supreme Court concluded that the federal sentencing guidelines “do not fix the permissible range of sentences” and, therefore, are not subject to a vagueness challenge under the Due Process Clause. *See* 137 S. Ct. 886, 892 (2017). Rather, the sentencing guidelines “merely guide the district courts’ discretion.” *Id.* at 894. In so concluding, the Court noted that the sentencing system that predated the use of the guidelines gave nearly unfettered discretion to judges in sentencing, and that discretion was never viewed as raising similar concerns. *Id.* Thus, the Court reasoned that it was “difficult to see how the present system of guided discretion” could raise vagueness concerns. *Id.* Moreover, the *Beckles* Court explained that “the advisory Guidelines . . . do not implicate the twin concerns underlying [the] vagueness doctrine—providing notice and preventing arbitrary enforcement.” *Id.* According to the Court, the only notice that is required regarding criminal sentences is provided to the defendant by the applicable statutory range and the guidelines. Further, the guidelines, which serve to advise courts how to exercise their discretion within the bounds set by Congress, simply do not regulate any conduct that can be arbitrarily enforced against a criminal defendant. *Id.* at 895.

² *See* *United States v. Batchelder*, 442 U.S. 114, 123 (1979).

³ *See, e.g.,* *Sykes v. United States*, 564 U.S. 1 (2011); *Chambers v. United States*, 555 U.S. 122 (2009); *Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007).

⁴ *See* *Johnson v. United States*, 135 S. Ct. 2551 (2015).

⁵ *See* 18 U.S.C. § 924(e)(2)(B) (2012).

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felon found in possession of a firearm, arguing that one of the defendant's previous crimes—unlawful possession of a short-barreled shotgun—qualified as a violent felony because the crime amounted to one that “involve[d] conduct that presents a serious potential risk of physical injury to another.”⁶ To determine whether a crime fell within the residual clause, the Court had previously endorsed a “categorical approach”—that is, instead of looking to whether the facts of a specific offense presented a serious risk of physical injury to another, the Supreme Court had interpreted the ACCA to require courts to consider whether the underlying crime fell within a category of crime that ordinarily would present a serious risk of physical injury.⁷

The Court in *Johnson* concluded that the residual clause was unconstitutionally vague because the clause's requirement that courts determine what an “ordinary case” of a crime entails led to “grave uncertainty” about (1) how to estimate the risk posed by the crime, and (2) how much risk was sufficient to qualify as a violent felony.⁸ For example, in determining whether attempted burglary ordinarily posed serious risks of physical injury, the Court suggested that reasonable minds could differ as to whether an attempted burglary would typically end in a violent encounter, resulting in the conclusion that the residual clause provided “no reliable way” to determine what crimes fell within its scope.⁹ In so holding, the Court relied heavily on the difficulties that federal courts (including the Supreme Court) have had in establishing consistent standards to judge the scope of the residual clause, noting that the failure of “persistent efforts” to establish a standard can provide evidence of vagueness.¹⁰

In *Sessions v. Dimaya*, the Court extended *Johnson* to conclude that a statute allowing the deportation of any alien who committed a “crime of violence” was unconstitutionally vague.¹¹ Similar to the statute at issue in *Johnson*, the statute at issue in *Dimaya* defined the phrase “crime of violence” by reference to a statutory “residual clause” covering felonious conduct that “involve[d] a substantial risk that physical force . . . may be used in the course of committing the offense,” and lower courts had again adopted the categorical approach to determine whether any particular offense fell within the ambit of the residual clause.¹² The Court concluded that *Johnson* had “straightforward application” to the case before it,¹³ because in both cases, the statutes required courts to impermissibly speculate about the “ordinary version” of an offense, and about whether that offense involved a sufficient risk of violence to fall within the ambit of the provision. In so doing, the Court rejected purported distinctions between the two residual clauses.¹⁴ The government raised a number of textual differences between the two statutes—the *Dimaya* statute used the phrase “in the course of,” while the *Johnson* statute did not; the *Dimaya* statute referenced the risk of “physical force,” while the *Johnson* statute referred to “physical injury”; and the *Dimaya* statute, unlike the *Johnson*

⁶ *Johnson*, 135 S. Ct. at 2556.

⁷ See *James*, 550 U.S. at 208.

⁸ *Johnson*, 135 S. Ct. at 2557–58.

⁹ *Id.*

¹⁰ See *id.* at 2558–60 (“Nine years’ experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise.”).

¹¹ 138 S. Ct. 1204, 1213 (2018). Justice Neil Gorsuch did not join that portion of the Court’s opinion detailing how the void-for-vagueness doctrine applies in the context of non-criminal removal cases. See *id.* at 1212–13. Justice Gorsuch suggested that he believed the Due Process Clause required the same standard in both criminal and civil cases, *id.* at 1228–30 (Gorsuch, J., concurring), but he ultimately resolved the issue by citing to the relevant statute, noting that Congress had *chosen* “to extend existing forms of liberty” to certain individuals—and once it had done so, the government could take away that “liberty . . . only after affording due process.” *Id.* at 1230.

¹² *Id.* at 1211 (majority opinion).

¹³ *Id.* at 1216.

¹⁴ *Id.* at 1218–19.

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statute, did not include an exemplary list of covered crimes.¹⁵ In the eyes of the Court, these were “the proverbial distinction[s] without a difference,” because none related “to the pair of features—the ordinary-case inquiry and a hazy risk threshold—that *Johnson* found to produce impermissible vagueness.”¹⁶

The Court subsequently considered the constitutionality of another residual clause in *United States v. Davis*, and as in *Johnson* and *Dimaya*, held that the clause was unconstitutionally vague.¹⁷ The challenged federal statute created a sentence enhancement for offenders “using or carrying a firearm ‘during and in relation to,’ or possessing a firearm ‘in furtherance of,’ any federal ‘crime of violence or drug trafficking crime.’”¹⁸ The statutory definition of “crime of violence” included a residual clause stating that a felony offense would be included in the definition if, “by its nature,” the offense “involve[d] a substantial risk that physical force . . . may be used in the course of committing the offense.”¹⁹ In light of *Johnson* and *Dimaya*, the government acknowledged that if this statute also used the categorical approach to determine whether a crime was a “crime of violence,” the provision would be unconstitutional.²⁰ Instead, the government defended the provision by arguing that courts should adopt a “case-specific approach” to interpreting this statute, asking whether a defendant, through his or her “actual conduct,” posed a “substantial risk of physical violence.”²¹ Although the Court acknowledged that this case-specific method would “avoid the vagueness problem” by focusing on the specific defendant’s actual conduct, it nonetheless concluded that the statute could not be read to embrace this approach.²² The Court emphasized that it had already interpreted very similar statutory provisions to require the categorical approach,²³ concluding that the word “offense” is “most naturally” read to “refer to a generic crime”²⁴ and expressing concerns about an approach that would give different meanings to the phrase “crime of violence” in different parts of the criminal code.²⁵ Consequently, because the statute employed a categorical approach, the Court held that the provision in *Davis*, like the ones at issue in *Johnson* and *Dimaya*, was “unconstitutionally vague.”²⁶

Amdt5.9 Takings

Amdt5.9.1 Overview of Takings Clause

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval

¹⁵ *Id.* at 1218–21.

¹⁶ *Id.* at 1218. Nor did it matter to the Court that there were fewer lower court and Supreme Court cases wrestling with the proper meaning of the statute than had divided on the proper interpretation of the *Johnson* statute; the cases interpreting the *Dimaya* statute still demonstrated divisive problems of application. *Id.* at 1221–23.

¹⁷ 139 S. Ct. 2319, 2323–24 (2019).

¹⁸ *Id.* at 2324 (quoting 18 U.S.C. § 924(c)(1)(A)).

¹⁹ *Id.* at 2324 (quoting 18 U.S.C. § 924(c)(3)). This provision was almost identical to the residual clause considered in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 (2018).

²⁰ *Davis*, 139 S. Ct. at 2327.

²¹ *Id.*

²² *Id.* at 2327–28.

²³ *Id.* at 2327–28.

²⁴ *Id.* at 2328 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 33–34 (2009)) (internal quotation mark omitted).

²⁵ *Id.* at 2329.

²⁶ *Id.* at 2336.

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Overview of Takings Clause

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.

The Fifth Amendment provision barring the Government from taking private property for public use absent just compensation has its origin in common law. In his *Commentaries on the Constitution of the United States*, Justice Joseph Story grounded the Takings Clause in “natural equity,” describing it as “a principle of universal law” without which “almost all other rights would become utterly worthless.”¹ The Supreme Court has recognized the government’s ability to take property as inherent to its powers, stating “[t]he Fifth Amendment to the Constitution says ‘nor shall private property be taken for public use, without just compensation.’ This is a tacit recognition of a preexisting power to take private property for public use, rather than a grant of new power.”²

The Fifth Amendment requirement that just compensation be paid for the taking of private property is intrinsic to the Fifth Amendment’s objective of protecting citizens from government power.³ In its 1898 decision, *Backus v. Fort Street Union Depot Co.*, the Supreme Court stated: “When . . . [the] power [of eminent domain] is exercised it can only be done by giving the party whose property is taken or whose use and enjoyment of such property is interfered with, full and adequate compensation, not excessive or exorbitant, but just compensation.”⁴ Half a century later, in *Armstrong v. United States*, the Supreme Court explained the basis for the Fifth Amendment’s just compensation guarantee further, stating that the doctrine “was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”⁵

In the Nation’s early years, the federal power of eminent domain lay dormant as to property outside the District of Columbia.⁶ It was not until the Supreme Court’s 1876 decision, *Kohl v. United States*,⁷ that the Court affirmed the federal government’s power of eminent domain as implied by the Fifth Amendment, noting that such authority was as necessary to the National Government as it was to the states. Three years later in *Boom Co. v. Patterson*, the Court confirmed that the power of eminent domain “appertains to every independent

¹ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1784 (1833). See also *United States v. Great Falls Mfg. Co.*, 112 U.S. 645 (1884) (federal government must compensate private property owner for loss of property resulting from federal river project).

