ARTICLE I
LEGISLATIVE BRANCH

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ARTICLE I—LEGISLATIVE BRANCH

ArtI.1 Overview of Article I, Legislative Branch

Article I of the U.S. Constitution establishes the Legislative Branch of the federal government. Section 1, the Legislative Vesting Clause, provides that all federal legislative powers are vested in the Congress.[1] As the Supreme Court stated in 1810, "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society."[2] One influential legal scholar in 1826 described "[t]he power of making laws" as "the supreme power in a state."[3] As discussed elsewhere, however, the Founders limited Congress's power by only vesting the legislative powers "herein granted" by the Constitution, by creating a bicameral legislature, and by creating checks in the other branches.[4]

Section 2 of Article I outlines the makeup and certain unique powers of the House of Representatives, and Section 3 does the same for the Senate. Sections 4 through 6 address procedural matters common to the two Houses, including elections, assembly and adjournment, legislative procedures, and certain privileges and limitations on Members.

As mentioned, the Constitution does not grant Congress "plenary legislative power but only certain enumerated powers."[5] Sections 7 and 8 outline the exercise of those enumerated powers. Section 7 addresses the procedures for enacting legislation, including special provisions for bills raising revenue, and the general requirements of bicameralism and presentment—the need for a bill to pass both Houses of Congress and be presented to the President for signature.[6] Section 8 enumerates Congress's specific legislative authorities, including the power to tax and spend, to borrow money, to regulate interstate commerce, to establish uniform rules on naturalization and bankruptcy, to coin money, to punish counterfeiters, to establish post offices, to regulate intellectual property, to establish courts, to punish maritime crimes, to declare war, to raise and support armies, to govern enclaves, and to make other laws "necessary and proper" for executing these enumerated powers.

Section 9 *denies* certain powers to Congress, including by restricting the slave trade; generally denying the ability to suspend the writ of habeas corpus; prohibiting bills of attainder and ex post facto laws; restricting direct taxes, export taxes, and appropriations; prohibiting ports preferences; and prohibiting titles of nobility and foreign emoluments. Section 10 denies certain powers to the *states*, including by preventing states from entering into treaties, issuing bills of credit or coining money; prohibiting bills of attainder, ex post facto laws, or laws impairing the obligations of contracts; and by restricting states' ability to impose duties on imports or exports. Section 10 also provides that states may not take certain actions without Congress's consent, including laying duties of tonnage, keeping troops or engaging in war, or entering into compacts with other states or foreign powers.

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[1] *See* ArtI.S1.1 Overview of Legislative Vesting Clause.

[2] Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 136 (1810).

[3] 1 James Kent, Commentaries on American Law (1826), https://press-pubs.uchicago.edu/founders/documents/a1_1s10.html.

[4] *See* ArtI.S1.2.1 Origin of Limits on Federal Power; ArtI.S1.2.2 Origin of a Bicameral Congress.

[5] Murphy v. NCAA, No. 16-476, slip op. at 15 (U.S. May 14, 2018).

[6] ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills.

Section 1—Legislative Vesting Clause

ArtI.S1.1 Overview of Legislative Vesting Clause

Article I, Section 1:

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

The Legislative Vesting Clause of the Constitution grants specific and limited legislative powers[1] to a bicameral Congress of the United States, which is composed of a House of Representatives and Senate.[2] As such, the Legislative Vesting Clause and the coordinate Executive and Judicial Vesting Clauses delineate the powers the Framers accorded the U.S. Government's Legislative, Executive, and Judicial Branches.

Historical sources from the decades leading up to the ratification of the Constitution suggest that the Legislative Vesting Clause would have been understood to: (1) limit the powers of Congress to those expressly granted in the nation's founding document; (2) diffuse legislative power by creating a legislature with two chambers; and (3) limit the extent to which the other branches of government could exercise legislative power.[3] Although documents authored by, known to, or relied upon by the Founders support these three interrelated purposes of the Legislative Vesting Clause, scholars continue to debate whether the Framers or others alive at the time of the Founding would have understood the Clause to prohibit Congress from empowering the other branches of government or private entities to govern private conduct.[4]

ArtI.S1.2 Historical Background

ArtI.S1.2.1 Origin of Limits on Federal Power

Article I, Section 1:

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

The Legislative Vesting Clause begins by providing that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[1] The decision of the Framers of the

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[1] At least one of the Framers defined "legislative power" as the power to "prescribe rules for the regulation of society." The Federalist No. 75 (Alexander Hamilton). *See also* John Locke, Two Treatises of Government 382 (Peter Laslett ed., Cambridge Univ. Press 1967) (1690) (defining the legislative power as "that which has a right to direct how the Force of the Commonwealth shall be imploy'd for preserving the Community and the Members of it.").

[2] U.S. Const. art. I, §§ 1, 8. In *McCulloch v. Maryland*, the Supreme Court stated that the Constitution created a government of enumerated powers. 17 U.S. (4 Wheat.) 316, (1819) ("This government is acknowledged by all, to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments, which its enlightened friends, while it was depending before the people, found it necessary to urge; that principle is now universally admitted.").

[3] *See, e.g.*, Baron Charles de Montesquieu, Spirit of Laws (1748); John Locke, Two Treatises of Government (Peter Laslett ed., Cambridge Univ. Press 1967) (1690); David Hume, Of the Original Contract (1752); Marchamont Nedham, The Excellence of a Free State (1656); William Blackstone, Commentaries on the Laws of England (1765).

[4] *Compare* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1733–34 (2002) ("[T]here's remarkably little evidence that the Framers envisioned [a nondelegation constraint] on legislative authority. . . . The Framers' principal concern was with legislative aggrandizement—the legislative seizure of powers belonging to other institutions—rather than with legislative grants of statutory authority to executive agents."), *with* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 334 (2002) ("If one is concerned about the original meaning of the Constitution, the widespread modern obsession with the nondelegation doctrine may have some justification.").

[1] U.S. Const. art. I, § 1.

Constitution to limit Congress's powers to those "herein granted"—or, in other words, those specifically enumerated in the Constitution—reflects their experience as colonists living under the rule of the powerful British Parliament of the 1700s. The English jurist William Blackstone, writing only two decades before the American Revolution, described the British Parliament as possessing wide-ranging powers to enact legislation affecting each individual's life, liberty, and property[2] that no other governmental authority could effectively amend or repeal.[3] Although the British King could give his assent to laws, exercise some limited legislative powers in making treaties, and enforce the laws, the King could not make law without Parliament.[4] As a result, only Parliament had the power to undo or change the laws it had made, leaving the British people either to petition Parliament for changes to undesirable laws or take the extreme step of overthrowing their government.[5]

The Framers rejected this form of "parliamentary supremacy," believing that a national legislature should not exercise the "absolute despotic power"[6] of government without limitation.[7] Indeed, scholars have noted that some of the major grievances prompting the American Revolution concerned various Acts of the British Parliament that violated the colonists' rights (e.g., the right to trial by jury), which "were guaranteed specifically to the colonists by means of colonial charters."[8] Consequently, to preserve individual liberty, the Framers specifically limited the federal legislative power to those powers expressly mentioned in the Constitution and the power to "make all Laws which shall be necessary and proper" to carry out the Federal Government's limited powers.[9] As James Wilson argued during the

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[2] 1 William Blackstone, Commentaries 159–60 (Philadelphia 1893) (1768) ("[The Parliament] hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations. . . . All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal."). *But see id.* at 335–36 (suggesting that the Crown's powers, including collecting taxes and commanding a standing army, indicated that the "*real* power of the crown has not been too far weakened by any transactions in the last century").

[3] *Id.* at 160 ("True it is, that what the parliament doth, no authority upon earth can undo . . . .").

[4] The Federalist No. 47 (James Madison) ("The executive magistrate forms an integral part of the legislative authority. He alone has the prerogative of making treaties with foreign sovereigns, which when made have, under certain limitations, the force of legislative acts . . . . [But] [t]he magistrate in whom the whole executive power resides cannot of himself make a law . . . "). The understanding that the King could not both make and enforce laws governing the rights and duties of private individuals had a lengthy pedigree in the British common law tradition, with "ancient roots in the concept of the 'rule of law'" (i.e., the notion that the King, too, was subject to the statutory and common law of the land when exercising his powers). *See* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 66–76 (2015) (Thomas, J., concurring) (discussing the history of the separation of executive and legislative power in the British common law tradition).

[5] 1 Blackstone, *supra* note 2, at 160 ("No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation . . . ").

[6] *Id.* at 159.

[7] *See, e.g.*, The Federalist No. 83 (Alexander Hamilton) ("[T]he power of Congress . . . shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretention to a general legislative authority; because an affirmative grant of special powers would be absurd as well as useless, if a general authority was intended."); The Federalist No. 48 (James Madison) ("[I]n a representative republic, where the executive magistracy is carefully limited both in the extent and the duration of its power; and where the legislative power is exercised by an assembly . . . it is against the enterprising ambition of [the legislative] department, that the people ought to indulge all their jealousy and exhaust all their precautions."); 3 Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 95 (2d ed. 1836) (James Madison) (stating that the "powers of the federal government are enumerated").

[8] Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1699 (2012).

[9] U.S. Const. art. I, §§ 1, 8.

Pennsylvania ratification convention, "to control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states."[10]

The Legislative Vesting Clause and the other text of Article I thus served as an ostensible limitation on Congress's legislative power. Nonetheless in the post-Convention debates over ratification of the Constitution, Anti-Federalists raised concerns that these textual limitations would fail to prevent Congress from growing too powerful.[11] In an effort to assuage these concerns, Alexander Hamilton, who supported ratification of the Constitution, argued that the courts could enforce the Constitution's limitations on Congress's powers by declaring a legislative act in excess of such powers to be void.[12] And indeed, less than two decades after the ratification of the Constitution, the Supreme Court asserted its authority to review the constitutionality of legislative acts, and to declare void those provisions of legislation that violated the Constitution, in a case or controversy properly before the Court.[13] Thus, the Legislative Vesting Clause of the U.S. Constitution reflects a departure from the British legal tradition of "parliamentary supremacy" because it provided external limitations on the power of Congress.

ArtI.S1.2.2 Origin of a Bicameral Congress

Article I, Section 1:

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

The Framers of the Constitution aimed to limit Congress's power further by specifying in the Legislative Vesting Clause that Congress would be a bicameral institution composed of a House of Representatives and Senate. Although Congress's bicameral structure was a departure from the unicameral legislature comprised of state delegations under the Articles of Confederation,[1] the Framers had significant experience with bicameral legislatures. Under British rule, colonists were subject to law enacted by the bicameral Parliament of Great Britain, where the hereditary aristocracy was represented in the House of Lords and the freeholders of the land were represented in the House of Commons.[2] Further, many of the

[10] 2 Elliot, *supra* note 7, at 432.

[11] Brutus No. I (Oct. 18, 1787), *reprinted in* The Debate on the Constitution: Federalist and Anti-Federalist Speeches, Articles and Letters During the Struggle Over Ratification, Part One: September 1787–February 1788 (Bernard Bailyn ed., 1993) ("The powers of the general legislature extend to every case that is of the least importance—there is nothing valuable to human nature, nothing dear to freemen, but what is within its power.").

[12] The Federalist No. 78 (Alexander Hamilton) ("Limitations [on legislative power] can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.").

[13] Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176–77 (1803) ("The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. . . . Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void."). Further checks on congressional power in the Constitution include the President's qualified veto power over legislation. *See* 2 The Records of the Federal Convention of 1787, at 52–53 (Max Farrand ed., 1966) (Madison's notes, July 19, 1787) (statement of Mr. Gouverneur Morris) (arguing that the President's veto power would permit the President to serve as the "guardian of the people" against "[l]egislative tyranny").