² *United States v. Carmack*, 329 U.S. 230, 241–42 (1946). The same is true of “just compensation” clauses in state constitutions. *Boom Co. v. Patterson*, 98 U.S. 403, 406 (1879).

³ 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION § 1784 (1833).

⁴ *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 573, 575 (1898).

⁵ *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Supreme Court stated: “The political ethics reflected in the Fifth Amendment reject confiscation as a measure of justice.” *United States v. Cors*, 337 U.S. 325, 332 (1949). There is no constitutional prohibition against confiscating enemy property, but aliens not so denominated are entitled to the protection of this clause. Compare *United States v. Chemical Found.*, 272 U.S. 1, 11 (1926) and *Stoehr v. Wallace*, 255 U.S. 239 (1921), with *Silesian-Am. Corp. v. Clark*, 332 U.S. 469 (1947), *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931), and *Guessefeldt v. McGrath*, 342 U.S. 308, 318 (1952). Takings Clause protections for such aliens may be invoked, however, only “when they have come within the territory of the United States and developed substantial connections with this country.” *United States v. Verdugo-Urquidez*, 494 U.S. 259, 271 (1990).

⁶ Prior to this time, the Federal Government pursued condemnation proceedings in state courts and commonly relied on state law. *Kohl v. United States*, 91 U.S. 367, 373 (1876); *United States v. Jones*, 109 U.S. 513 (1883). The general statutory authority for federal condemnation proceedings in federal courts was not enacted until 1888. Act of Aug. 1, 1888, ch. 728, 25 Stat. 357. See 1 NICHOLS ON EMINENT DOMAIN § 1.24[5] (Julius L. Sackman et al. eds., 2006).

⁷ *Kohl*, 91 U.S. 367.

FIFTH AMENDMENT—RIGHTS OF PERSONS

Takings

Amdt5.9.1

Overview of Takings Clause

government. It requires no constitutional recognition; it is an attribute of sovereignty.”⁸ The federal power of eminent domain is, of course, limited by the grants of power in the Constitution, so that property may only be taken pursuant to a legitimate exercise of Constitutional authority,⁹ but the ambit of national powers is broad enough to enable broad objectives.¹⁰ This prerogative of the National Government can neither be enlarged nor diminished by a state.¹¹

The Fourteenth Amendment extended the Fifth Amendment constraints on the exercise of the power of eminent domain to state governments¹² Because the Fifth Amendment’s Just Compensation Clause did not explicitly apply to states,¹³ the Supreme Court at first did not recognize the Due Process Clause of the Fourteenth Amendment as extending to property owners the same protection against the states as the Fifth Amendment provided against the Federal Government.¹⁴ However, by the 1890s, the Court had rejected arguments that local law solely governed the amount of compensation to be awarded in a state eminent domain case. In *Chicago, B. & Q. R.R. Co. v. City of Chicago*, the Court ruled that, although a state “legislature may prescribe a form of procedure to be observed in the taking of private property for public use . . . it is not due process of law if provision be not made for compensation. . . . The mere form of the proceeding instituted against the owner . . . cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation.”¹⁵

While the Court has recognized the power of eminent domain to be inherent to federal and state government, federal and state governments may exercise such power only through legislation or legislative delegation. Such delegation is usually to another governmental body such as an agency or local government, although it may also be to private corporations such as public utilities, railroad companies, or bridge companies, so long as the delegation is for a valid public purpose.¹⁶ Furthermore, legislation that delegates taking authority or authorizes an agency to take property by eminent domain does not by itself constitute a taking, as “[s]uch legislation may be repealed or modified, or appropriations may fail” before the taking itself is effectuated.¹⁷

⁸ 98 U.S. 403, 406 (1879).

⁹ *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668, 679 (1896).

¹⁰ *E.g.*, *California v. Cent. Pac. R.R.*, 127 U.S. 1, 39 (1888) (highways); *Luxton v. N. River Bridge Co.*, 153 U.S. 525 (1894) (interstate bridges); *Cherokee Nation v. S. Kan. Ry.*, 135 U.S. 641 (1890) (railroads); *Albert Hanson Lumber Co. v. United States*, 261 U.S. 581 (1923) (canal); *Ashwander v. TVA*, 297 U.S. 288 (1936) (hydroelectric power). “Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end.” *Berman v. Parker*, 348 U.S. 26, 33 (1954).

¹¹ *Kohl*, 91 U.S. at 374.

¹² *Green v. Frazier*, 253 U.S. 233, 238 (1920) (noting that “[p]rior to the adoption of the Fourteenth Amendment,” the power of eminent domain of state governments “was unrestrained by any federal authority”).

¹³ *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

¹⁴ *Davidson v. City of New Orleans*, 96 U.S. 97 (1878). The Court attached most weight to the fact that both due process and just compensation were guaranteed in the Fifth Amendment while only due process was contained in the Fourteenth, and refused to equate the missing term with the present one.

¹⁵ *Chi., B. & Q. R.R. v. City of Chi.*, 166 U.S. 226, 233, 236–37 (1897). *See also* *Sweet v. Rechel*, 159 U.S. 380, 398 (1895).

¹⁶ *Noble v. Okla. City*, 297 U.S. 481 (1936); *Luxton v. N. River Bridge Co.*, 153 U.S. 525 (1894). One of the earliest examples of such delegation is *Curtiss v. Georgetown & Alexandria Turnpike Co.*, 10 U.S. (6 Cr.) 233 (1810).

¹⁷ *Danforth v. United States*, 308 U.S. 271 (1939).

FIFTH AMENDMENT—RIGHTS OF PERSONS

Takings

Amdt5.9.2
Public Use and Takings Clause

Amdt5.9.2 Public Use and Takings Clause

Fifth Amendment:

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

The Just Compensation Clause explicitly requires that the taking of private property be for a public use; the government cannot deprive anyone of their property for any reason other than a public use, even with compensation.¹ The question of whether a particular intended use is a public use is clearly a judicial one,² but the Court has always granted a high degree of deference to legislative determinations,³ stating that “[t]he role of the judiciary in determining whether that power is being exercised for a public use is an extremely narrow one.”⁴ When state action is challenged under the Fourteenth Amendment, the Court also defers to the highest court of the state in resolving such an issue.⁵ In its 1908 decision *Chicago, B. & Q. R.R. v. City of Chicago*, the Court noted that, “[n]o case is recalled where this court has condemned as a violation of the Fourteenth Amendment a taking upheld by the state court as a taking for public uses”⁶

In a 1946 case involving federal eminent domain power, the Court cast doubt upon the power of courts to review the issue of public use, stating “[w]e think that it is the function of Congress to decide what type of taking is for a public use and that the agency authorized to do the taking may do so to the full extent of its statutory authority.”⁷ While there is some suggestion in *United States ex rel. TVA v. Welch* that “the scope of the judicial power to determine what is a ‘public use’” may differ between Fifth and Fourteenth Amendment cases, with greater power in the latter type of cases than in the former,⁸ *Welch* also cautions great judicial restraint in evaluating “public uses” more broadly.⁹ Once it is admitted or determined that the taking is for a public use and is within the granted authority, the necessity or

¹ *Fallbrook Irrigation Dist. v. Bradley*, 164 U.S. 112, 158–59 (1896); *Cole v. La Grange*, 113 U.S. 1, 6 (1885).

² *City of Cincinnati v. Vester*, 281 U.S. 439, 444 (1930) (“It is well established that in considering the application of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.”).

³ *Kelo v. City of New London*, 545 U.S. 469, 482 (2005). The taking need only be “rationally related to a conceivable public purpose.” *Id.* at 490 (Kennedy, J., concurring).

⁴ *Berman v. Parker*, 348 U.S. 26, 32 (1954) (federal eminent domain power in District of Columbia).

⁵ *Green v. Frazier*, 253 U.S. 233, 240 (1920); *Vester*, 281 U.S. at 446. *See also* *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229 (1984) (appeals court erred in applying more stringent standard to action of state legislature).

⁶ *Hairston v. Danville & W. Ry.*, 208 U.S. 598, 607 (1908). An act of condemnation was voided as not for a public use in *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896), but the Court read the state court opinion as acknowledging this fact, thus not bringing it within the literal content of this statement.

⁷ *United States ex rel. TVA v. Welch*, 327 U.S. 546, 551–52 (1946). Justices Stanley Reed and Felix Frankfurter and Chief Justice Harlan Stone disagreed with this view. *Id.* at 555, 557 (concurring).

⁸ *Welch*, 327 U.S. at 552.

⁹ *See Berman*, 348 U.S. at 32 (“The role of the judiciary in determining whether that power [of eminent domain] is being exercised for a public purpose is an extremely narrow one.”).

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Amdt5.9.2

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expediency of the particular taking is exclusively in the legislature, or the body to which the legislature has delegated the decision, and is not subject to judicial review.¹⁰

At an earlier time, the prevailing judicial view was that the term “public use” was synonymous with “use by the public” and that, if there was no duty upon the taker to permit the public as of right to use or enjoy the property taken, the taking was invalid. But the Court rejected this view.¹¹ The modern conception of public use equates it with the police power in furtherance of the public interest. No definition of the reach or limits of the power is possible, the Court has said, because such “definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition. . . . Public safety, public health, morality, peace and quiet, law and order—these are some of the . . . traditional application[s] of the police power”¹² Because the legislature has authority to effectuate these matters, its power to achieve them by exercising eminent domain is established. As the Supreme Court observed, “For the power of eminent domain is merely the means to the end.”¹³ Subsequently, the Court added as an indicium of “public use” whether the government purpose could be validly achieved by tax or user fee.¹⁴

Traditionally, eminent domain has been used to facilitate transportation, the supplying of water, and the like,¹⁵ but its use to establish public parks, to preserve places of historic interest, and to promote beautification has substantial precedent.¹⁶ The Supreme Court has generally approved federal and state governments using the power of eminent domain in conjunction with private companies to facilitate urban renewal, destruction of slums, erection

¹⁰ *Rindge Co. v. L.A. Cnty.*, 262 U.S. 700, 709 (1923); *Bragg v. Weaver*, 251 U.S. 57, 58 (1919); *Berman*, 348 U.S. at 33. *Midkiff*, 467 U.S. at 242–43 (“When the legislature’s purpose is legitimate and its means are not irrational, our cases make clear that empirical debates over the wisdom of takings . . . are not to be carried out in federal courts.”)

¹¹ *Clark v. Nash*, 198 U.S. 361 (1905); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30, 32 (1916).

¹² *Berman*, 348 U.S. at 32.

¹³ *Id.* at 32–33.

¹⁴ *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 232 (2003). Reasonable user fees are not takings that necessitate just compensation. *See United States v. Sperry Corp.*, 493 U.S. 52 (1989) (holding that a 1% user fee deducted from awards granted by an international tribunal to cover the costs of administering that tribunal did not constitute a taking).

¹⁵ *E.g.*, *Kohl v. United States*, 91 U.S. 367 (1876) (public buildings); *New Orleans Gas Co. v. Drainage Comm’n*, 197 U.S. 453 (1905) (city drainage system); *Chi., M., & St. P. Ry. v. City of Minneapolis*, 232 U.S. 430 (1914) (canal); *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685 (1897) (condemnation of privately owned water supply system formerly furnishing water to municipality under contract); *Mt. Vernon-Woodberry Cotton Duck Co. v. Ala. Interstate Power Co.*, 240 U.S. 30 (1916) (land, water, and water rights condemned for production of electric power by public utility); *Dohany v. Rogers*, 281 U.S. 362 (1930) (land taken for purpose of exchange with a railroad company for a portion of its right-of-way required for widening a highway); *Del., L. & W. R.R. v. Town of Morristown*, 276 U.S. 182 (1928) (establishment by a municipality of a public hack stand upon driveway maintained by railroad upon its own terminal grounds to afford ingress and egress to its patrons); *Clark v. Nash*, 198 U.S. 361 (1905) (right-of-way across neighbor’s land to enlarge irrigation ditch for water without which land would remain valueless); *Strickley v. Highland Boy Mining Co.*, 200 U.S. 527 (1906) (right of way across a placer mining claim for aerial bucket line). In *Mo. Pac. Ry. v. Nebraska*, 164 U.S. 403 (1896), however, the Court held that it was an invalid use when a state attempted to compel, on payment of compensation, a railroad, which had permitted the erection of two grain elevators by private citizens on its right-of-way, to grant upon like terms a location to another group of farmers to erect a third grain elevator for their own benefit.

¹⁶ *E.g.*, *Shoemaker v. United States*, 147 U.S. 282 (1893) (establishment of public park in District of Columbia); *Rindge Co. v. L.A. Cnty.*, 262 U.S. 700 (1923) (scenic highway); *Brown v. United States*, 263 U.S. 78 (1923) (condemnation of property near town flooded by establishment of reservoir in order to locate a new townsite, even though there might be some surplus lots to be sold); *United States v. Gettysburg Elec. Ry.*, 160 U.S. 668 (1896), and *Roe v. Kansas ex rel. Smith*, 278 U.S. 191 (1929) (historic sites). When time is deemed to be of the essence, Congress may take land directly by statute, authorizing procedures by which owners of appropriated land may obtain just compensation. *See, e.g.*, Pub. L. No. 90-545, § 3, 82 Stat. 931 (1968), 16 U.S.C. § 79 (c) (taking land for creation of Redwood National Park); Pub. L. No. 93-444, 88 Stat. 1304 (1974) (taking lands for addition to Piscataway Park, Maryland); Pub. L. No. 100-647, § 10002 (1988) (taking lands for addition to Manassas National Battlefield Park).

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of low-cost housing in place of deteriorated housing, and promotion of aesthetic values as well as economic ones. In *Berman v. Parker*,¹⁷ a unanimous Court observed: “The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.”¹⁸ For “public use,” then, it may well be that “public interest” or “public welfare” is the more correct phrase.¹⁹ In *Hawaii Housing Authority v. Midkiff*,²⁰ the Court applied *Berman* to uphold the Hawaii Land Reform Act as a “rational” effort to “correct deficiencies in the market determined by the state legislature to be attributable to land oligopoly.”²¹ Direct transfer of land from lessors to lessees was permissible, the Court held, as there is no requirement “that government possess and use property at some point during a taking.”²² “The ‘public use’ requirement is . . . coterminous with the scope of a sovereign’s police powers,” the Court concluded.²³

The Court’s expansive interpretation of public use in eminent domain cases may have reached its outer limit in *Kelo v. City of New London*.²⁴ There, a five-Justice majority upheld as a public use the government acquisition of privately owned land to be transferred to another private party for purposes of economic development, pursuant to a redevelopment plan adopted by a municipality to invigorate a depressed economy. The Court saw no principled way to distinguish economic development from the economic purposes endorsed in *Berman* and *Midkiff*, and stressed the importance of judicial deference to legislative judgment as to public needs. At the same time, the Court cautioned that condemnations of individual properties that are transferred to another private party, not as part of an “integrated development plan . . . raise a suspicion that a private purpose [is] afoot.”²⁵ A vigorous four-Justice dissent countered that, because localities will always be able to manufacture a plausible public purpose, the majority opinion leaves the vast majority of private parcels subject to condemnation when a locality desires a higher-valued use.²⁶ Revisiting the Court’s past endorsements in *Berman* and *Midkiff* of a public use/police power equation, the dissenters referred to the “errant language” of these decisions, which was “unnecessary” to their holdings.²⁷

¹⁷ 348 U.S. 26, 32–33 (1954) (citations omitted). Rejecting the argument that the project was illegal because it involved the turning over of condemned property to private associations for redevelopment, the Court said:

Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. Here one of the means chosen is the use of private enterprise for redevelopment of the area. Appellants argue that this makes the project a taking from one businessman for the benefit of another businessman. But the means of executing the project are for Congress and Congress alone to determine, once the public purpose has been established. The public end may be as well or better served through an agency of private enterprise than through a department of government—or so the Congress might conclude.

Id. at 33–34 (citations omitted).

¹⁸ *Berman*, 348 U.S. at 32–33.

¹⁹ In 2005, the Court equated public use with “public purpose.” *Kelo v. City of New London*, 545 U.S. 469, 480 (2005).

²⁰ 467 U.S. 229, 243 (1984).

²¹ *Id.*

²² *Id.*

²³ *Id.* at 240. *See also* *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) (required data disclosure by pesticide registrants, primarily for benefit of later registrants, has a “conceivable public character”).

²⁴ 545 U.S. 469 (2005).

²⁵ *Kelo*, 545 U.S. at 487.

²⁶ Written by Justice Sandra Day O’Connor, and joined by Justices Antonin Scalia and Clarence Thomas, and Chief Justice William Rehnquist.

²⁷ *Kelo*, 545 U.S. at 501.

FIFTH AMENDMENT—RIGHTS OF PERSONS

Takings

Amdt5.9.3

Property Interests Subject to Takings Clause

Amdt5.9.3 Property Interests Subject to Takings Clause

Fifth Amendment:

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

If real property is condemned, the market value of that property must be paid to the owner. But there are many kinds of property and many uses of property which cause problems in computing just compensation. It is not only the full fee simple interest in land that is compensable “property,”¹ but also such lesser interests as easements² 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.³ Government action that does not encroach on private property does not result in a taking requiring just compensation, even if the action impairs the use of the private property.⁴

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,⁵ 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.⁶ 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.⁷ 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.⁸

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.⁹ 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.¹⁰ For example, in *Horne v.*

¹ *United States v. Gen. Motors Corp.*, 323 U.S. 373 (1945).

² *United States v. Welch*, 217 U.S. 333 (1910).

³ *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.

⁴ *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).

⁵ *Bauman*, 167 U.S. 548.

⁶ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893).

⁷ *Reichelderfer v. Quinn*, 287 U.S. 315, 318 (1932).

⁸ *Calero-Toledo v. Pearson Yacht Leasing*, 416 U.S. 663 (1974).

⁹ *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).

¹⁰ *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

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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.”¹¹ 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.¹² The majority also rejected the government’s argument that the reserve requirement was not a physical taking because raisin growers voluntarily participated in the raisin market.¹³ 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.”¹⁴ 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.¹⁵

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,¹⁶ patent rights,¹⁷ and trade secrets.¹⁸ The franchise of a private corporation has also been deemed property that cannot be taken for public use without compensation. For example, on

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.”).

¹¹ *Horne*, 135 S. Ct. 2419, 2422 (2015).

¹² *Id.* at 2428–30.

¹³ 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”).

¹⁴ *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.

¹⁵ *Horne*, 135 S. Ct. at 2431–32.

¹⁶ *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).

¹⁷ *James v. Campbell*, 104 U.S. 356, 358 (1882). *See also* *Hollister v. Benedict Mfg. Co.*, 113 U.S. 59, 67 (1885).

¹⁸ *Ruckelshaus*, 467 U.S. 986.

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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.¹⁹

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,²⁰ 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.²¹ When a ship builder defaulted and the government took title to the builder's uncompleted boats pursuant to a contract, the Court found that 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.²²

As a general rule, there is no property interest in the continuation of a rule of law.²³ 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.²⁴ Similarly, there is no right to the continuation of governmental welfare benefits.²⁵

Amdt5.9.4 Physical Takings

Fifth Amendment:

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

When government institutes condemnation proceedings directed to property, or mistakenly grants privately held property rights to third parties,¹ it "takes" such property and the Fifth Amendment requires just compensation. In contrast, where government action causes physical damage to property, limits activity on property, or otherwise deprives property of value,² determining whether such actions constitute "takings" in the Fifth Amendment sense is more complex.

¹⁹ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 345 (1893).

²⁰ *Omnia*, 261 U.S. 502.

²¹ *Int'l Paper Co. v. United States*, 282 U.S. 399 (1931).

²² *Armstrong v. United States*, 364 U.S. 40, 50 (1960).

²³ *Duke Power Co. v. Carolina Envt. Study Group*, 438 U.S. 59, 88 n.32 (1978).

²⁴ *Bowen v. Pub. Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986).

²⁵ "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 *United States v. Creek Nation*, 295 U.S. 103 (1935).