[1] Articles of Confederation of 1781, art. V, para. 4. For more information about the Articles of Confederation, see Intro.6.1 Continental Congress and Adoption of the Articles of Confederation.

[2] *See, e.g.*, 1 The Records of The Federal Convention of 1787, at 196, 198, 484–85 (Max Farrand ed., 1911) (discussing the House of Lords and House of Commons as a possible model for Congress).

Framers of the Constitution were governed by their bicameral state legislatures. Following the Declaration of Independence in 1776, all the states but Georgia, Pennsylvania, and Vermont established bicameral legislatures.[3]

The Constitutional Convention[4] was assembled in 1787, in part, to restructure the national unicameral legislature and to address the "defects" of the Articles of Confederation.[5] Congress, under the Articles, had no direct means to implement or compel compliance with its laws.[6] For example, Congress lacked the power to levy duties, to tax individuals directly, and to regulate interstate commerce.[7] The Articles, recognizing the states' "sovereignty, freedom, and independence," retained for the states all powers not expressly delegated to Congress.[8] As a result, Congress, among other things, was unable to stop states from adopting "discriminatory and retaliatory" trade practices among the states.[9]

However, in seeking to strengthen federal legislative power over states and individuals, the Framers were also concerned that a single legislative body with unchecked and concentrated power would threaten individual liberties.[10] James Wilson, representing Pennsylvania at the Convention, cautioned that "[i]f the Legislative authority be not restrained, there can be no liberty nor stability."[11] In supporting a bicameral Congress, he remarked that legislative power "can only be restrained by dividing it within itself, into distinct and independent branches. In a single house there is no check, but the inadequate one, of the virtue [and] good sense of those who compose it."[12]

In debating the new structure of Congress, the Convention considered several proposals.[13] Much of the debate focused on two proposals—the Virginia Plan and the New Jersey Plan.[14] Virginia Governor Edmund Randolph presented the Virginia Plan that proposed three separate branches of government—legislative, executive, and judicial.[15] The Legislative

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[3] James Quayle Dealey, Growth of American State Constitutions 37 (1915).

[4] For discussion of the Constitutional Convention, see Intro.6.1 Continental Congress and Adoption of the Articles of Confederation.

[5] *See* New York v. United States, 505 U.S. 144, 163 (1992) (citing The Federalist Nos. 15, 16 (Alexander Hamilton)); *see also* 1 The Records of The Federal Convention of 1787, *supra* note 2, at 18 (Edmund Randolph, in opening the Constitutional Convention, "observed that in revising the federal system we ought to inquire 1. into the properties, which such a government ought to possess, 2. the defects of the confederation, 3. the danger of our situation &. 4. the remedy.").

[6] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1447 (1987).

[7] Articles of Confederation of 1781, art. V. *See also* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1442, 1447 (1987) (discussing the lack of Federal Government power under the Articles).

[8] Articles of Confederation of 1781, art. II.

[9] For example, New York, in an effort to capitalize on its position as a port of entry, imposed duties on goods imported by nearby states. In retaliation, these states enacted taxes on commerce with New York. Robert N. Clinton, *A Brief History of the Adoption of the United States Constitution*, 75 Iowa L. Rev. 891, 896 (1990).

[10] *See e.g.*, 2 The Records of The Federal Convention of 1787, *supra* note 2, at 74 (statement of James Madison on July 21, 1787) ("Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex."); *id.* at 76 (concurring that "public liberty [was] in greater danger from Legislative usurpations than from any other source") (statement of Mr. Gouverneur Morris). *See also* The Federalist No. 48 (James Madison) (describing how the concentration of "[a]ll the powers of government, legislative, executive, and judiciary" in Virginia's legislative body "is precisely the definition of despotic government"); 4 John Adams, Thoughts on Government, *in* The Works of John Adams 195 (Charles F. Adams ed., 1851) ("A single [legislative] assembly is liable to all the vices, follies, and frailties of an individual; subject to fits of humor, starts of passion, flights of enthusiasm, partialities, or prejudice, and consequently productive of hasty results and absurd judgments."); Gordon S. Wood, Creation of the American Republic 1776–1787, at 404–13 (1969) (discussing concerns related to state governments).

[11] 1 The Records of The Federal Convention of 1787, *supra* note 2, at 254.

[12] *Id.*

[13] *See, e.g.*, *id.* at 20–22 (The Virginia Plan); *id.* at 242–45 (The New Jersey Plan); *id.* at 23 (The Pinkney Plan).

[14] New York v. United States, 505 U.S. 144, 164 (1992).

[15] 1 The Records of The Federal Convention of 1787, *supra* note 2, at 21–22.

Branch under the Virginia Plan would consist of a bicameral body in which each state would have a different number of representatives based on the state's population.[16] In addition, the Virginia Plan allowed Congress to exercise legislative authority over individuals, removing the constraint under the Articles that the state legislatures act as intermediaries to implement enacted legislation.[17] The Virginia Plan was principally favored by the larger states that embraced the notion that the view of the majority of the Nation's population should prevail in the national legislature.[18]

As an alternative to the Virginia Plan, William Paterson proposed the New Jersey Plan to the Convention.[19] In following the unicameral structure provided under the Articles of Confederation, Paterson's proposal represented an effort to revise the current Articles rather than replace them.[20] The proposed structure of Congress under the New Jersey Plan provided for a unicameral legislature with a voting system that allowed for one vote per state in the national legislature.[21] Under this proposed system, Congress would require the "consent" of the state legislatures before exercising legislative authority directly upon individuals.[22] Smaller states generally supported the New Jersey Plan because they did not favor a major departure from the Articles or proportional representation in Congress based on state size.[23]

[16] *Id.* at 20. As originally proposed by the Virginia delegates, the bicameral legislature consisted of two chambers, one that would be "elected by the people of the several states" and another that would be elected "by those of the first [chamber], out of a proper number of persons nominated by the individual [state] legislatures." *Id.* at 20. Historians have noted that the original Virginia Plan was drafted by James Madison. Max Farrand, The Framing of the Constitution of the United States 68–69 (1913). The Virginia Plan went through various revisions and amendments before it was finalized and adopted at the Convention. *Id.* The later amended version consisted of a bicameral legislature with members of one branch elected by the people, and members of the second branch elected by the individual state legislatures. 1 The Records of The Federal Convention of 1787, *supra* note 2, at 228.

[17] *See* New York v. United States, 505 U.S. 144, 164 (1992); 1 The Records of The Federal Convention of 1787, *supra* note 2, at 21, 229 (Max Farrand ed., 1911).

[18] The larger states such as Virginia, Massachusetts, and Pennsylvania supported this proposal, as it gave each state a vote in Congress based on its population size. Farrand, *supra* note 16, at 81–82 ("As the discussion proceeded it became more and more evident that Connecticut, New York, New Jersey, Delaware, and Maryland were tending to vote together, in opposition to the other states led by Virginia, Pennsylvania, and Massachusetts."); *see also* The Federalist No. 22 (Alexander Hamilton) ("Every idea of proportion and every rule of fair representation conspire to condemn a principle, which gives to Rhode Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New York; and to Delaware an equal voice in the national deliberations with Pennsylvania, or Virginia, or North Carolina.").

[19] Farrand, *supra* note 16, at 84–85.

[20] In presenting the New Jersey Plan, Paterson resolved that the "[A]rticles of Confederation ought to be so revised, corrected & enlarged, as to render the federal Constitution adequate to the exigencies of Government, & the preservation of the Union." 1 The Records of The Federal Convention of 1787, *supra* note 2, at 242.

[21] *Id.* at 242; *see also* Intro.6.1 Continental Congress and Adoption of the Articles of Confederation.

[22] 1 The Records of The Federal Convention of 1787, *supra* note 2, at 243–244.

[23] Farrand, *supra* note 16, at 84–85; 1 The Records of The Federal Convention of 1787, *supra* note 2, at 242. John Dickinson, a delegate from Delaware, reportedly remarked to James Madison, a delegate from Virginia, that the smaller states "would sooner submit to a foreign power" rather than be deprived of an equal vote in both chambers of Congress. *Id.*

ArtI.S1.2.3 The Great Compromise of the Constitutional Convention

Article I, Section 1:

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

Although the states generally favored a bicameral legislature,[1] the states were heavily divided over the representation in each branch of Congress.[2] To resolve these concerns, the Convention delegates approved forming a "compromise committee" to devise a compromise among the proposed plans for Congress.[3] The committee proposed a plan that became known as the Great Compromise.[4] The plan provided for a bicameral legislature with proportional representation based on a state's population for one chamber and equal state representation in the other.[5] For the House of Representatives, the plan proposed that each state would have "one representative for every 40,000 inhabitants," elected by the people.[6] For the Senate, the committee proposed that each state would have an equal vote with members elected by the individual state legislatures.[7] After significant debate, the Convention adopted the Great Compromise on July 16, 1787.[8]

During the state ratification debates that followed the Convention, one of the central objections from the Anti-Federalists was that the consolidation of government power in a national Congress could "destroy" state legislative power.[9] The Federalists attempted to curb these fears by noting that the sovereign power of the Nation resides in the people, and the Constitution merely "distribute[s] one portion of power" to the state and "another proportion to the government of the United States."[10] To further allay Anti-Federalist concerns regarding concentrated federal power in Congress, the Federalists emphasized that bicameralism, which lodged legislative power directly in the state governments through equal representation in the Senate, would serve to restrain, separate, and check federal power.[11]

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[1] 1 The Records of The Federal Convention of 1787, at 54–55 (Max Farrand ed., 1911).

[2] *Id.* at 509; Max Farrand, The Framing of the Constitution of the United States 92 (1913).

[3] Farrand, Framing of the Constitution, *supra* note 2, at 97–98.

[4] *See generally id.* at 91–112 (discussing the process that led to the Great Compromise). Roger Sherman and other delegates from Connecticut repeatedly advanced a legislative structure early in the Convention debates that eventually was proposed as the Great Compromise. *See* 1 The Records of The Federal Convention of 1787, *supra* note 2, at 196. Historians often credit Sherman and the Connecticut delegates as the architects of the Great Compromise. Mark David Hall, Roger Sherman and the Creation of the American Republic 96–98 (2013) (discussing Sherman's proposal during the Convention debates that led to the "Connecticut Compromise"); Farrand, Framing of the Constitution, *supra* note 2, at 106. *See also* Wesberry v. Sanders, 376 U.S. 1, 12–13 (1964) (discussing Sherman's role in the Great Compromise).

[5] 1 The Records of The Federal Convention of 1787, *supra* note 1, at 524. *See* Farrand, Framing of the Constitution, *supra* note 2, at 104–07.

[6] 1 The Records of The Federal Convention of 1787, *supra* note 1, at 526. The compromise was amended to allow that state inhabitants would also include "three-fifths of the slaves" in the state. *Id.* at 603–06; Farrand, Framing of the Constitution, *supra* note 2, at 99. For discussion of the "three-fifths" clause, see Intro.6.1 Continental Congress and Adoption of the Articles of Confederation.

[7] 1 The Records of The Federal Convention of 1787, *supra* note 1, at 160. In 1913, the states ratified the Seventeenth amendment that requires members of the Senate to be elected by the people.

[8] Farrand, Framing of the Constitution, *supra* note 2, at 104–07; 1 Congressional Quarterly, Inc., Guide to Congress 358, 367–68 (5th ed. 2000) (discussing of the ratification of the Seventeenth Amendment).