² There is continuing uncertainty regarding whether the actions of a court may constitute a taking. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, Justice Antonin Scalia, joined by three other Justices, recognized that a court could effect a taking through a decision that contravened established property

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In early cases, the Supreme Court considered the Fifth Amendment requirement that the government pay just compensation for property taken for public use to refer only to “direct appropriation, and not to consequential injuries resulting from the exercise of lawful power.”³ Accordingly, the Supreme Court has held a variety of consequential injuries not to constitute takings, including: damage to abutting property resulting from the authorization of a railroad to erect tracts, sheds, and fences over a street;⁴ lessening the circulation of light and air and impairing access to premises, resulting from the erection of an elevated viaduct over a street, or resulting from the changing of a grade in the street;⁵ the forced sale of cattle due to loss of grazing land due to government flooding,⁶ and a federal irrigation project that resulting in raised groundwater and lake water impacting nearby properties.⁷ Nor did the Court hold the government liable for extra expenses property owners incurred addressing the consequences of governmental actions, such as expenses incurred by a railroad in planking an area condemned for a crossing, constructing gates, and posting gatemen,⁸ or by a landowner in raising the height of dikes around his land to prevent their partial flooding consequent to private construction of a dam under public licensing.⁹

The Court has decided that the government can “take” land by physical invasion or occupation when it floods land permanently or recurrently, thereby triggering the just compensation requirement.¹⁰ In its 1947 decision *United States v. Dickinson*, the Court stated that “[p]roperty is taken in the constitutional sense when inroads are made upon an owner’s use of it to an extent that, as between private parties, a servitude has been acquired either by agreement or in course of time.”¹¹ The Court thus held in *Portsmouth Harbor Land & Hotel Co. v. United States* that the government had imposed a servitude for which it must compensate the owner on land adjoining its fort when it repeatedly fired guns at the fort across the land and established a fire control service there.¹² In two cases—*United States v. Causby* and *Griggs v. Allegheny County*—the Court held that lessees or operators of airports were required to compensate owners of adjacent land when the noise, glare, and fear of injury occasioned by low

law. 560 U.S. 702 (2010). Justice Anthony Kennedy and Justice Stephen Breyer, each joined by one other Justice, wrote concurring opinions finding that the case at hand did not require the Court to determine whether, or when, a judicial decision on the rights of a property owner can violate the Takings Clause. Though all eight participating Justices agreed on the result in *Stop the Beach Renourishment, Inc.*, the viability and dimensions of a judicial takings doctrine remains unresolved.

³ The *Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871). The Fifth Amendment “has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals,” the Court explained.

⁴ *Meyer v. City of Richmond*, 172 U.S. 82 (1898).

⁵ *Sauer v. City of N.Y.*, 206 U.S. 536 (1907).

⁶ *Bothwell v. United States*, 254 U.S. 231 (1920).

⁷ *John Horstmann Co. v. United States*, 257 U.S. 138 (1921).

⁸ *Chi., B. & Q. R.R. v. City of Chi.*, 166 U.S. 226 (1897).

⁹ *Manigault v. Springs*, 199 U.S. 473 (1905).

¹⁰ *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177–78 (1872). Recurrent, temporary floodings are not categorically exempt from Takings Clause liability. *Ark. Game & Fish Comm’n v. United States*, 568 U.S. 23 (2012) (downstream timber damage caused by changes in seasonal water release rates from government dam). However, the Court has found damages due to flooding caused by government efforts to prevent erosion not to constitute a taking. *Bedford v. United States*, 192 U.S. 217 (1904). The Court has also held that flooding resulting from the construction of a canal was not a taking unless the overflow was a “direct result of the structure” and constituted an “actual, permanent invasion of the land, amounting to an appropriation of and not merely an injury to the property.” *Sanguinetti v. United States*, 246 U.S. 146, 149 (1924). The Court in *Arkansas Game & Fish* addressed the seeming inconsistency of its decision with this language in the *Sanguinetti* decision, noting that to the extent the Court “indeed meant to express a general limitation on the Takings Clause, that limitation has been superseded by subsequent developments in our jurisprudence.” *Ark. Game & Fish*, 568 U.S. at 34.

¹¹ *United States v. Dickinson*, 331 U.S. 745, 748 (1947)

¹² *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922). *Cf.* *Portsmouth Harbor Land & Hotel Co. v. United States*, 250 U.S. 1 (1919); *Peabody v. United States*, 231 U.S. 530 (1913).

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altitude overflights during takeoffs and landings made the land unfit for the use to which the owners had applied it.¹³ The Court has also held in *Cedar Point Nursery v. Hassid* that a law requiring employers to allow union organizers to enter a business property effectuated a physical taking, and thus was unconstitutional in the absence of just compensation.¹⁴ The term “inverse condemnation” is often used to refer to cases where the government has not instituted formal condemnation proceedings, but the property owner has instead sued for just compensation, claiming that governmental action or regulation has “taken” his property.¹⁵

The Fifth Amendment generally does not prohibit the government from collecting administrative and other fees incidental to conducting government business. For example, in *United States v. Sperry Corp.*, the Court held that a 1% user fee deducted from awards granted by an international tribunal to cover the costs of administering that tribunal did not constitute a taking, but simply a “user fee.”¹⁶ The Court further noted that “[t]he amount of a user fee need not be precisely calibrated to the use that a party makes of governmental services.”¹⁷ The Court, however, has found other government fees to be excessive enough to constitute a taking for which there must be just compensation.¹⁸

The Court’s repeated holdings that riparian ownership is subject to Congress’s power to regulate commerce is an important reservation to the law of liability in the taking area. When government improvements to a river’s navigable capacity or to a nonnavigable river designed to affect navigability elsewhere cause damage, the Court has generally not considered such damage to be a taking of property but merely an exercise of a servitude to which the property is always subject.¹⁹ This exception does not apply to lands above the ordinary high-water mark of a stream;²⁰ hence, it is inapplicable to the damage the government may do to such “fast lands” by causing overflows, by erosion, and otherwise, consequent on erection of dams or other improvements.²¹ Furthermore, when previously nonnavigable waters are made navigable by

¹³ *United States v. Causby*, 328 U.S. 256 (1946); *Griggs v. Allegheny Cnty.*, 369 U.S. 84 (1962). The Court held a corporation chartered by Congress to construct a tunnel and operate railway trains liable for damages when the plaintiff’s property was so injured by smoke and gas forced from the tunnel as to amount to a taking. *Richards v. Wash. Terminal Co.*, 233 U.S. 546 (1914).

¹⁴ *Cedar Point Nursery v. Hassid*, No. 20-107 (U.S. June 23, 2021).

¹⁵ Discussing the term “inverse condemnation,” the Supreme Court has noted: “The phrase ‘inverse condemnation’ generally describes a cause of action against a government defendant in which a landowner may recover just compensation for a ‘taking’ of his property under the Fifth Amendment, even though formal condemnation proceedings in exercise of the sovereign’s power of eminent domain have not been instituted by the government entity.” *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 638 n.2 (1981) (Brennan, J., dissenting). See also *United States v. Clarke*, 445 U.S. 253, 257 (1980); *Agins v. City of Tiburon*, 447 U.S. 255, 258 n.2 (1980).

¹⁶ *United States v. Sperry Corp.*, 493 U.S. 52 (1989).

¹⁷ *Id.* at 60–62. See also *Cal. Reduction Co. v. Sanitary Reduction Works*, 199 U.S. 306 (1905) (disposal fee and designated disposal site imposed on waste generator did not constitute a taking).

¹⁸ See, e.g., *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160–65 (1980) (interest earned on interpleader fund deposited in the registry of a county court was the property of the parties just like the principal, and the government could not retain it as an administrative fee for managing the fund); *Norwood v. Baker*, 172 U.S. 269 (1898) (special assessment on certain property owners to pay for road construction are justified if those owners receive special benefits, but assessment exceeding value of benefit amounts to a taking).

¹⁹ *Gibson v. United States*, 166 U.S. 269 (1897); *Scranton v. Wheeler*, 179 U.S. 141 (1900); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *Lewis Blue Point Oyster Co. v. Briggs*, 229 U.S. 82 (1913); *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913); *Greenleaf-Johnson Lumber Co. v. Garrison*, 237 U.S. 251 (1915); *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940); *United States v. Commodore Park, Inc.*, 324 U.S. 386 (1945); *United States v. Willow River Power Co.*, 324 U.S. 499 (1945); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956); *United States v. Rands*, 389 U.S. 121 (1967).

²⁰ *United States v. Va. Elec. & Power Co.*, 365 U.S. 624, 628 (1961).

²¹ *United States v. Lynah*, 188 U.S. 445 (1903); *United States v. Cress*, 243 U.S. 316 (1917); *Jacobs v. United States*, 290 U.S. 13 (1933); *United States v. Dickinson*, 331 U.S. 745 (1947); *United States v. Kan. City Life Ins. Co.*, 339 U.S. 799 (1950); *Va. Elec. & Power Co.*, 365 U.S. 624.

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private investment, government may not assert a navigation servitude and direct the property owners to afford public access without paying just compensation.²²

Amdt5.9.5 Early Jurisprudence on Regulatory Takings

Fifth Amendment:

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

While government may take private property, with compensation, to promote the public interest, government may also regulate property use pursuant to its police power. For years, regulation designed to secure the common welfare, especially in the area of health and safety, was not considered a “taking.”¹

Regulation, however, may deprive an owner of most or all beneficial use of his property and may destroy the values of the property for the purposes to which it is suited.² While early cases denied compensation for this diminution of property values,³ the Court changed direction in its 1922 decision, *Pennsylvania Coal Co. v. Mahon*. In *Mahon*, the Court established as a general principle that “if regulation goes too far it will be recognized as a taking.”⁴ The majority in *Mahon* held unconstitutional a state statute prohibiting subsurface mining in regions where it presented a danger of subsidence for homeowners. The homeowners had purchased land, the deeds of which reserved to coal companies ownership of subsurface mining rights and held the companies harmless for damage caused by subsurface mining operations. The statute thus enriched the homeowners and deprived the coal companies of the entire value of their subsurface estates. The Court observed that “[f]or practical purposes, the right to coal consists in the right to mine,” and that the statute, by making it “commercially impracticable to mine

²² *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979)

¹ *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887). *See also* *The Legal Tender Cases*, 79 U.S. (12 Wall.) 457, 551 (1871); *Chi., B. & Q. R.R. v. City of Chi.*, 166 U.S. 226, 255 (1897); *Reinman v. Little Rock*, 237 U.S. 171 (1915); *Omnia Com. Co. v. United States*, 261 U.S. 502 (1923); *Norman v. Balt. & Ohio R.R.*, 294 U.S. 240 (1935).

² *E.g.*, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (ordinance upheld restricting owner of brick factory from continuing his use after residential growth surrounding factory made use noxious, even though value of property was reduced by more than 90%); *Miller v. Schoene*, 276 U.S. 272 (1928) (no compensation due owner’s loss of red cedar trees ordered destroyed because they were infected with rust that threatened contamination of neighboring apple orchards: preferment of public interest in saving cash crop to property interest in ornamental trees was rational).

³ *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887) (ban on manufacture of liquor greatly devalued plaintiff’s plant and machinery; no taking possible simply because of legislation deeming a use injurious to public health and welfare); *Welch v. Swasey*, 214 U.S. 91 (1909) (state law limiting maximum height of buildings did not constitute a taking); *Corn Refining Products Co. v. Eddy*, 249 U.S. 427 (1919) (state law requiring companies to affix labels on product disclosing ingredients was not a taking of plaintiff’s proprietary formula, because there is no constitutional right to sell goods without revealing information to purchasers); *Hamilton v. Ky. Distilleries & Warehouse Co.*, 251 U.S. 146 (1919) (federal statute banning domestic liquor sales during wartime was not a taking); *Jacob Ruppert, Inc. v. Caffey*, 251 U.S. 264 (1920) (extension of federal ban on liquor to beer sales also did not constitute a taking, despite the ban taking effect immediately); *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920) (state ban on the use of natural gas for purposes other than heating did not constitute a taking even though it forced a plant to close, because the ban was within the state’s police power to regulate consumption of natural resources).

⁴ *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). *See also* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (a regulation that deprives a property owner of *all* beneficial use of his property requires compensation, unless the owner’s proposed use is one prohibited by background principles of property or nuisance law existing at the time the property was acquired).

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certain coal,” had essentially “the same effect for constitutional purposes as appropriating or destroying” the subsurface estate.⁵ The regulation, therefore, in precluding the companies from exercising any mining rights whatever, went “too far.”⁶ However, when presented sixty-five years later with a similar restriction on coal mining, the Court upheld it, pointing out that, unlike its predecessor, the newer law identified important public interests, and that the plaintiffs had not sufficiently demonstrated diminution of their property interests.⁷

The Court had long been concerned with the government imposing on one or a few individuals the costs of furthering the public interest.⁸ This issue has frequently arisen in disputes over zoning regulations. The Court’s first zoning case, *Village of Euclid v. Ambler Realty Co.*, involved a real estate company’s allegation that a comprehensive municipal zoning ordinance prevented development of its land for industrial purposes and thereby reduced its value from \$10,000 an acre to \$2,500 an acre.⁹ Acknowledging that zoning was of recent origin, the Court, applying substantive due process analysis instead of takings-based analysis, observed that it must be justified by police power and evaluated by the constitutional standards applied to exercises of police power. After considering traditional nuisance law, the Court determined that the public interest was served by segregating incompatible land uses and the ordinance was thus valid on its face. Instead, a zoning regulation that diminished property values would be unconstitutional only if it were “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”¹⁰ A few years later in *Nectow v. City of Cambridge*, the Court, again relying on due process rather than takings law, invalidated application of a zoning ordinance to a tract of land, finding that the tract would be rendered nearly worthless and that exempting the tract would not impair a substantial municipal interest.¹¹ The Court gave additional attention to this issue in the 1970s as states and municipalities developed more comprehensive zoning techniques.¹²

As governmental regulation of property has expanded over the years—in terms of zoning and other land use controls, environmental regulations, and the like—the Court has avoided a “set formula to determine where regulation ends and taking begins.”¹³ The Court has observed that, “[i]n the near century since *Mahon*, the Court for the most part has refrained from elaborating this principle through definitive rules”¹⁴ and “[t]his area of the law has been characterized by ‘ad hoc, factual inquiries, designed to allow careful examination and weighing

⁵ *Mahon*, 260 U.S. at 414–15.

⁶ *Id.* at 415. In dissent, Justice Louis Brandeis argued that a restriction imposed to abridge the owner’s exercise of his rights in order to prohibit a noxious use or to protect the public health and safety simply could not be a taking, because the owner retained his interest and his possession. *Id.* at 416.

⁷ *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987).

⁸ *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405 (1935) (government may not require railroad at its own expense to separate the grade of a railroad track from that of an interstate highway). See also *Panhandle Co. v. Highway Comm’n*, 294 U.S. 613 (1935); *Atchison, T. & Santa Fe Ry. v. Pub. Util. Comm’n*, 346 U.S. 346 (1953). Compare the Court’s two decisions in *Ga. Ry. & Elec. Co. v. City of Decatur*, 295 U.S. 165 (1935) and 297 U.S. 620 (1936).

⁹ *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

¹⁰ *Id.* at 395. See also *Zahn v. Bd. of Pub. Works*, 274 U.S. 325 (1927).

¹¹ *Nectow v. City of Cambridge*, 277 U.S. 183 (1928).

¹² Initially, the Court’s return to the land-use area involved substantive due process, not takings. *Vill. of Belle Terre v. Boraas*, 416 U.S. 1 (1974) (sustaining single-family zoning as applied to group of college students sharing a house); *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (voiding single-family zoning so strictly construed as to bar a grandmother from living with two grandchildren of different children). See also *City of Eastlake v. Forest City Enters.*, 426 U.S. 668 (1976).

¹³ *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 124 (1978). The phrase appeared first in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962).

¹⁴ *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017) (rejecting the argument of the owners of two adjoining undeveloped lots that a regulatory taking occurred through the enactment of regulations that forbade improvement or separate sale of the lots).

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of all the relevant circumstances.”¹⁵ Nonetheless, the Court has articulated general principles that guide many of its decisions in the area.¹⁶ These principles are often referred to as the “Penn Central” framework.

Amdt5.9.6 Regulatory Takings and Penn Central Framework

Fifth Amendment:

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

In its 1978 decision, *Penn Central Transportation Co. v. City of New York*,¹ the Court, while cautioning that regulatory takings cases require “essentially ad hoc, factual inquiries,” nonetheless provided general guidance for determining whether a regulatory taking had occurred. The Court emphasized that the degree to which a government action interfered with a property owner’s interest in his property—whether the interference amounted to a “physical invasion” or only reflected an “adjusting of benefits and burdens”—indicated whether a taking had occurred. The Court explained:

The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are . . . relevant considerations. So too, is the character of the governmental action. A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.²

Penn Central concerned New York City’s landmarks preservation law, pursuant to which the City denied approval to construct a fifty-three-story office building atop Grand Central Terminal. The Court denied Penn Central’s takings claim by applying the principles set forth above. Considering the economic impact on Penn Central, the Court noted that the company could still make a “reasonable return” on its investment by continuing to use the facility as a rail terminal with office rentals and concessions, and the City specifically permitted owners of landmark sites to transfer to other sites the right to develop those sites beyond the otherwise permissible zoning restrictions, a valuable right that mitigated the burden otherwise to be

¹⁵ *Id.* (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency* 535 U.S. 302, 322 (2002)).

¹⁶ While observing that the “central dynamic of the Court’s regulatory takings jurisprudence . . . is its flexibility,” the Court in *Murr v. Wisconsin* reiterated the “two guidelines . . . for determining when government regulation is so onerous that it constitutes a taking.” *Id.* at 1942. First, with some qualifications, “a regulation which denies all economically beneficial or productive use of land will require compensation under the Takings Clause.” *Id.* (quoting *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001)). Second, if “a regulation impedes the use of property without depriving the owner of all economically beneficial use, a taking still may be found based on ‘a complex of factors,’ including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.” *Id.* at 1942–43 (quoting *Palazzolo*, 533 U.S. at 617).

¹ 438 U.S. 104 (1978). Justices William Rehnquist and John Paul Stevens and Chief Justice Warren Burger dissented. *Id.* at 138.

² *Id.* at 124 (citations omitted).

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suffered by the owner. As for the character of the governmental regulation, the Court found the landmarks law to be an economic regulation rather than a governmental appropriation of property, the preservation of historic sites being a permissible goal and one that served the public interest.³ *Penn Central's* economic impact standard also left room for Justice Oliver Wendell Holmes's observation in *Mahon* that “[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every . . . change in the general law.”⁴ Thus, the Court has held that a mere permit requirement does not amount to a taking,⁵ nor does a simple recordation requirement.⁶

Several times the Court has relied on the concept of “distinct [or, in later cases, ‘reasonable’] investment-backed expectations,” which it introduced in *Penn Central*, to analyze whether a taking had occurred. In *Ruckelshaus v. Monsanto Co.*,⁷ the Court used this concept to determine whether the government's disclosure of trade secret information submitted with applications for pesticide registrations resulted in a taking. The Court reasoned that disclosing data that had been submitted from 1972 to 1978, a period when the statute guaranteed confidentiality and thus “formed the basis of a distinct investment-backed expectation,” would have destroyed the property value of the trade secret and constituted a taking.⁸ Following 1978 amendments setting forth conditions of data disclosure, applicants who voluntarily submitted data in exchange for the economic benefits of registration had no reasonable expectation of additional protections of confidentiality.⁹

Rejecting an assertion that reasonable investment backed-expectations had been upset in *Connolly v. Pension Benefit Guaranty Corp.*,¹⁰ the Court upheld the government's retroactive imposition of liability for pension plan withdrawals. The Court reasoned that employers had at least constructive notice that Congress might buttress the legislative scheme to accomplish its legislative aim that employees receive promised benefits. However, where a statute imposes severe and “substantially disproportionate” retroactive liability based on conduct several decades earlier, on parties that could not have anticipated the liability, a taking (or violation of due process) may occur. On this rationale, the Court in *Eastern Enterprises v. Apfel*¹¹ enjoined applying the Coal Miner Retiree Health Benefit Act requirement that companies formerly engaged in mining pay certain miner retiree health benefits to a company that had spun off its mining operation in 1965, before collective bargaining agreements included an express

³ *Id.* at 124–28, 135–38.