[9] Gordon S. Wood, Creation of the American Republic 1776–1787, at 526–530 (1969) (discussing state ratifications concerning the jurisdiction of federal and state legislatures under the Constitution).

[10] *Id.* at 530 (quoting James Wilson from the Pennsylvania ratifying convention from Pennsylvania and the Federal Constitution 1787–1788, at 302 (John Bach McMaster & Frederick D. Stone, eds. 2011)).

[11] *See id.* at 559 (analyzing the Federalists' views of bicameralism).

ArtI.S1.2.3
The Great Compromise of the Constitutional Convention

In vesting the legislative power in a bicameral Congress, the Framers of the Constitution purposefully divided and dispersed that power between two chambers—the House of Representatives with representation based on a state's population and the Senate with equal state representation.[12] The Framers recognized that the division of legislative power between two distinct chambers of elected members was needed "to protect liberty" and address the states' fear of an imbalance of power in Congress.[13] As later explained by Chief Justice Warren Burger, "the Great Compromise, under which one House was viewed as representing the people and the other the states, allayed the fears of both the large and small states."[14]

By diffusing legislative power between two chambers of Congress in the legislative Vesting Clause, the Framers of the Constitution sought to promote the separation of powers, federalism, and individual rights.[15] They designed the bicameral Congress so that "legislative power would be exercised only after opportunity for full study and debate in separate settings."[16] While acknowledging that the bicameral legislative process often produces conflict, inefficiency, and "in some instances [can] be injurious as well as beneficial," the Framers believed that the intricate law-making process promotes open discussion and safeguards against "against improper acts of legislation."[17] As the Supreme Court later explained, the "legislative steps outlined in Art. I are not empty formalities" but serve to "make certain that there is an opportunity for deliberation and debate."[18]

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[12] U.S. Const. art. I, § 7. cl. 2. *See* The Federalist No. 39 (James Madison) ("The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the Legislature of a particular State. So far the Government is national not federal. The Senate on the other hand will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is federal, not national.").

[13] *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 950 (1983) ("[T]he Framers were . . . concerned, although not of one mind, over the apprehensions of the smaller states. Those states feared a commonality of interest among the larger states would work to their disadvantage; representatives of the larger states, on the other hand, were skeptical of a legislature that could pass laws favoring a minority of the people." *See also* The Federalist No. 51 (James Madison) ("In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit."); Farrand, Framing of the Constitution, *supra* note 2, at 99–112 (describing the debate among the states regarding the structure of Congress).

[14] *Chadha*, 462 U.S. at 950. *See also* Farrand, Framing of the Constitution, *supra* note 2, at 105–06 (explaining the structure of Congress as achieved under the "Great Compromise").

[15] *See* The Federalist No. 62 (James Madison) ("[A] senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient."). *See also* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 708–09 (1997) (describing how the legislative procedures "promote caution and deliberation; by mandating that each piece of legislation clear an intricate process involving distinct constitutional actors, bicameralism and presentment reduce the incidence of hasty and ill-considered legislation").

[16] *Chadha*, 462 U.S. at 951.

[17] The Federalist No. 62 (James Madison). John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 Colum. L. Rev. 673, 709–10 (1997) (discussing the legislative process as protection against "hasty and ill-considered legislation"). Some scholars have argued that the Framers deliberately designed the lawmaking process to be slow and inefficient so that the laws that passed were sufficiently deliberative, representative, and accountable. *See, e.g.*, Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum. L. Rev. 452, 524 (1989) ("The Confederation period led [the Framers] to conclude that government which moved too quickly in establishing and altering policy was, over time, less likely to make wise choices and more likely to threaten individual liberty. Therefore, they deliberately created a lawmaking process that was slow, even cumbersome.").

[18] *Chadha*, 462 U.S. at 958 n.23.

ArtI.S1.2.4 Legislative Power and the Executive and Judicial Branches

Article I, Section 1:

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

A third purpose of the Framers for the Legislative Vesting Clause was to limit the extent to which the other two branches of government could exercise legislative power. The Framers crafted the Legislative Vesting Clause against the historical backdrop of English legal tradition that viewed, in the words of William Blackstone, a "tyrannical government" as one in which "the right of both *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men."[1] For Blackstone, "wherever these two powers are united together, there can be no public liberty."[2] And James Madison, echoing Blackstone and other prominent thinkers of the time, wrote in the *Federalist Papers* of the "necessary partition of power among the several departments, as laid down in the Constitution."[3] In Madison's view, the concentration of distinct forms of government power in the same entity would lead to tyranny as when a single entity had the power to both prescribe and enforce the law.[4] To separate these powers, the Framers, in the first three Articles of the Constitution, vested the legislative powers in a Congress;[5] the executive power in a President;[6] and the judicial power of the United States "in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[7]

Although the Framers had concerns about the other two branches aggrandizing themselves at the expense of the Legislative Branch, they were unable to articulate a bright-line rule for identifying when such violations of the separation of powers principle had occurred. Indeed, Madison referred to the "separate and distinct exercise of the different powers of government" as "to a certain extent . . . admitted on all hands to be essential to the preservation of liberty."[8] But he acknowledged the difficulty in distinguishing the legislative power from the judicial or executive power in some instances.[9] Further, in contrast to some state constitutional provisions in existence at the time of the Founding,[10] the text of the Constitution does not specifically prohibit the Executive or Judicial Branches from exercising legislative power.[11]

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[1] 1 William Blackstone, Commentaries on the Laws of England 144 (J. B. Lippincott Co. ed., 1893).

[2] *Id.*

[3] The Federalist No. 51 (James Madison). The notion of separation of powers was drawn from classical political philosophy. *See generally* Baron Charles de Montesquieu, The Spirit of the Laws, at XI6, 157 (Anne M. Cohler, et. al., trans. & eds., 1989).

[4] *See also* The Federalist No. 47 (James Madison) ("No political truth is . . . stamped with the authority of more enlightened patrons of liberty [than the separation of powers because the] accumulation of all powers, legislative, executive, and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.").

[5] U.S. Const. art. I.

[6] *Id.* art. II.

[7] *Id.* art. III.

[8] *Id.* at 289.

[9] The Federalist No. 37 (James Madison) ("Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary; or even the privileges and powers of the different Legislative branches. Questions daily occur in the course of practice, which prove the obscurity which reigns in these subjects, and which puzzle the greatest adepts in political science."). *But see* Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 342 (2002) ("The terms 'legislative,' 'executive,' and 'judicial' meant something to Madison, even if he could not articulate precisely (or even vaguely) what they meant.").

[10] *See, e.g.*, Mass. Const. of 1780, pt. 1, art. XXX ("In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise

Indeed, while the Framers of the Constitution saw great importance in allocating the legislative power to a Congress, the design of the Constitution contemplates some overlap in the branches' performance of government functions.[12] Madison explained that even the influential French political philosopher Baron de Montesquieu, who once wrote that there could be "no liberty where the legislative and executive powers are united in the same person," would have found it permissible for the functions of government to be shared, to some extent, among the branches.[13] And Madison acknowledged that contemporaneous state constitutional provisions requiring a strict separation of powers were perhaps aspirational because, in practice, the branches of state governments sometimes shared such functions, as when a state senate served as a judicial tribunal for trying impeachments of executive or judicial officers.[14] Thus, the Framers may not have understood the Legislative Vesting Clause as prohibiting the executive and Judicial Branches from performing functions that overlapped with those performed by Congress, so long as they were not purely legislative in nature.

Although the Founders wanted to prevent the Executive Branch and judiciary from aggrandizing their power by usurping the legislative role, it is unclear whether the Legislative Vesting Clause would have been understood to prohibit Congress from giving away its power to the other two branches. The text of the Constitution is silent with respect to the extent to which Congress is prohibited from delegating its legislative power to the Executive Branch, courts, or a private entity.[15] The Framers debated the necessity of having a more express constitutional provision on separation of powers, but these debates did not lead to explicit limits on legislative delegations. For example, in the Convention debates, James Madison made a motion to give the national Executive the power to "execute such other powers ('not Legislative nor 'Judiciary' in their nature') as may from time to time be delegated by the National Legislature."[16] The motion was defeated, with Charles Pinckney arguing that the language was "unnecessary, the object of [the language] being included in the 'power to carry into effect the national laws.'"[17]

The debates over who could exercise the legislative power continued into the First Congress. Following ratification of the Constitution, James Madison also introduced an

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the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."); Md. Const. of 1776, Declaration of Rights cl. VI ("That the legislative, executive, and judicial powers of government, ought to be forever separate and distinct from each other."). *But see* S.C. Const. of 1776, art. VII (vesting the legislative authority in "the president and commander-in-chief, the general assembly and legislative council").

[11] Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 337 (2002) ("[T]here is nothing in the Constitution that specifically states, in precise terms, that no other actor may exercise legislative power or that Congress may not authorize other actors to exercise legislative power. Such clauses were known to the founding generation.").

[12] Buckley v. Valeo, 424 U.S. 1, 121 (1976) (per curiam) ("[The Framers] saw that a hermetic sealing off of the three branches of government from one another would preclude establishment of a Nation capable of governing itself effectively."); Youngtown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("[W]hile the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."). For more on the concept of "separation of powers," see Intro.7.2 Separation of Powers Under the Constitution.

[13] The Federalist No. 47 (James Madison) ("[Montesquieu] did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other.").

[14] *Id.* ("If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which [the separation of powers doctrine] has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.").

[15] *Id.*

[16] 1 The Records of the Federal Convention of 1787, at 64, 67 (Max Farrand ed., 1911).

[17] *Id.* However, this historical episode sheds little light on whether the Founders would have understood the Constitution to permit Congress to delegate its legislative power, as Madison's language would not have specifically permitted delegations of "legislative power," and the records of the Convention debates do not fully explain the basis for Pinckney's concerns.

amendment to the Constitution in the House of Representatives of the First United States Congress that would have provided that the powers "delegated by this Constitution to the Government of the United States, shall be exercised as therein appropriated, so that the Legislative shall not exercise the powers vested in the Executive or the Judicial; nor the Executive the power vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive."[18] Although James Madison argued that the amendment would help to resolve doubts about how the Constitution should be construed, Representative Roger Sherman opposed the amendment as "unnecessary" because the Constitution already vested the legislative, executive, and judicial powers in three separate branches.[19] Although the House adopted the amendment, the Senate later rejected it without elaboration.[20] Furthermore, the founding generation during the First Congress broadly authorized the President to perform tasks that required the Executive Branch to fill ambiguities and gaps in the statutory scheme created by the legislature. One oft-cited example is a 1789 Act of the First Congress that provided pensions to wounded and disabled Revolutionary War Veterans for one year "under such regulations as the President of the United States may direct."[21] Nonetheless, the Framers did not appear to endorse wholesale delegations of the legislative power to the Executive Branch, and the import of the actions of the First Congress has been the subject of debate among legal historians.[22]

ArtI.S1.3 Legislative Power in the Constitutional Framework

ArtI.S1.3.1 Separation of Powers and Checks and Balances

Article I, Section 1:

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

The Legislative Vesting Clause, along with the coordinate Executive and Judicial Vesting Clauses, delineate the powers the Framers accorded to the National Government's Legislative, Executive, and Judicial Branches. Separating the powers to legislate, to execute, and to adjudicate into separate government departments was a familiar concept to the Framers. As noted by James Madison in the *Federalist No. 47*, political theorist Baron Charles de Montesquieu had written about the separation of powers concept almost 100 years earlier.[1] Consequently, when the colonies separated from Great Britain following the American Revolution, the framers of the new state constitutions generally embraced the principle of separation of powers in their charters.[2] The framers of the new state constitutions, however,

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[18] 1 Annals of the Congress of the United States 789 (1789).

[19] *Id.*

[20] 2 Bernard Schwartz, The Bill of Rights: A Documentary History 1151 (1971).

[21] Act of Sept. 29, 1789, ch. 24, § 1, 1 Stat. 95, 95.

[22] *See, e.g.*, Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1733–34 (2002) ("[T]here's remarkably little evidence that the Framers envisioned [a nondelegation constraint] on legislative authority. . . . The Framers' principal concern was with legislative aggrandizement—the legislative seizure of powers belonging to other institutions—rather than with legislative grants of statutory authority to executive agents."); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 334 (2002) ("If one is concerned about the original meaning of the Constitution, the widespread modern obsession with the nondelegation doctrine may have some justification.").

[1] The Federalist No. 47 (James Madison).

[2] The Constitution of Virginia of 1776 provided: "The legislative, executive, and judiciary department shall be separate and distinct, so that neither exercise the powers properly belonging to the other; nor shall any person exercise the powers of more than one of them, at the same time[.]" *The Constitution of Virginia of 1776*, *reprinted in* 10 Sources and Documents of United States Constitutions 52 (William F. Swindler ed., 1979). *See also* 5 *id.* at 96. Similarly, the

did not necessarily incorporate systems of checks and balances. Accordingly, violations of the separation of powers doctrine by state legislatures were commonplace prior to the convening of the Constitutional Convention.[3] Theory as much as experience guided the Framers in the summer of 1787.[4]

In drafting the Constitution, the Framers considered how to order a system of government that provided sufficient power to govern while protecting the liberties of the governed.[5] The doctrine of separation of powers, which the Framers implemented in drafting the Constitution, was based on several generally held principles: the separation of government into three branches: legislative, executive, and judicial; the concept that each branch performs unique and identifiable functions that are appropriate to each branch; and the proscription against any person or group serving in more than one branch simultaneously.[6]

While the Constitution largely effectuated these principles, the Framers' separation of power was not rigid, but incorporated a system of checks and balances whereby one branch could check the powers assigned to another. For example, the Constitution allows the President to veto legislation,[7] but requires the President to gain the Senate's consent to appoint executive officers and judges or enter into treaties.[8] Some critics of the proposed Constitution objected to what they regarded as a curious mixture of government functions and powers.[9] In response to criticism that the Constitution blurred the powers accorded to the three branches of government, James Madison wrote a series of essays addressing this issue.[10]

In the *Federalist No. 47*, Madison relied on the theories of Baron de Montesquieu in addressing critics of the new Constitution.[11] According to Madison, Montesquieu and other political theorists "did not mean that these departments ought to have no *partial agency* in, or no control over, the acts of each other," but rather liberty was endangered "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department."[12] Madison further reasoned that neither sharply drawn demarcations of institutional boundaries nor appeals to the electorate were sufficient to protect liberty.[13] Instead, to secure liberty from concentrated power, Madison argued, "consists in giving to those who administer each department the necessary constitutional means and personal

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Massachusetts Constitution of 1780 provided: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."

[3] The Federalist No. 51 (James Madison) ("In republican government the legislative authority, necessarily, predominates."). *See also id.* No. 48. This theme continues to influence the Court's evaluation of congressional initiatives. *See, e.g.,* Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252, 273–74, 277 (1991). *But compare id.* at 286 n.3 (White, J., dissenting).

[4] The intellectual history of the Confederation period and the Constitutional Convention is detailed in Gordon S. Wood, The Creation of the American Republic, 1776–1787 (1969).

[5] *See, e.g.*, M.J.C. Vile, Constitutionalism and the Separation of Powers (1967).

[6] The Federalist No. 47 (James Madison).

[7] U.S. Const. art. I, § 7.

[8] *Id.* art. II, § 2, cl. 2.

[9] *See, e.g.*, The Federalist No. 47 (James Madison) ("[O]ne of the principal objections inculcated by the more respectable adversaries to the Constitution, is its supposed violation of the political maxim, that the legislative, executive, and judiciary departments ought to be separate and distinct. . . . The several departments of power are distributed and blended in such a manner as at once to destroy all symmetry and beauty of form, and to expose some of the essential parts of the edifice to the danger of being crushed by the disproportionate weight of other parts.").

[10] *Id.* Nos. 47–51 (James Madison).

[11] *Id.* No. 47 (James Madison).

[12] *Id.*

[13] *Id.* Nos. 47–49.

motives to resist encroachments of the others."[14] Thus, James Madison famously stated: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[15]

To achieve the principles articulated by Madison in the *Federalist No. 47*, the Constitution features many "checks and balances." For example, bicameralism reduces legislative predominance,[16] while the presidential veto gives the President a means of defending his priorities and preventing congressional overreach.[17] The Senate's role in appointments and treaties provides a check on the President.[18] The courts are assured independence from the political branches through good-behavior tenure and security of compensations,[19] and, through judicial review, the courts check the other two branches.[20] The impeachment power gives Congress authority to root out corruption and abuse of power in the other two branches.[21]

ArtI.S1.3.2 Functional and Formalist Approaches to Separation of Powers

Article I, Section 1:

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

Throughout the Nation's history, questions have arisen on how to apply the separation of powers doctrine. Since 1976, the Supreme Court has curtailed congressional discretion to structure the National Government when the Court has deemed such discretion to violate the separation of powers.[1] For example, in *Bowsher v. Synar*, the Court found unconstitutional a congressional scheme to provide for a relatively automatic deficit-reduction process pursuant to the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act)[2] because the Act required the critical involvement of an officer with significant legislative ties.[3] In *Immigration & Naturalization Service v. Chadha*, moreover, the Court found Congress's use of legislative vetoes unconstitutional on separation of powers grounds.[4] And in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, the Court held that Congress vesting broad judicial powers to handle bankruptcy cases in officers not possessing security of tenure and salary violated separation of powers principles.[5] The Court, however, sustained

[14] *Id.* No. 51.

[15] *Id.*

[16] U.S. Const. art. I, § 1.

[17] *Id.* art. I, § 7.

[18] *Id.* art. II, § 2, cl. 2.

[19] *Id.* art. III, § 1.

[20] *Id.*; Marbury v. Madison, 5 U.S. (1 Cranch.) 137 (1803).

[21] U.S. Const. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6. For a more detailed discussion of the separation of powers and checks and balances, see Intro.7.2 Separation of Powers Under the Constitution and Intro.7.1 Overview of Basic Principles Underlying the Constitution.

[1] *See* Buckley v. Valeo, 424 U.S. 1, 109–43 (1976) (holding that Congress could not reserve to itself the power to appoint certain officers charged with enforcing a law).

[2] Pub. L. No. 99-177, 99 Stat. 1038.

[3] Bowsher v. Synar, 478 U.S. 714 (1986).

[4] 462 U.S. 919 (1983).

[5] 458 U.S. 50 (1982).

Congress's establishment of a process by which independent special prosecutors could investigate and prosecute cases of alleged corruption in the Executive Branch in *Morrison v. Olson*.[6]

In ruling on separation of powers questions, the Supreme Court has used two different approaches: formalist and functionalist. The Court's stricter formalist approach emphasizes the need to maintain three distinct branches of government by drawing bright lines among branches to reflect differences in legislating, executing, and adjudicating.[7] In contrast, the Court's functional approach emphasizes each branch's core functions and asks whether the challenged action threatens the essential attributes of the legislative, executive, or judicial function or functions.[8] Under this approach, the Court's rulings have provided flexibility to the branch if there is little risk that the challenged action will impair a core function. If there is a significant risk that the action will impair a branch's core function, courts will consider whether there is a compelling reason for the action.[9]

In *Immigration & Naturalization Service v. Chadha*, the Supreme Court used the formalist approach to invalidate Congress's legislative veto by which it could set aside an Attorney General determination to suspend deportation of an alien pursuant to a delegation of power from Congress.[10] Central to *Chadha* were two conceptual premises. First, the action Congress had taken was legislative because it had the purpose and effect of altering the legal rights, duties, and relations of persons outside the Legislative Branch, and thus Congress had to comply with the Constitution's bicameralism and presentment requirements.[11] Second, the Attorney General was performing an executive function in implementing the congressional delegation, and the legislative veto was an impermissible interference in the law's execution. Congress could act only by legislating to change its delegation's terms.[12]

Subsequently, in *Bowsher v. Synar*, the Court held that Congress could not vest even part of a law's execution in the Comptroller General because the Comptroller General was an officer who was subject to removal by Congress. Allowing Congress to vest execution of the laws in the Comptroller General would enable Congress to play a role in executing the laws because Congress could remove the Comptroller General if Congress was dissatisfied with how the Comptroller General was implementing its authority.[13] The Court noted that Congress could act only by passing laws.[14]

On the same day that the Court decided *Bowsher* through a seemingly formalist analysis, the Court appeared to use the less strict, functional approach in *Commodity Futures Trading Commission (CFTC) v. Schor* to resolve a challenge to a regulatory agency's power to adjudicate a state common law issue—the type of issue that the Court, in a formalist plurality

[6] 487 U.S. 654 (1988). *See also* Mistretta v. United States, 488 U.S. 361 (1989).

[7] *Chadha*, 462 U.S. at 951 ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power . . . must be resisted. Although not 'hermetically' sealed from one another, the powers delegated to the three Branches are functionally identifiable."). *See also N. Pipeline Constr. Co.*, 458 U.S. at 64–66 (plurality opinion); *Bowsher*, 478 U.S. at 721–27.

[8] *See, e.g.*, CFTC v. Schor, 478 U.S. 833 (1986).

[9] *Schor*, 478 U.S. 833; Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587, 589–93 (1985). The Court first formulated this analysis in cases challenging alleged infringements on presidential powers, United States v. Nixon, 418 U.S. 683, 713 (1974); Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 442–42 (1977), but it subsequently turned to the stricter test. *Schor* and *Thomas* both involved provisions challenged as infringing on judicial powers.

[10] *Chadha*, 462 U.S. 919.

[11] *Id.* at 952.

[12] *Id.*

[13] Bowsher v. Synar, 478 U.S. 714, 726–27, 733–34 (1986). *But see id.* at 737 (Stevens, J., concurring) (suggesting a functionalist approach).

[14] *Id.* at 726–27, 733–34.

opinion with a more limited concurrence, had denied to a non-Article III bankruptcy court in *Northern Pipeline*.[15] Sustaining the CFTC's power, the Court emphasized "the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III.'"[16] The Court held that, in evaluating such a separation of powers challenge, the Court had to consider the extent to which the "essential attributes of judicial power" were reserved to Article III courts and the extent to which the non-Article III entity exercised the jurisdiction and powers normally vested only in Article III courts; the origin and importance of the rights to be adjudicated; and the concerns that drove Congress to depart from Article III's requirements.[17] The Court distinguished *Schor* from *Bowsher* stating "[u]nlike *Bowsher*, this case [*Schor*] raises no question of the aggrandizement of congressional power at the expense of a coordinate branch."[18] The test the Court used was a balancing one—whether Congress had impermissibly undermined the role of another branch without appreciable expansion of its own power.