⁴ Pa. Coal Co. v. Mahon, 260 U.S. 393, 413 (1922).

⁵ United States v. Riverside Bayview Homes, 474 U.S. 121 (1985) (requirement that permit be obtained for filling privately-owned wetlands is not a taking, although permit denial resulting in prevention of economically viable use of land may be).

⁶ Texaco v. Short, 454 U.S. 516 (1982) (state statute deeming mineral claims lapsed upon failure of putative owners to take prescribed steps is not a taking); United States v. Locke, 471 U.S. 84 (1985) (reasonable regulation of recordation of mining claim is not a taking).

⁷ 467 U.S. 986 (1984).

⁸ *Id.* at 1011.

⁹ *Id.* at 1006–07. Similarly, disclosure of data submitted before the confidentiality guarantee was placed in the law did not frustrate reasonable expectations, the Trade Secrets Act merely protecting against “unauthorized” disclosure. *Id.* at 1008–10.

¹⁰ 475 U.S. 211 (1986). *Accord* Concrete Pipe & Products v. Constr. Laborers Pension Tr., 508 U.S. 602, 645–46 (1993). See also *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (involving frustration of “expectancies” developed through improvements to private land and governmental approval of permits); *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) (characterizing and distinguishing *Kaiser Aetna* as involving interference with “reasonable investment backed expectations”).

¹¹ 524 U.S. 498 (1998). Although the plurality opinion announcing the judgment in *Eastern Enterprises* analyzed the case as a takings issue, five Justices in that case (one supporting the judgment and four dissenters) found substantive due process, not takings law, to provide the analytical framework where, as in *Eastern Enterprises*, the gravamen of the complaint is the unfairness and irrationality of the statute rather than its economic impact.

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promise of lifetime benefits. In 1998, the Court, however, sustained a federal ban on selling artifacts made from eagle feathers as applied to the existing inventory of a commercial dealer in such artifacts, while not directly addressing the ban’s interference with investment-backed expectations.¹² The Court merely noted that the ban served a substantial public purpose in protecting the eagle from extinction, that the owner still had viable economic uses for his holdings, such as displaying them in a museum and charging admission, and that he still had the value of possession.¹³

The Court has made plain that, in applying the economic impact and investment-backed expectations factors of *Penn Central*, courts should compare what the property owner has lost through the challenged government action with what the owner retains. Discharging this mandate requires a court to define the extent of plaintiff’s property—the “parcel as a whole”—that sets the scope of analysis.¹⁴ In *Murr v. Wisconsin*, the Court stated that, “[l]ike the ultimate question whether a regulation has gone too far, the question of the proper parcel in regulatory takings cases cannot be solved by any simple test. Courts must instead define the parcel in a manner that reflects *reasonable expectations* about the property.”¹⁵

In *Murr*, the owners of two small adjoining lots, previously owned separately, wished to sell one of their lots and build on the other. The landowners were prevented from doing so by state and local regulations, enacted to implement a federal Act, which effectively merged the lots when they came under common ownership prior to their purchase by the plaintiffs, thereby barring the separate sale or improvement of the lots. The plaintiff landowners therefore sought just compensation, alleging a regulatory taking of their property. In ruling against the landowners, the Supreme Court set forth a flexible multi-factor test for defining “the proper unit of property” to analyze whether a regulatory taking has occurred,¹⁶ whereby the boundaries of the parcel determine the “denominator of the fraction” of value taken from a property by a governmental regulation, which in turn can determine whether the government

¹² *Andrus v. Allard*, 444 U.S. 51 (1979).

¹³ The Court in *Goldblatt* had pointed out that the record contained no indication that the mining prohibition would reduce the value of the property in question. 369 U.S. 590, 594 (1962). *Contrast* *Hodel v. Irving*, 481 U.S. 704 (1987) (finding insufficient justification for a complete abrogation of the right to pass on to heirs interests in certain fractionated property). Note as well the differing views expressed in *Irving* as to whether that case limits *Andrus v. Allard* to its facts. *Id.* at 718 (Brennan, J., concurring), 719 (Scalia, J., concurring). *See also* *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027–28 (1992) (suggesting that *Allard* may rest on a distinction between permissible regulation of personal property, on the one hand, and real property, on the other).

¹⁴ The “parcel as a whole” analysis refers to the precept that takings law “does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated.” *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 130 (1978); *see also* *Concrete Pipe*, 508 U.S. at 644; *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987). In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, the Court affirmed the established spatial dimension of the doctrine, under which the court must consider the entire relevant tract, as well as the functional dimension, under which the court must consider plaintiff’s full bundle of rights. *See* 535 U.S. 302, 327 (2002). The spatial dimension is perhaps best illustrated by the analysis in *Penn Central*, wherein the Court declined to segment Grand Central Terminal from the air rights above it. 438 U.S. at 130. And the functional dimension of the parcel as a whole is demonstrated by the Court’s refusal in *Andrus v. Allard* to segment one “stick” in the plaintiff’s “bundle” of property rights in holding that denial of the right to sell Indian artifacts was not a taking in light of rights in the artifacts that were retained. 444 U.S. 51, 65–66 (1979). In *Tahoe-Sierra*, the Court also added a temporal dimension to the “parcel as a whole” analysis, under which a court considers the entire time span of plaintiff’s property interest. Invoking this temporal dimension, the Court held that temporary land-use development moratoria do not effect a total elimination of use because use and value return in the period following the moratorium’s expiration. *Tahoe-Sierra*, 535 U.S. at 327. Thus, such moratoria are to be analyzed under the ad hoc, multifactor *Penn Central* test, rather than a per se “total takings” approach.

¹⁵ *Murr v. Wisconsin*, 137 S. Ct. 1933, 1950 (2017) (internal citation omitted) (emphasis added).

¹⁶ *Id.* at 1943–46. In doing so, the Court rejected arguments for the adoption of “a formalistic rule to guide the parcel inquiry,” one that would “tie the definition of the parcel to state law.” *See id.* at 1946.

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has “taken” private property.¹⁷ Under this formula, regulators have an interest in a larger denominator—in the *Murr* case, combining the two adjoining lots—to reduce the likelihood of having to provide compensation, while property owners seeking to show that their property has been taken have an interest in the denominator being as small as possible. The *Murr* Court instructed that, in determining the parcel at issue in a regulatory takings case, “no single consideration can supply the exclusive test for determining the denominator. Instead, courts must consider a number of factors,” including (1) “the treatment of the land under state and local law”¹⁸; (2) “the physical characteristics of the land”¹⁹; and (3) “the prospective value of the regulated land.”²⁰

In *Penn Central*, the Court rejected the principle that no compensation is required when regulation bans a noxious or harmful effect of land use. The principle, the City contended, followed from several earlier cases, including *Goldblatt v. Town of Hempstead*.²¹ In that case, the town enacted an ordinance that in effect terminated further mining at a site owned by the plaintiff. Declaring that no compensation was owed, the Court stated that “[a] prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it, but is only a declaration by the State that its use by anyone, for certain forbidden purposes, is prejudicial to the public interests.”²² In *Penn Central*, however, the Court clarified the test on which prior cases had turned, stating “These cases are better understood as resting not on any supposed ‘noxious’ quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property.”²³ In *Lucas v. South Carolina Coastal Council*,²⁴ the Court further explained “noxious use” analysis as merely an early characterization of police power measures that do not require compensation. The Court noted, “[N]oxious use logic cannot serve as a touchstone to distinguish regulatory ‘takings’—which require compensation—from regulatory deprivations that do not require compensation.”²⁵

¹⁷ *Id.* at 1944 (“[B]ecause our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property ‘whose value is to furnish the denominator of the fraction.’ As commentators have noted, the answer to this question may be outcome determinative.” (quoting *Keystone*, 480 U.S. at 497)).

¹⁸ *Id.* at 1945 (“[C]ourts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law.”).

¹⁹ *Id.* (“[C]ourts must look to the physical characteristics of the landowner’s property. These include the physical relationship of any distinguishable tracts, the parcel’s topography, and the surrounding human and ecological environment. In particular, it may be relevant that the property is located in an area that is subject to, or likely to become subject to, environmental or other regulation.”).

²⁰ *Id.* at 1945, 1946 (“[C]ourts should assess the value of the property under the challenged regulation, with special attention to the effect of burdened land on the value of other holdings.”).

²¹ 369 U.S. 590 (1962). *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and, perhaps, *Miller v. Schoene*, 276 U.S. 272 (1928), also fall under this heading, although *Schoene* may also be assigned to the public peril line of cases.

²² 369 U.S. at 593 (quoting *Mugler v. Kansas*, 123 U.S. 623, 668–69 (1887)). The Court posited a two-part test. First, the interests of the public required the interference, and, second, the means were reasonably necessary for the accomplishment of the purpose and were not unduly oppressive of the individual. *Id.* at 595. The test was derived from *Lawton v. Steele*, 152 U.S. 133, 137 (1894), which held that state officers properly destroyed fish nets that were banned by state law in order to preserve certain fisheries from extinction.

²³ *Penn Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 133–34 n.30 (1978).

²⁴ 505 U.S. 1003 (1992).

²⁵ *Id.* at 1026. The *Penn Central* majority also rejected the dissent’s contention, 438 U.S. at 147–50, that regulation of property use constitutes a taking unless it spreads its distribution of benefits and burdens broadly so

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Amdt5.9.7
Per Se Takings and Exactions

Amdt5.9.7 Per Se Takings and Exactions

Fifth Amendment:

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

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

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

that each person burdened has at the same time the enjoyment of the benefit of the restraint upon his neighbors. The Court deemed it immaterial that the landmarks law has a more severe impact on some landowners than on others: “Legislation designed to promote the general welfare commonly burdens some more than others.” *Id.* at 133–34.