While the Court has exercised some flexibility in using a formalist or functionalist analysis in separation of powers cases, it has generally applied a formalist approach when the Constitution clearly commits a function or duty to a particular branch and a functionalist approach when the constitutional text is indeterminate, thereby requiring the Court to assess the likelihood that a branch's essential power would be impaired. For example, in *Morrison v. Olson*, the Court used a functionalist analysis to sustain Congress's creation of an independent counsel.[19] The independent-counsel statute, Title VI of the Ethics in Government Act,[20] the Court emphasized, did "not involve an attempt by Congress to increase its own power at the expense of the Executive Branch" nor did it constitute a "judicial usurpation" of executive power.[21] Moreover, the Court stated, the law did not "impermissibly undermine" Executive Branch powers, nor did it "disrupt the proper balance between the coordinate branches [by] prevent[ing] the Executive Branch from accomplishing its constitutionally assigned functions."[22] The Court also acknowledged that the statute undeniably reduced executive control over what the Court had previously identified as a core executive function—executing laws through criminal prosecution—through its appointment provisions and its assurance of independence by limiting removal to a "good cause" standard.[23] The Court noted the circumscribed nature of the reduction, the discretion of the Attorney General to initiate appointment, the limited jurisdiction of the counsel, and the power of the Attorney General to

[15] Although the agency in *Schor* was an independent regulatory commission and the bankruptcy court in *Northern Pipeline* was either an Article I court or an adjunct to an Article III court, the Court did not rely on the characterization of the particular entity. The issue in each case was whether the judicial power of the United States could be conferred on an entity that was not an Article III court.

[16] CFTC v. Schor, 478 U.S. 833, 848 (1986) (quoting Thomas v. Union Carbide Agric. Prods. Co., 473 U.S. 568, 587 (1985)).

[17] *Id.* at 851.

[18] *Id.* at 856.

[19] The Appointments Clause (U.S. Const. art. II, § 2) specifically provides that Congress may vest in the courts the power to appoint inferior officers (Morrison v. Olson, 487 U.S. 654, 670–77 (1988)), suggesting that, unlike *Chadha* and Bowsher, *Morrison* could be a textual commitment case. But the Court's evaluation of the separation of powers issue in *Morrison* did not appear to turn on that distinction. *Id.* at 685–96. Nevertheless, this possible distinction may work against a reading of *Morrison* as a rejection of formalism when executive powers are litigated.

[20] 28 U.S.C. § 591 *et seq*.

[21] *Morrison*, 487 U.S. at 694–95.

[22] *Id.* at 695 (quoting, respectively, *Schor*, 478 U.S. at 856 and Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 443 (1977)).

[23] *Id.*

ensure that the laws are faithfully executed by the counsel.[24] This balancing, the Court concluded, left the President with sufficient control to ensure his ability to perform his constitutionally assigned functions.[25]

Similarly, in *Mistretta v. United States*, the Court used a functionalist analysis when it upheld the constitutionality of the U.S. Sentencing Commission.[26] Through the Sentencing Reform Act of 1984, Congress created the Sentencing Commission as an independent entity in the Judicial Branch to promulgate sentencing guidelines binding on federal judges when sentencing convicted offenders. Under the Act, the President appoints all seven Sentencing Commission members, three of whom have to be Article III judges, and he could remove any member for cause. Noting that the Court's separation of powers jurisprudence is always animated by concerns over encroachment and aggrandizement, the Supreme Court stated: "we have not hesitated to strike down provisions of law that either accrete to a single Branch powers more appropriately diffused among separate Branches or that undermine the authority and independence of one or another coordinate Branch."[27] Thus, with regard to the discrete questions—the placement of the Commission, the appointment of the members, especially the service of federal judges, and the removal power—the Court carefully analyzed whether one branch had been given power it could not exercise, or had enlarged its powers impermissibly, and whether any branch would have its institutional integrity threatened by the structural arrangement.[28]

Notwithstanding *Morrison* and *Mistretta*, the Supreme Court continued to apply a formalist analysis in separation of powers cases. For instance, in its 1991 decision in *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Airport Noise*,[29] the Supreme Court applied a formalistic analysis, although the case appeared to involved a factual situation that could be resolved under *Morrison* and *Mistretta*'s concern over Congress aggrandizing its powers. In *Granfinanciera, S.A. v. Nordberg*,[30] the Court reasserted the fundamental holding of *Northern Pipeline* in a bankruptcy context, although the issue was the right to a jury trial under the Seventh Amendment rather than strictly a separation of powers question. And in *Freytag v. Commissioner*,[31] the Court pursued a straightforward Appointments Clause analysis, informed by a separation of powers analysis, but not governed by it. Finally, in *Public Citizen v. U.S. Department of Justice*,[32] Justice Anthony Kennedy, in a concurring opinion, would have followed the formalist approach, but explicitly grounded his concurrence in the distinction between an express constitutional vesting of power and implicit vesting of power.

The Supreme Court has also considered the separation of powers in standing cases. For instance, in *Allen v. Wright*,[33] the Court viewed the standing requirement for access to judicial review as reflecting a separation of powers component—confining the courts to their proper

[24] *Id.* at 696.

[25] *Id.* at 697.

[26] Mistretta v. United States, 488 U.S. 361 (1989). The Court acknowledged reservations with respect to the Commission's placement as an independent entity in the Judicial Branch. *Id.* at 384, 397, 407–08. As in *Morrison*, Justice Antonin Scalia was the lone dissenter, arguing for a fairly rigorous application of separation of powers principles. *Id.* at 413, 422–27 (Scalia, J., dissenting).

[27] *Id.* at 382.

[28] *Id.*

[29] Metro. Wash. Airports Auth. v. Citizens for the Abatement of Airport Noise, 501 U.S. 252 (1991).

[30] Granfinanciera, S.A. v. Nordberg, 492 U.S. 33 (1989).

[31] Freytag v. Commissioner, 501 U.S. 868 (1991).

[32] Public Citizen v. U.S. Dep't of Just., 491 U.S. 440, 467 (1989) (Kennedy, J., concurring).

[33] Allen v. Wright, 468 U.S. 737, 752 (1984).

sphere. In *Lujan v. Defenders of Wildlife*,[34] moreover, the Court imported the Take-Care Clause, obligating the President to see to the faithful execution of the laws, into the standing analysis, creating a substantial barrier to congressional decisions to provide for judicial review of executive actions.

ArtI.S1.3.3 Enumerated, Implied, Resulting, and Inherent Powers

Article I, Section 1:

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

The Supreme Court has recognized four general categories of powers belonging to the National Government—enumerated, implied, resulting, and inherent. Enumerated powers are those specifically identified in the Constitution.[1] In *McCulloch v. Maryland*, Chief Justice John Marshall recognized that the Constitution expressly provides the National Government with specific enumerated powers,[2] stating:

> This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent, to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted.[3]

Article I, Section 8, of the Constitution lists various powers that the States ceded to the National Government. These powers include the power to tax and spend, to borrow, and to regulate commerce. Article I, Section 8, however, is not an exclusive list of powers the Constitution expressly grants to the National Government or its constituent branches. For instance, Congress also has power to regulate the electoral process under Article I, Section 4,[4] and the President has the power to veto legislation under Article I, Section 7.[5]

Implied powers are those powers necessary to effectuate powers enumerated in the Constitution.[6] In other words, the Constitution's enumeration of powers implies an additional grant of such powers that are necessary to effectuate them. In *McCulloch v. Maryland*, Chief Justice Marshall declared that the power conferred by the Necessary and Proper Clause[7] embraces all legislative "means which are appropriate" to carry out the powers provided expressly by the Constitution.[8] Chief Justice Marshall stated: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the

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[34] Lujan v. Defs. of Wildlife, 504 U.S. 555, 577 (1992).

[1] *Enumerated powers*, Black's Law Dictionary (6th ed. 1990) (defining enumerated or express powers to be "Powers expressly provided for in the Constitution").

[2] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819). *See* U.S. Const. art. I, § 8.

[3] *McCulloch*, 17 U.S. (4 Wheat.) at 405.

[4] U.S. Const. art. I, § 4, cl. 1.

[5] *Id.* art. I, § 7, cl. 2.

[6] *Implied powers*, Black's Law Dictionary (6th ed. 1990) (defining implied powers to be "Such as are necessary to make available and carry into effect those powers which are expressly granted or conferred, and which must therefore be presumed to have been within the intention of the constitutional or legislative grant").

[7] U.S. Const. art. I, § 8, cl.18.

[8] *McCulloch*, 17 U.S. (4 Wheat.) at 421.

constitution, are constitutional."[9] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story discussed implied powers, noting that any analysis of whether a power is constitutional must first begin by determining whether the Constitution expressly provides for the power.[10] If the Constitution does not expressly state (or enumerate) the power, the question then becomes if such a power is necessary to implement a power provided expressly by the Constitution.[11]

Chief Justice Marshall identified resulting powers as those "result[ing] from the whole mass of the powers of the National Government and from the nature of political society."[12] In *American Ins. Co. v. Canter*, Chief Justice Marshall recognized that "the constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty."[13] From the power to acquire territory, Chief Justice Marshall reasoned, arises the right to govern it.[14] In the *Legal Tender Cases (Knox v. Lee)*, the Supreme Court clarified that the Constitution neither expressly grants resulting powers to Congress nor are they ancillary to an unenumerated power.[15]

A fourth category of power identified by the Supreme Court—inherent powers[16]—appears to share some of the same characteristics of resulting powers. In *United States v. Curtiss-Wright Export Corp.*, Justice George Sutherland described inherent powers as those that are independent of an authorizing power but are inherent to the government in its role as sovereign.[17] Justice Sutherland emphasized that enumerated and implied powers pertain to those the States ceded to the National Government when the United States was formed,[18] while inherent powers originated in the external sovereignty that Great Britain passed to the United States at the end of the American Revolution. Justice Sutherland wrote:

> [S]ince the states severally never possessed international powers, such powers could not have been carved from the mass of state powers but . . . were transmitted to the United States from some other source. . . . When . . . the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union. . . . The powers to declare and wage war, to conclude peace, to make treaties, to

[9] *Id. See also* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816) (Story, J.) ("The government, then, of the United States, can claim no powers which are not granted to it by the constitution, and the powers actually granted, must be such as are expressly given, or given by necessary implication.").

[10] 3 Joseph Story, Commentaries on the Constitution of the United States § 1238 (1833).

[11] *Id.*

[12] Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511, 516 (1828); *Resulting powers*, Black's Law Dictionary (6th ed. 1990).

[13] *Am. Ins. Co.*, 26 U.S. (1 Pet.) 511.

[14] *Id.* See also 2 Story, *supra* note 10, § 1251 ("[I]f the United States should make a conquest of any of the territories of its neighbors, the [N]ational [G]overnment would possess sovereign jurisdiction over the conquered territory. This would, perhaps, rather be a result from the whole mass of the powers of the [N]ational [G]overnment, and from the nature of political society, than a consequence or incident of the powers specially enumerated.").

[15] Legal Tender Cases (Knox v. Lee), 79 U.S. 457 (1870).

[16] *Inherent powers*, Black's Law Dictionary (6th ed. 1990) (defining inherent powers as "authority possessed without it being derived from another"; a "right, ability, or faculty of doing a thing, without receiving that right, ability, or faculty from another"; "[p]owers originating from the nature of government or sovereignty, *i.e.,* powers over and beyond those explicitly granted in the Constitution or reasonably to be implied from express grants"). *See also* Robert J. Kaczorowski, *Inherent National Sovereignty Constitutionalism: An Original Understanding of the U.S. Constitution*, 101 Minn. L. Rev. 699 (2016).

[17] United States v. Curtiss-Wright Exp., 299 U.S. 304 (1936).

[18] *Id.* at 316–18. For early versions of this concept of the national government's powers in the field of foreign relations, see Penhallow v. Doane 3 U.S. (3 Dall.) 54, 80, 81 (1795); Holmes v. Jennison, 14 U.S. (14 Pet.) 540, 575–76 (1840) (Taney, C.J.).

> maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality.[19]

Justice Sutherland emphasized the difference between domestic and foreign powers, with the former limited under the enumerated powers doctrine and the latter "virtually free of any restraint."[20]

Notwithstanding the doctrine of enumerated powers—the power to legislate by the "rights expressly given and duties expressly enjoined" by the Constitution[21]—the Court has ascribed implied, resulting, and inherent powers to the National Government. Consequently, the United States, among other things, has power to impart to paper currency the quality of legal tender to pay debts;[22] to acquire territory by discovery;[23] to legislate for Indian tribes wherever situated in the United States;[24] to exclude and deport aliens[25] and to require that those who are admitted be registered and fingerprinted;[26] and the powers of sovereignty to conduct foreign relations.[27]

ArtI.S1.3.4 Bicameralism

Article I, Section 1:

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

Although the Continental Congress consisted of a unicameral house, the Framers adopted a bicameral legislature for the U.S. Government at the Constitutional Convention. In making this decision, historical and then-recent experience informed the Framers' decision. For example, some of the ancient republics, which the Framers used as models, had two-house legislatures,[1] and the Parliament of Great Britain was based in two social orders, the hereditary aristocracy represented in the House of Lords and the freeholders of the land represented in the House of Commons.[2]

By providing a national legislature comprised of two Houses, the Framers further reinforced the separation of powers. The Great Compromise, one of the critical decisions leading to the Convention's successful completion, provided for a House of Representatives apportioned on population, and a Senate in which the states were equally represented. Bicameralism thus enabled a composite National and Federal Government, but it also provided for a further separation and diffusion of powers. The legislative power, the Framers recognized, should be predominant in a society dependent upon the suffrage of the people. However, it was important that legislative power be subject to checks unless transient

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[19] *Curtiss-Wright Exp. Corp.*, 299 U.S. at 316–18.

[20] *Id.*

[21] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539, 616, 618–19 (1842).

[22] Juilliard v. Greenman, 110 U.S. 421, 449–50 (1884). *See also* Knox v. Lee, 79 U.S. (12 Wall.) 457, 565 (1871) (Bradley, J., concurring).

[23] United States v. Jones, 109 U.S. 513 (1883).

[24] United States v. Kagama, 118 U.S. 375 (1886).

[25] Fong Yue Ting v. United States, 149 U.S. 698 (1893).

[26] Hines v. Davidowitz, 312 U.S. 52 (1941).

[27] United States v. Curtiss-Wright Exp. Corp., 299 U.S. 304 (1936).

[1] John Adams, A Defense of the Constitutions of Government of the United States (1776).

[2] 1 William Blackstone, Commentaries on the Laws of England 149–151 (1765).

majorities abuse their powers. Hence, the Framers provided that both Houses of Congress—their Members beholden to different constituencies—deliberate on and agree to new legislation.[3]

During the North Carolina Ratifying Convention, future Supreme Court Justice James Iredell articulated the importance of a bicameral legislature for diffusing factional power, stating:

> [I]t was the general sense of all America . . . that the legislative body should be divided into two branches, in order that the people might have a double security. It will often happen that, in a single body, a bare majority will carry exceptionable and pernicious measures. The violent faction of a party may often form such a majority in a single body, and by that means the particular views or interests of a part of the community may be consulted, and those of the rest neglected or injured. . . . If a measure be right, which has been approved of by one branch, the other will probably confirm it; if it be wrong, it is fortunate that there is another branch to oppose or amend it.[4]

Events since 1787 have altered both the separation of powers and the federalism bases of bicameralism through adoption of the Seventeenth Amendment, which resulted in the popular election of the Senate. Consequently, the differences between the House of Representatives and the Senate are less pronounced than they were at the Nation's inception.

ArtI.S1.4 Delegations of Legislative Power

ArtI.S1.4.1 Overview of Delegations of Legislative Power

Article I, Section 1:

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

By vesting Congress with "[a]ll legislative Powers," the Supreme Court has viewed the Legislative Vesting Clause as limiting the authority Congress can delegate to other branches of government or private entities. In general, the Court has held that "the legislative power of Congress cannot be delegated."[1] In 1935, Chief Justice Charles Evans Hughes, on behalf of the Court, declared that "Congress is not permitted to abdicate or to transfer to others the

[3] The Federalist No. 51 (James Madison). The safeguard's assurance is built into the Presentment Clause. U.S. Const. art. I, § 7, cl. 2, 3. The structure is not often the subject of case law, but it was a foundational matter in *INS v. Chadha,* 462 U.S. 919, 944–51 (1983).

[4] 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 21 (Jonathan Elliott, ed., 1830) (James Iredell, North Carolina Ratifying Convention (July 25, 1788)). At the North Carolina Ratifying Convention on July 24, 1788, William R. Davie also spoke of the advantages of a bicameral legislature, stating: "In order to form some balance, the departments of government were separated, and as a necessary check, the legislative body was composed of *two branches*. Steadiness and wisdom are better insured when there is a second branch, to balance and check the first. The stability of the laws will be greater when the popular branch, which might be influenced by local views, or the violence of party, is checked by another, whose longer continuance in office will render them more experienced, more temperate, and more competent to decide rightly." *Id.* at 12.

[1] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). *See also* Gundy v. United States, No. 17-6086, slip op. at 1 (U.S. June 20, 2019) (plurality opinion) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001) ("[The] text in [Article I, Section I of the Constitution] permits no delegation of those powers."); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) ("[I]n carrying out [the] constitutional division into three branches[,] it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial Branch, or if by law it attempts to invest itself or its members with either executive power or judicial power."); Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the

essential legislative functions with which it is thus vested."[2] This principle is the basis of the nondelegation doctrine that serves as an important, though seldom used, limit on who may exercise legislative power and the extent to which legislative power may be delegated. In its 2022 decision in *West Virginia v. Environmental Protection Agency*, the Supreme Court provided further clarity on the nondelegation doctrine, emphasizing that a decision of "magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[3]

ArtI.S1.4.2 Historical Background on Delegating Legislative Power

Article I, Section 1:

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

The extent to which Congress can delegate its legislative powers has been informed by two distinct constitutional principles: separation of powers and due process. A rigid application of separation of powers would prevent the lawmaking branch from divesting itself of any of its power and conferring it on one of the other branches. But the doctrine is not so rigidly applied as to prevent conferral of significant authority on the Executive Branch.[1] In *J. W. Hampton, Jr. & Co. v. United States*,[2] Chief Justice William Howard Taft discussed the ability of Congress to delegate power, stating:

> The Federal Constitution . . . divide[s] the governmental power into three branches. . . . [I]n carrying out that constitutional division into three branches it is a breach of the National fundamental law if Congress gives up its legislative power and transfers it to the President, or to the Judicial Branch, or if by law it attempts to invest itself or its members with either executive power or judicial power. This is not to say that the three branches are not co-ordinate parts of one government and that each in the field of its duties may not invoke the action of the two other branches in so far as the action invoked shall not be an assumption of the constitutional field of action of another branch. In determining what it may do in seeking assistance from another branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination.[3]

In *Loving v. United States*,[4] the Court distinguished between its usual separation of powers doctrine—emphasizing arrogation of power by a branch and impairment of another branch's ability to carry out its functions—and the delegation doctrine, "another branch of our separation of powers jurisdiction," which is informed not by the arrogation and impairment analyses but solely by the provision of standards.[5] This confirmed what had long been evident—that the delegation doctrine is unmoored to traditional separation of powers principles.

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system of government ordained by the Constitution."); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825) ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.").

[2] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

[3] No. 20-1530, slip op. at 31 (U.S. June 30, 2022).

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

[2] 276 U.S. 394 (1928).

[3] *Id.* at 406. Chief Justice Taft traced the separation of powers doctrine to the maxim, *Delegata potestas non potest delegari* (a delegated power may not be delegated), *id.* at 405, but the maxim does not help differentiate between permissible and impermissible delegations, and Court has not repeated this reference in later delegation cases.

[4] 517 U.S. 748 (1996).

[5] *Id.* at 758–59.

The second principle underlying delegation law is a due process conception that undergirds delegations to administrative agencies. The Court has contrasted the delegation of authority to a public agency, which typically is required to follow established procedures in building a public record to explain its decisions and to enable a reviewing court to determine whether the agency has stayed within its ambit and complied with the legislative mandate, with delegations to private entities, which typically are not required to adhere to such procedural safeguards.[6]

Two theories suggested themselves to the early Court to justify the results of sustaining delegations. The Chief Justice alluded to the first in *Wayman v. Southard*.[7] He distinguished between "important" subjects, "which must be entirely regulated by the legislature itself," and subjects "of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details." While his distinction may be lost, the theory of the power "to fill up the details" remains current. A second theory, formulated even earlier, is that Congress may legislate contingently, leaving to others the task of ascertaining the facts that bring its declared policy into operation.[8]

ArtI.S1.4.3 Delegating Legislative Power to Fill Up the Details

Article I, Section 1:

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

In finding a power to "fill up the details," the Court in *Wayman v. Southard*[1] rejected the contention that Congress had unconstitutionally delegated power to the federal courts to establish rules of practice.[2] Chief Justice John Marshall agreed that the rulemaking power was a legislative function and that Congress could have formulated the rules itself, but he denied that the delegation was impermissible. Since then, of course, Congress has authorized the Supreme Court to prescribe rules of procedure for the lower federal courts.[3]

Congress has long provided for the Executive and Judicial Branches to fill up the details of statutes. For example, the Court upheld a statute requiring the manufacturers of oleomargarine to have their packages "marked, stamped and branded as the Commissioner of Internal Revenue . . . shall prescribe," rejecting a contention that the prosecution was not for violation of law but for violation of a regulation.[4] "The criminal offence," said Chief Justice Melville Fuller, "is fully and completely defined by the act and the designation by the Commissioner of the particular marks and brands to be used was a mere matter of detail."[5]

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[6] Carter v. Carter Coal Co., 298 U.S. 238, 310–12 (1936); Yakus v. United States, 321 U.S. 414, 424–25 (1944). Because the separation of powers doctrine is inapplicable to the states as a requirement of federal constitutional law, Dreyer v. Illinois, 187 U.S. 71, 83–84 (1902), it is the Due Process Clause to which federal courts must look for authority to review delegations by state legislatures. *See, e.g.*, Eubank v. City of Richmond, 226 U.S. 137 (1912); Embree v. Kansas City Road Dist., 240 U.S. 242 (1916).

[7] 23 U.S. (10 Wheat.) 1, 41 (1825).

[8] The Brig Aurora, 11 U.S. (7 Cr.) 382 (1813).

[1] 23 U.S. (10 Wheat.) 1 (1825).

[2] Act of May 8, 1792, § 2, 1 Stat. 275, 276.

[3] The power to promulgate rules of civil procedure was conferred by the Act of June 19, 1934, 48 Stat. 1064; the power to promulgate rules of criminal procedure was conferred by the Act of June 29, 1940, 54 Stat. 688. These authorities are now subsumed under 28 U.S.C. § 2072. In both instances Congress provided for submission of the rules to it, presumably reserving the power to change or to veto the rules. Additionally, Congress has occasionally legislated rules itself. *See, e.g.*, 82 Stat. 197 (1968), 18 U.S.C. §§ 3501–02 (admissibility of confessions in federal courts).

[4] *In re* Kollock, 165 U.S. 526 (1897).