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.”

⁵ 447 U.S. 255, 260 (1980).

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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 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

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).

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

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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 community—at least in the context of adjudicated (rather than legislated) conditions. 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

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.*,²² 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,

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).

²¹ *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606–07 (2013).

²² 526 U.S. 687 (1999).

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or only to physically invasive dedication conditions.²³ 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.²⁴

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.²⁵

Amdt5.9.8 Calculating Just Compensation

Fifth Amendment:

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

The Supreme Court has held that the Fifth Amendment's just compensation requirement provides for "a full and perfect equivalent for the property taken."¹ Just compensation is measured "by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future, . . . [but] 'mere possible or imaginary uses or the speculative schemes of its proprietor, are to be excluded.'"² The general standard thus is the market value of the property,

²³ A strong hint that monetary exactions are indeed outside *Nollan/Dolan* was provided in *Lingle v. Chevron United States 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.

²⁴ *Koontz*, 570 U.S. 595.

²⁵ *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).

¹ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 326 (1893). The owner's loss, not the taker's gain, is the measure of such compensation. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 236 (2003); *United States ex rel. TVA v. Powelson*, 319 U.S. 266, 281 (1943); *United States v. Miller*, 317 U.S. 369, 375 (1943). The value of the property to the government for its particular use is not a criterion. *United States v. Chandler-Dunbar Co.*, 229 U.S. 53 (1913); *United States v. Twin City Power Co.*, 350 U.S. 222 (1956). Attorneys' fees and expenses are not embraced in the concept. *Dohany v. Rogers*, 281 U.S. 362 (1930).

Applying the owner's-loss standard, the Court addressed a state program requiring lawyers to deposit client funds that cannot earn net interest in a pooled account generating interest for indigent legal aid. *Brown*, 538 U.S. at 237. Assuming a taking of the client's interest, his pecuniary loss is nonetheless zero; hence, the just compensation required is likewise. *Brown* is in tension with the Court's earlier treatment of a similar state program, where it recognized value in the possession, control, and disposition of the interest. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 170 (1998).

² *Chi. B. & Q. R.R. v. City of Chi.*, 166 U.S. 226, 250 (1897); *See McGovern v. City of N.Y.*, 229 U.S. 363, 372 (1913). *See also Boom Co. v. Patterson*, 98 U.S. 403 (1879); *McCandless v. United States*, 298 U.S. 342 (1936).

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Calculating Just Compensation

i.e., what a willing buyer would pay a willing seller.³ If fair market value does not exist or cannot be calculated, resort must be had to other data which will yield a fair compensation.⁴ However, the Court has resisted alternative standards, having repudiated reliance on the cost of substitute facilities.⁵ Just compensation is especially difficult to compute in wartime, when enormous disruptions in supply and governmentally imposed price ceilings totally skew market conditions. In an early case concerning a takings case under the Pennsylvania constitution, the Court required that the equivalent be in money, not in kind,⁶ but in its 1974 decision, *Regional Rail Reorganization Act Cases*, the Court provided for greater flexibility in the form of compensation recognized.⁷

In two postwar decisions, the Court held that the rule of market value applies even where value is measured by a government-fixed ceiling price. Thus, owners of cured pork and of black pepper could recover only the ceiling price for their commodities despite findings by the Court of Claims that the products had value in excess of their regulatory price ceilings.⁸ However, the Court has also ruled that the government was not obliged to pay the market value of a tug when the present value had been greatly enhanced as a consequence of the government's wartime needs, instead requiring the government only to pay the value prior to the events that necessitated its use.⁹

The difficulties in applying the fair market standard of just compensation are illustrated by two cases decided in the same year by 5-4 votes, one in which compensation was awarded and one in which it was denied. One decision held that a company was entitled to compensation for the value of improvements on leased property for the life of the improvements and not simply for the remainder of the term of the lease that had no renewal option, because the company occupied the land for nearly fifty years and had every expectancy of continued occupancy under a new lease. Just compensation, the Court said, required taking into account the possibility that the lease would be renewed, inasmuch as a willing buyer and a willing seller would certainly have placed a value on the possibility.¹⁰ However, when the Federal Government condemned privately owned grazing land of a rancher who had leased adjacent federally owned grazing land, it was held that the compensation owed need not include the value attributable to the proximity to the federal land. The result would have been different if the adjacent grazing land had been privately owned, but the general rule is that government need not pay for value that it itself creates.¹¹

³ *Miller*, 317 U.S. at 374; *Powelson*, 319 U.S. at 275. *See also* *United States v. New River Collieries Co.*, 262 U.S. 341 (1923); *Olson v. United States*, 292 U.S. 264 (1934); *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949). Exclusion of the value of improvements made by the government under a lease was held constitutional. *Old Dominion Land Co. v. United States*, 269 U.S. 55 (1925).

⁴ *Miller*, 317 U.S. at 374.

⁵ *United States v. 564.54 Acres of Land*, 441 U.S. 506 (1979) (condemnation of church-run camp); *United States v. 50 Acres of Land*, 469 U.S. 24 (1984) (condemnation of city-owned landfill). In both cases the Court determined that market value was ascertainable.

⁶ *Van Horne's Lessee v. Dorrance*, 2 U.S. (2 Dall.) 304, 315 (C.C. Pa. 1795) ("No just compensation can be made except in money."); *Miller*, 317 U.S. at 373 ("Such compensation means the full and perfect equivalent money of the property taken.")

⁷ *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 150–51 (1974) ("No decision of this Court holds that compensation other than money is an inadequate form of compensation under eminent domain statutes.")

⁸ *United States v. Felin & Co.*, 334 U.S. 624 (1948); *United States v. Commodities Trading Corp.*, 339 U.S. 121 (1950). *See also* *Vogelstein & Co. v. United States*, 262 U.S. 337 (1923)

⁹ *United States v. Cors*, 337 U.S. 325 (1949). *See also* *United States v. Toronto Navigation Co.*, 338 U.S. 396 (1949).

¹⁰ *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973).

¹¹ *United States v. Fuller*, 409 U.S. 488 (1973).

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Amdt5.9.9

Consequential Damages

Amdt5.9.9 Consequential Damages

Fifth Amendment:

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

The Fifth Amendment requires compensation for the taking of “property;” it does not require payment for losses or expenses incurred by property owners or tenants incidental to or as a consequence of the taking of real property, if those losses or expenses are not reflected in the market value of the property taken.¹ The Court has stated that when the government takes property by eminent domain it must compensate the property owner “for what is taken, not more; and [the property owner] must stand whatever indirect or remote injuries are properly comprehended within the meaning of ‘consequential damage’ as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress.”² The Court held, for example, that business owners may not recoup diminution of the value of their business attributed to a taking,³ that the government was not required to incorporate the value of an unused right to exercise eminent domain to seize neighboring acreage when taking the underlying property,⁴ and that a state law barring utilities from incorporating into their rates certain costs associated with construction of non-operational nuclear power facilities did not constitute a taking.⁵

The Court has on occasion carved out exceptions of sorts to this strict rule. For example, in *Kimball Laundry Co. v. United States*, the government seized a tenant’s laundry plant for the duration of the war, which turned out to be less than the full duration of the lease, and, having no other means of serving its customers, the laundry suspended business during the military occupancy. The Court narrowly held that the government must compensate for the loss in value of the business attributable to the destruction of its “trade routes,” that is, for the loss of customers, whose patronage the laundry had developed over the years.⁶ Another exception to the general rule occurs with a partial taking, in which the government takes less than the entire parcel of land and leaves the owner with a portion of what he had before; in such a case compensation includes any diminished value of the remaining portion (“severance damages”) as well as the value of the taken portion.⁷

¹ *Mitchell v. United States*, 267 U.S. 341 (1925); *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943); *United States v. Petty Motor Co.*, 327 U.S. 372 (1946). For consideration of the problem of fair compensation in government-supervised bankruptcy reorganization proceedings, see *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935); *New Haven Inclusion Cases*, 399 U.S. 392, 489–95 (1970).

² *United States v. Gen. Motors Corp.*, 323 U.S. 373, 382 (1945).

³ *Mitchell v. United States*, 267 U.S. 341 (1925).

⁴ *United States ex rel. TVA v. Powelson*, 319 U.S. 266 (1943).

⁵ *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

⁶ 338 U.S. 1 (1949). See also *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (in temporary seizure, Government must compensate for losses attributable to increased wage payments by the Government).

⁷ *United States v. Miller*, 317 U.S. 369, 375–76 (1943). “On the other hand,” the Court added, “if the taking has in fact benefited the remainder, the benefit may be set off against the value of the land taken.” *Id.*

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Amdt5.9.10

Enforcing Right to Just Compensation

Amdt5.9.10 Enforcing Right to Just Compensation

Fifth Amendment:

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

Ordinarily, the government takes property under a condemnation suit upon paying a money award, and no interest accrues.¹ If, however, the government takes property before making payment, just compensation includes an increment which, to avoid use of the term “interest,” the Court has called “an amount sufficient to produce the full equivalent of that value paid contemporaneously with the taking.”² If the owner and the government enter into a contract which stipulates the purchase price for lands to be taken, with no provision for interest, the Fifth Amendment is inapplicable and the landowner cannot recover interest even though payment of the purchase price is delayed.³ Where property of a citizen has been mistakenly seized by the government and converted into money which is invested, the property owner is entitled to recover compensation that incorporates increases to the property value during the period of seizure.⁴

The legislature has discretion over the nature and character of the tribunal to determine compensation and may select a regular court, a special legislative court, a commission, or an administrative body.⁵ The Government brings proceedings to condemn land for the benefit of the United States in the federal district court for the district in which the land is located.⁶ The Fifth Amendment does not establish a right to a jury to estimate just compensation; a judge, commission, or other body may make such determinations.⁷ Federal courts may appoint a commission in condemnation actions to resolve the compensation issue.⁸ If a body other than a court is designated to determine just compensation, its decision must be subject to judicial review,⁹ although the legislature may limit the scope of review.¹⁰ When a state court’s

¹ *Danforth v. United States*, 308 U.S. 271, 284 (1939); *Kirby Forest Industries v. United States*, 467 U.S. 1 (1984) (no interest due in straight condemnation action for period between filing of notice of *lis pendens* and date of taking).