[5] *Id.* at 533.

Kollock was not the first such case,[6] and it was followed by a multitude of delegations that the Court sustained. In one such case, for example, the Court upheld an act directing the Secretary of the Treasury to promulgate minimum standards of quality and purity for tea imported into the United States.[7]

ArtI.S1.4.4 Contingent Delegations and Nondelegation Doctrine

Article I, Section 1:

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

The Supreme Court has held that Congress may delegate authority or legislative action contigent on fact-finding or actions by the Executive Branch.[1] In the 1813 case, *Cargo of Brig Aurora v. United States*, the Court upheld the revival of a law upon the issuance of a presidential proclamation.[2] After previous restraints on British shipping had lapsed, Congress passed a new law stating that those restrictions should be renewed in the event the President found and proclaimed that France had abandoned certain practices that violated the neutral commerce of the United States.[3] To the objection that this was an invalid delegation of legislative power, the Court answered briefly that "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct."[4]

Similarly, in *Marshall Field & Co. v. Clark*, the Supreme Court upheld the delegation to the President to suspend the import of specific commodities under Tariff Act of 1890 as constitutional.[5] The Act directed the President to suspend the import of the commodities "for such time as he shall deem just" if he found that other countries imposed upon agricultural or other products of the United States duties or other exactions that "he may deem to be reciprocally unequal and unjust."[6] In sustaining this statute, the Court relied upon two factors: (1) legislative precedents, which demonstrated that "in the judgment of the Legislative Branch of the government, it is often desirable, if not essential, . . . to invest the President with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations,"[7] and (2) that the Act

> does not, in any real sense, invest the President with the power of legislation. . . . Congress itself prescribed, in advance, the duties to be levied, . . . while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was

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[6] United States v. Bailey, 34 U.S. (9 Pet.) 238 (1835); Caha v. United States, 152 U.S. 211 (1894).

[7] Buttfield v. Stranahan, 192 U.S. 470 (1904). *See also* United States v. Grimaud, 220 U.S. 506 (1911) (upholding act authorizing executive officials to make rules governing use of forest reservations); ICC v. Goodrich Transit Co., 224 U.S. 194 (1912) (upholding delegation to prescribe methods of accounting for carriers in interstate commerce).

[1] *See generally* Gundy v. United States, No. 17-6086, slip op. at 26 (U.S. June 20, 2019) (Gorsuch, J., dissenting) ("[Congress] may always authorize Executive Branch officials to fill in even a large number of details, to find facts that trigger the generally applicable rule of conduct specified in a statute, or to exercise non-legislative powers.").

[2] 11 U.S. (7 Cr.) 382 (1813).

[3] *Id.*

[4] *Id.* at 388.

[5] 143 U. S. 649 (1892).

[6] *Id.* at 680.

[7] *Id.* at 691.

left to the determination of the President. . . . He had no discretion in the premises except in respect to the duration of the suspension so ordered.[8]

By similar reasoning, the Supreme Court sustained the flexible provisions of the Tariff Act of 1922 whereby duties were increased or decreased to reflect differences in cost of production at home and abroad, as such differences were ascertained and proclaimed by the President.[9]

ArtI.S1.5 Nondelegation Doctrine

ArtI.S1.5.1 Overview of Nondelegation Doctrine

Article I, Section 1:

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

The nondelegation doctrine is rooted in certain separation of powers principles.[1] In limiting Congress's power to delegate, the nondelegation doctrine exists primarily to prevent Congress from ceding its legislative power to other entities not vested with legislative authority under the Constitution. As interpreted by the Court, the doctrine seeks to ensure that legislative decisions are made through a bicameral legislative process by the elected Members of Congress or governmental officials subject to constitutional accountability.[2] Reserving the legislative power for a bicameral Congress was "intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps."[3]

The nondelegation doctrine, however, does not require complete separation of the three branches of government, and its continuing strength is the question of much debate.[4] In its nondelegation jurisprudence, the Supreme Court has recognized the need and importance of coordination among the three branches of government so long as one branch does not encroach on the "constitutional field" of another branch.[5] The nondelegation doctrine seeks to distinguish the constitutional delegations of power to other branches of government that may

[8] *Id.* at 692, 693.

[9] J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928).

[1] *See* Loving v. United States, 517 U.S. 748, 758 (1996) ("Another strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties."). For discussion of the separation of powers, see Intro.7.2 Separation of Powers Under the Constitution.

[2] *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 959 (1983) ("There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution.") (citations omitted). *See also* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 61 (2015) (Alito, J., concurring) ("The principle that Congress cannot delegate away its vested powers exists to protect liberty. Our Constitution, by careful design, prescribes a process for making law, and within that process there are many accountability checkpoints. It would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints. The Constitution's deliberative process was viewed by the Framers as a valuable feature, not something to be lamented and evaded.") (citations omitted); Indus. Union Dep't, AFL-CIO v. API, 448 U.S. 607, 687 (1980) ("It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process.").

[3] Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 957–58 (1983).

[4] Marshall Field & Co. v. Clark, 143 U.S. 649, 692 (1892); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[5] J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

be "necessary" for governmental coordination from unconstitutional grants of legislative power that may violate separation of powers principles.[6]

ArtI.S1.5.2 Historical Background on Nondelegation Doctrine

Article I, Section 1:

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

While the Supreme Court has declared categorically that "the legislative power of Congress cannot be delegated,"[1] and on other occasions has recognized more forthrightly, as Chief Justice John Marshall did in 1825, that, although Congress may not delegate powers that "are strictly and exclusively legislative," it may delegate "powers which [it] may rightfully exercise itself."[2] The categorical statement has never been literally true, the Court having upheld the delegation at issue in the very case in which the statement was made.[3] The Court has long recognized that administration of the law requires exercise of discretion,[4] and that, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[5] The real issue is where to draw the line. Chief Justice Marshall recognized "that there is some difficulty in discerning the exact limits," and that "the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."[6] Accordingly, the Court's solution has been to reject delegation challenges in all but the most extreme cases, and to accept delegations of vast powers to the President or to administrative agencies.

During the nineteenth and early twentieth centuries, the nondelegation doctrine developed slowly, partly due to the relatively few statutes that were enacted and the lack of executive agencies to exercise those delegations.[7] In early nondelegation cases, the Supreme Court upheld various delegations of authority to the President, administrative agencies, and

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[6] *Id.* at 406. *See also Chadha*, 462 U.S. at 944 ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government.").

[1] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932). *See also* Field v. Clark, 143 U.S. 649, 692 (1892).

[2] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41 (1825).

[3] The Court in *Shreveport Grain & Elevator* upheld a delegation of authority to the Food and Drug Administration to allow reasonable variations, tolerances, and exemptions from misbranding prohibitions that were backed by criminal penalties. It was "not open to reasonable dispute" that such a delegation was permissible to fill in details "impracticable for Congress to prescribe."

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

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

[6] Wayman v. Southard, 23 U.S. (10 Wheat.) at 42. For particularly useful discussions of delegations, see 1 K. Davis, Administrative Law Treatise Ch. 3 (2d ed., 1978); L. Jaffe, Judicial Control of Administrative Action ch. 2 (1965).

[7] *See* David Schoenbrod, Power without Responsibility: How Congress Abuses the People through Delegation 31–33 (1993) (discussing the history of the nondelegation doctrine and the lack of "strong, lawmaking agencies" during the nineteenth century); Jon D. Michaels, Constitutional Coup: Privatization's Threat to the American Republic 41–42 (2017) (discussing the development of federal administrative power from the "smattering of key federal agencies" that existed before the Civil War to the current modern administrative state). *See also* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 420–21 (2017) (analyzing the number of nondelegation cases before and after 1880s).

the judiciary.[8] For example, in *Wayman v. Southard*, the Court upheld the Process Acts of 1789, which authorized the federal courts to issue writs to execute their judgments.[9] In *Wayman*, the Court declared that "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[10] His opinion distinguished between "important" policy issues, "which must be entirely regulated by the legislature itself," and subjects "of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details."[11] Later, in *Marshall Field & Co. v. Clark*,[12] the Court affirmed Congress's grant of power to the President to impose import tariffs only if the President determined that other nations imposed "unequal or unreasonable" tariffs on American exports.[13] The Court reasoned that Congress must "make the law, which necessarily involves a discretion as to what it shall be," and its delegations may only "confer[ ] authority and discretion as to its execution, to be exercised under and in pursuance of the law."[14]

While acknowledging the Congress may delegate some authority in these early decisions, the Supreme Court began to clarify the role of the delegee with respect to Congress and draw the boundary between permissible and impermissible delegations. In these early nondelegation cases, the Court determined that governmental entities acted as a "mere agent" to administer and effectuate the laws and "essential"[15] policy decisions Congress enacted and were not exercising legislative power.[16] To ensure the delegations were not boundless, the Court also required that the delegations of authority must stay "within the great outlines marked out by the legislature."[17]

ArtI.S1.5.3 Origin of Intelligible Principle Standard

Article I, Section 1:

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

As the primary means to enforce the nondelegation doctrine, the Supreme Court has required that Congress lays out an "intelligible principle" to govern and guide its delegee.[1] The

[8] *See* Peter H. Aranson et al., *A Theory of Legislative Delegation*, 68 Cornell L. Rev. 1, 7 (1982) (discussing early challenges to the congressional delegations).

[9] 23 U.S. (10 Wheat.) 1, 14 (1825).

[10] *Id.* at 42.

[11] *Id.* at 1, 6, 43.

[12] 143 U.S. 649 (1892).

[13] *Id.* at 699.

[14] *Id.* at 693–94 (quoting Cincinnati, Wilmington, & Zansville, R.R. v. Comm'rs of Clinton Cty., 1 Ohio St. 77, 88 (1852)).

[15] A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935).

[16] *See* United States v. Grimaud, 220 U.S. 506, 516 (1911) (upholding the constitutionality of regulations and criminal penalties promulgated by the Secretary of Agriculture regarding the use of federal grazing lands, reasoning that "Congress was merely conferring administrative functions upon an agent, and not delegating to him legislative power"); Marshall Field & Co. v. Clark, 143 U.S. 649, 693 (1892) (holding that the delegation of authority to the President to suspend import tariffs was constitutional as the President was acting as "the mere agent of the law-making department to ascertain and declare the event upon which [Congress's] expressed will was to take effect"); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 6, 43 (1825) (upholding Congress's delegation of the authority to the judiciary to establish procedures for executing judgments because the judiciary was exercising this delegated power to act pursuant to "general provisions to fill up the details").

[17] *Wayman*, 23 U.S. (10 Wheat.) at 45.