² *United States v. Klamath Indians*, 304 U.S. 119, 123 (1938); *Jacobs v. United States*, 290 U.S. 13, 17 (1933); *Kirby Forest Industries*, 467 U.S. 1 (substantial delay between valuation and payment necessitates procedure for modifying award to reflect value at time of payment).

³ *Albrecht v. United States*, 329 U.S. 599 (1947).

⁴ *Henkels v. Sutherland*, 271 U.S. 298 (1926); *see also Phelps v. United States*, 274 U.S. 341 (1927).

⁵ *United States v. Jones*, 109 U.S. 513 (1883); *Bragg v. Weaver*, 251 U.S. 57 (1919).

⁶ 28 U.S.C. § 1403. Inverse condemnation actions (claims that the United States has taken property without compensation) are governed by the Tucker Act, 28 U.S.C. § 1491 (a)(1), which vests the Court of Federal Claims (formerly the Claims Court) with jurisdiction over claims against the United States “founded . . . upon the Constitution.” *See E. Enters. v. Apfel*, 524 U.S. 498, 520 (1998). Federal district courts may also hear inverse condemnation claims against the United States not in excess of \$10,000 under the “Little Tucker Act.” 28 U.S.C. § 1346(a)(2).

⁷ *Bauman v. Ross*, 167 U.S. 548 (1897). Even when a jury determines the amount of compensation, it is the rule, at least in federal court, that the trial judge instructs the jury on the criteria, which includes determining “all issues” other than the compensation amount, so that the judge decides those matters underlying the jury’s calculation. *United States v. Reynolds*, 397 U.S. 14 (1970).

⁸ Fed. R. Civ. P. 71.1(h). These commissions have the same powers as a court-appointed master.

⁹ *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 327 (1893).

¹⁰ *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685 (1897).

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Amdt5.9.10

Enforcing Right to Just Compensation

judgment to the amount of compensation is questioned, the Court's review is restricted. The Court has stated: "All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made as to the amount of compensation, and when this has been provided there is that due process of law which is required by the Federal Constitution."¹¹ The Court has also recognized that "[T]here must be something more than an ordinary honest mistake of law in the proceedings for compensation before a party can make out that the State has deprived him of his property unconstitutionally."¹² Unless, by its rulings of law, the state court prevented a complainant from obtaining substantially any compensation, the Court will not overturn the state court findings as to the amount of damages on appeal, even though, as a consequence of error therein, the property owner received less than he was entitled to.¹³

Following *Penn Central*, the Court grappled with the appropriate remedy for property owners impacted by land use regulations.¹⁴ Regulations that go "too far" in reducing the value of property or which do not substantially advance a legitimate governmental interest present constitutional issues. Courts may invalidate such regulations as denying due process, or they may require compensation, at least for the period in which the regulation was in effect. In *First English Evangelical Lutheran Church v. County of Los Angeles*, the Court held that when land use regulation constitutes a taking, compensation is due for the period of implementation prior to the holding.¹⁵ The Court recognized that, even though government may elect in such circumstances to discontinue regulation and thereby avoid compensation for a permanent property deprivation, "no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective."¹⁶ Outside the land-use context, however, the Court has recognized a limited number of situations where invalidation, rather than compensation, remains the appropriate takings remedy.¹⁷

The applicability of the ripeness doctrine to takings claims is an area the Court has developed extensively since *Penn Central*. In *Williamson County Regional Planning Commission v. Hamilton Bank*,¹⁸ the Court announced a two-part ripeness test for takings actions brought in federal court, although the Court subsequently overturned the second part of this test in *Knick v. Township of Scott*.¹⁹ The *Williamson County* two-part ripeness test provided, first, for an as-applied challenge, the property owner must obtain from the regulating agency a "final, definitive position" regarding how it will apply its regulation to the owner's land²⁰ and, second, when suing a state or municipality, the owner must exhaust any possibilities for obtaining compensation from the state or its courts before coming to federal

¹¹ *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 569 (1898).

¹² *McGovern v. City of N.Y.*, 229 U.S. 363, 370–71 (1913).

¹³ *Id.* at 371. *See also* *Provo Bench Canal Co. v. Tanner*, 239 U.S. 323 (1915); *Appleby v. City of Buffalo*, 221 U.S. 524 (1911).

¹⁴ *See, e.g.*, *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (issue not reached because property owners challenging development density restrictions had not submitted a development plan); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 293–97 (1981), and *Hodel v. Indiana*, 452 U.S. 314, 333–36 (1981) (rejecting facial taking challenges to federal strip mining law).

¹⁵ 482 U.S. 304 (1987).

¹⁶ *Id.* at 321.

¹⁷ *E. Enters. v. Apfel*, 524 U.S. 498 (1998) (statute imposing generalized monetary liability); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (amended statutory requirement that small fractional interests in allotted Indian lands escheat to tribe, rather than pass on to heirs); *Hodel v. Irving*, 481 U.S. 704 (1987) (pre-amendment version of escheat statute).

¹⁸ 473 U.S. 172 (1985).

¹⁹ 139 S. Ct. 2162, 2179 (2019).

²⁰ *Williamson Cty.*, 473 U.S. at 191.

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court.²¹ Thus, in *Williamson County*, the Court found the claim unripe because the plaintiff had failed to seek a variance (first prong of the *Williamson County* test), and had not sought compensation from the state courts in question even though they recognized inverse condemnation claims (second prong of the *Williamson County* test).²² Similarly, in *MacDonald, Sommer & Frates v. County of Yolo*,²³ the Court found a final decision lacking where the landowner was denied approval for one subdivision plan calling for intense development, but the possibility of approval for a scaled-down (though still economic) version remained. In a somewhat different context, the Court considered a taking challenge to a municipal rent control ordinance “premature” in the absence of evidence that a tenant hardship provision had been applied to reduce what would otherwise be considered a reasonable rent increase.²⁴

Beginning with *Lucas* in 1992, however, the Court’s ripeness determinations have displayed an impatience with formalistic reliance on the *Williamson County* “final decision” rule, while nonetheless explicitly reaffirming it. In *Palazzolo v. Rhode Island*,²⁵ for example, the Court did not require the landowner to apply for approval of a scaled-down development of his wetland, since the regulations at issue permitted no development of the wetland. The Court stated: “[O]nce it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened.”²⁶ Facial challenges dispense with the *Williamson County* “final decision” prerequisite, although unless claimants have pursued administrative remedies, they often lack evidence that a statute has the requisite economic impact on his or her property.²⁷

As noted previously, the Supreme Court eliminated the second prong of the *Williamson County* test, which required litigants to exhaust state remedies before bringing a federal takings claim,²⁸ because the “exhaustion requirement” had significant consequences for plaintiffs.²⁹ In *San Remo Hotel, L.P. v. City & County of San Francisco*, the plaintiffs lost an inverse condemnation claim in state court after a federal court dismissed their earlier attempt to file in federal court, citing *Williamson County*’s exhaustion requirement.³⁰ When the litigants attempted to return to federal court, the court dismissed their claim, holding that the legal doctrine of issue preclusion prevented the court from relitigating the claim.³¹ Under common-law preclusion doctrines, which are “implemented by” the federal full faith and credit statute,³² federal courts are, in some circumstances, required to abide by state court decisions

²¹ *Id.* at 195.

²² *Id.* at 194, 196–97.

²³ 477 U.S. 340 (1986).

²⁴ *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

²⁵ 533 U.S. 606 (2001).

²⁶ *Id.* at 620. *See also* *Suitum v. Tahoe Reg’l Planning Agency*, 520 U.S. 725 (1997) (taking claim ripe despite plaintiff’s not having applied for sale of her transferrable development rights, because no discretion remains to agency and value of such rights is a simple issue of fact).

²⁷ *See, e.g.*, *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 295–97 (1981) (facial challenge to surface mining law rejected); *United States v. Riverside Bayview Homes*, 474 U.S. 121, 127 (1985) (mere permit requirement does not itself take property); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 493–502 (1987) (facial challenge to anti-subsidence mining law rejected).

²⁸ *Williamson Cty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985).

²⁹ *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2169 (2019).

³⁰ 545 U.S. 323, 331–32 (2005).

³¹ *Id.* at 334–35.

³² 28 U.S.C. § 1738 (“[J]udicial proceedings . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.”).

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that have already resolved the issues presently before the federal court.³³ In *San Remo*, the Supreme Court held that these preclusion doctrines barred the plaintiffs' takings claim, declining to create any special exceptions in the context of the Takings Clause.³⁴ Thus, as the Court later described this outcome, "[t]he adverse state court decision that . . . gave rise to a ripe federal takings claim simultaneously barred that claim."³⁵

The Court overruled *Williamson County*'s exhaustion requirement in *Knick v. Township of Scott*,³⁶ holding that property owners have a "Fifth Amendment right to full compensation" and a concomitant right to bring a federal suit at the time the government takes their property, "regardless of post-taking remedies that may be available to the property owner."³⁷ The Court said its cases had long established that a right to compensation "arises at the time of the taking," and that *Williamson County*'s conclusion otherwise had rested on a misunderstanding of precedent.³⁸ The Supreme Court concluded that *Williamson County* was wrongly decided and that stare decisis considerations did not preclude it from overruling the exhaustion aspects of that decision.³⁹ In its 2021 decision, *Pakdel v. City & County of San Francisco*, the Court confirmed that property compensation need not exhaust avenues for compensation in state court prior to bringing a claim in federal court.⁴⁰

³³ *San Remo*, 545 U.S. at 336.

³⁴ *Id.* at 338.

³⁵ *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2169 (2019).

³⁶ *Id.* at 2179.

³⁷ *Id.* at 2170, 2173.

³⁸ *Id.* at 2170, 2173–75.

³⁹ *Id.* at 2177.

⁴⁰ *Pakdel v. City & Cnty. of S.F.*, No. 20-1212 (U.S. June 28, 2021).