[1] 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized [ ] is directed to conform, such legislative action is not a forbidden delegation of legislative power."). *See also* Gundy v. United States, No. 17-6086, slip op. at 5 (U.S. June 20, 2019) (plurality opinion) ("The

"intelligible principle" standard requires that Congress delineate a legal framework to constrain the authority of the delegee, such as an administrative agency.[2] The principle was explicitly set forth in the 1928 case, *J. W. Hampton, Jr. & Co. v. United States*, in which the Supreme Court upheld Congress's delegation of authority to the President to set tariff rates that would equalize production costs in the United States and competing countries.[3] The Court's opinion, written by Chief Justice William Howard Taft, emphasized that Congress was restrained only according to "common sense and the inherent necessities" of governmental cooperation in seeking the assistance of another branch.[4] The Court explained that Congress could delegate discretion to other entities to "secure the exact effect" of legislation if it provides an "intelligible principle" to which the President or other entity must conform.[5] The Court further noted: "Such legislative action is not a forbidden delegation of legislative power" if "nothing involving the expediency or just operation of such legislation was left to [delegee's] determination."[6] The Court concluded that, with respect to the tariff law at issue in the case, the President acted only as "the mere agent of the law-making department" because the President was guided by an "intelligible principle" laid out by Congress.[7] Hence, the "intelligible principle" standard, as imposed by the Supreme Court, seeks to ensure that Congress has laid down the "boundaries" and limits of Congress's delegations.[8]

In 1929, the year after the *J.W. Hampton* decision, the stock market crashed, precipitating the Great Depression of the 1930s.[9] After his election in 1932,[10] President Franklin Delano Roosevelt, in conjunction with Congress, began to implement his "New Deal"[11] of economic and labor reforms that greatly expanded the power of the Federal Government during his presidency.[12] The expansion of governmental power to combat the Great Depression and spur economic recovery during the New Deal era[13] led to several judicial challenges that, among

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constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion."); Loving v. United States, 517 U.S. 748, 771 (1996) ("The intelligible-principle rule seeks to enforce the understanding that Congress may not delegate the power to make laws and so may delegate no more than the authority to make policies and rules that implement its statutes.").

[2] *See, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935) ("The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply.").

[3] 276 U.S. 394 (1928).

[4] *Id.* at 406.

[5] *Id.* at 409.

[6] *Id.* at 410.

[7] *Id.* at 411.

[8] Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 105 (1946).

[9] *See generally* John K. Galbreth, The Great Crash 1929 (2009) (describing the events that led to the crash of the stock market in 1929 and subsequent impacts on the economy during the Great Depression).

[10] *See generally* William E. Leuchtenburg, The FDR Years: On Roosevelt and His Legacy 209–35 (1995) (discussing the political forces in play during the Great Depression and the election of Franklin Roosevelt).

[11] Franklin D. Roosevelt, Address Accepting the Presidential Nomination at the Democratic National Convention in Chicago (July 2, 1932) ("I pledge you, I pledge myself, to a new deal for the American people.").

[12] *See* William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 1932–1940, at 41–62 (Henry S. Commanger & Richard B. Morris eds., 1963) (describing the economic and labor reforms of Franklin Roosevelt's presidency).

[13] Historians note that the New Deal era under Franklin Delano Roosevelt began in 1933 and ended in 1938. *See generally* William E. Leuchtenburg, Franklin D. Roosevelt and the New Deal 1932–1940, at xv (Henry S. Commanger & Richard B. Morris eds., 1963) (describing the New Deal era as the "six years from 1933 to 1938 marked a greater upheaval in American institutions than in any similar period in our history"). *See also* Leuchtenburg, *supra* note 12, at 280 ("Conventionally the end of the New Deal is dated with the enactment of the Wages and Hours Act of 1938.") (quoting historian Carl Degler).

other issues, questioned the scope of Congress's authority to delegate broad power to the Executive Branch under the nondelegation doctrine.

In 1935, in the midst of the New Deal era, the Supreme Court struck down legislation that granted the President extensive and "unfettered" powers to regulate economic activity. As characterized by the Court, the delegations to the President challenged in *Panama Refining Co. v. Ryan*[14] and *A.L.A. Schechter Poultry Corp. v. United States*[15] were not only broad but unprecedented delegation of legislative power to the President. Both cases involved provisions of the National Industrial Recovery Act. At issue in *Panama Refining* was a delegation to the President of authority to prohibit interstate transportation of petroleum produced in excess of quotas set by state law.[16] The Supreme Court held that the Act provided no guidance to the President in determining whether or when to exercise this authority, requiring no finding by the President as a condition before exercising the authority.[17] As the Court noted, Congress "declared no policy, . . . established no standard, [and] laid down no rule" with respect to the so-called "hot oil" law at issue, but rather "left the matter to the President without standard or rule, to be dealt with as he pleased," resulting in the law's invalidation.[18]

Similarly, the Supreme Court in *Schechter Poultry* reviewed a delegation to the President of authority to promulgate codes of fair competition that industry groups or the President, on his own initiative, could propose and adopt.[19] The Court determined that the codes were required to implement the National Industrial Recovery Act, but the President's authority to approve, condition, or adopt codes on his own initiative was similarly devoid of meaningful standards and "virtually unfettered."[20] The Court noted that this broad delegation was "without precedent."[21] The Act supplied "no standards" for any trade or industry association for proposing codes and, unlike other broad delegations that the Court had upheld, did not set policies that an administrative agency could implement by following "appropriate administrative procedure."[22] The Court rejected the government's argument that such economic measures must take into consideration the "grave national crisis" caused by the Great Depression, stating that "[e]xtraordinary conditions do not create or enlarge constitutional power."[23]

The Supreme Court's decisions in *Panama Refining* and *Schechter Poultry* represent the "high-water mark" for the nondelegation doctrine.[24] A decline of judicial reliance on the nondelegation doctrine soon followed in the years after the Court issued its decisions in *Panama Refining* and *Schechter*.[25] This shift in the Court's approach to the nondelegation doctrine coincided with a broader "constitutional revolution" at the Supreme Court that

[14] 293 U.S. 388 (1935).

[15] 295 U.S. 495 (1935).

[16] 293 U.S. at 417–19.

[17] *Id.* at 415–18.

[18] *Id.* at 418, 430. Similarly, the Supreme Court explained that executive order exercising the authority contained no finding or other explanation by which the legality of the action could be tested. *Id.* at 431–33.

[19] *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 521–27.

[20] *Id.* at 542.

[21] *Id.* at 541. The Court was also concerned that the industrial codes were backed by criminal sanction and that the power to develop codes of fair competition was delegated to private individuals such as industry trade associations. *See generally* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) (interpreting *Schechter* and *Panama Refining* cases).

[22] *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 541.

[23] *Id.* at 528.

[24] Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L.J. 1399, 1405 (2000).

[25] *Id.*

largely affirmed the Federal Government's broad powers to guide the nation's social and economic development.[26] With respect to the nondelegation doctrine, the Court's use of the "intelligible principle" standard afforded the Executive Branch "substantial discretion" over regulatory policy.[27] As noted by legal scholars, "the federal judiciary [took] a hands-off approach to assessing the congressional assignment of policy responsibility to other government officials."[28]

Under the "intelligible principle" standard, the Court has not struck down legislation as an impermissible delegation of authority to other branches of government since its *Panama Refining* and *Schechter* decisions in 1935. Since 1935, the Court has not struck down a delegation to an administrative agency.[29] Rather, the Court has approved, "without deviation, Congress's ability to delegate power under broad standards."[30] The Court has upheld, for example, delegations to administrative agencies to determine "excessive profits" during wartime,[31] to determine "unfair and inequitable distribution of voting power" among securities holders,[32] to fix "fair and equitable" commodities prices,[33] to determine "just and reasonable" rates,[34] and to regulate broadcast licensing as the "public interest, convenience, or necessity require."[35] During all this time the Court "has not seen fit . . . to enlarge in the slightest [the] relatively narrow holdings" of *Panama Refining* and *Schechter*.[36] Again and again, the Court has distinguished the two cases, sometimes by finding adequate standards in the challenged statute,[37] sometimes by contrasting the vast scope of the power delegated by the National Industrial Recovery Act (NIRA),[38] and sometimes by pointing to required administrative findings and procedures that were absent in the NIRA.[39] The Court has also relied on the

[26] *See, e.g.*, W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (rejecting the view that the Fourteenth Amendment's Due Process Clause protected liberty of contract); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (adopting a broader view of the Commerce Clause). For discussion of New Deal Court, see ArtVI.C2.3.3 New Deal and Presumption Against Preemption. *See generally* Edward S. Corwin, Constitutional Revolution, LTD. 64–79, 112–14 (1941) (analyzing Supreme Court decisions during the New Deal era). *See also* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 420–21 (2017) (discussing the expansion of the federal government's role in regulating industry and interstate commerce).

[27] Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379, 382 (2017) (citing Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421, 447–48 (1987)).

[28] *Id.*

[29] A year later, the Court invalidated the Bituminous Coal Conservation Act on delegation grounds, but that delegation was to private entities. Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[30] Mistretta v. United States, 488 U.S. 361, 373 (1989).

[31] Lichter v. United States, 334 U.S. 742 (1948).

[32] American Power & Light Co. v. SEC, 329 U.S. 90 (1946).

[33] Yakus v. United States, 321 U.S. 414 (1944).

[34] FPC v. Hope Natural Gas Co., 320 U.S. 591 (1944).

[35] National Broadcasting Co. v. United States, 319 U.S. 190 (1943).

[36] Hampton v. Mow Sun Wong, 426 U.S. 88, 122 (1976) (Rehnquist, J., dissenting).

[37] Mistretta v. United States, 488 U.S. 361, 373–79 (1989).

[38] *See, e.g.*, Fahey v. Mallonee, 332 U.S. 245, 250 (1947) (contrasting the delegation to deal with "unprecedented economic problems of varied industries" with the delegation of authority to deal with problems of the banking industry, where there was "accumulated experience" derived from long regulation and close supervision); Whitman v. American Trucking Ass'ns, 531 U.S. 457, 474 (2001) (the NIRA "conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition'").

[39] *See, e.g.*, Yakus v. United States, 321 U.S. 414, 424–25 (1944) (*Schechter* involved delegation "not to a public official . . . but to private individuals"; it suffices if Congress has sufficiently marked the field within which an administrator may act "so it may be known whether he has kept within it in compliance with the legislative will.")

constitutional doubt principle of statutory construction to narrow interpretations of statutes that, interpreted broadly, might have presented delegation issues.[40]

ArtI.S1.5.4 Nature and Scope of Intelligible Principle Standard

Article I, Section 1:

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

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

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

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[40] *See, e.g.*, Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607, 645–46 (1980) (plurality opinion) (invalidating an occupational safety and health regulation, and observing that the statute should not be interpreted to authorize enforcement of a standard that is not based on an"understandable" quantification of risk); National Cable Television Ass'n v. United States, 415 U.S. 336, 342 (1974) ("hurdles revealed in [*Schechter* and *J. W. Hampton, Jr. & Co. v. United States*] lead us to read the Act narrowly to avoid constitutional problems").

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

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

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

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

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

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

[7] Nat'l Broad. Co. v. United States, 319 U.S. 190, 226 (1943).

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

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

[10] *See id.* at 379 (1989) ("Developing proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate."); Am. Power & Light Co. v. Sec. & Exch. Comm'n, 329 U.S. 90, 105 (1946) ("The legislative

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

The Supreme Court's application of the "intelligible principle" standard may also reflect the challenge in determining the appropriate line between permissible and impermissible delegations.[15] Since its early nondelegation decisions, the Court has recognized the difficulty in drawing the "line which separates legislative power to make laws, from administrative authority" to execute the laws enacted by Congress.[16] The "precise boundary of this [legislative] power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily."[17]

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process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority."); Yakus v. United States, 321 U.S. 414, 424 (1944) ("The Constitution as a continuously operative charter of government does not demand the impossible or the impracticable. It does not require that Congress find for itself every fact upon which it desires to base legislative action or that it make for itself detailed determinations which it has declared to be prerequisite to the application of the legislative policy to particular facts and circumstances impossible for Congress itself properly to investigate."); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–530 (1935) (recognizing "the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly"); United States v. Grimaud, 220 U.S. 506, 516 (1911) ("[I]t was impracticable for Congress to provide general regulations for these various and varying details of [forest reservation] management."); Marshall Field & Co. v. Clark, 143 U.S. 649, 694 (1892) ("The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.").

[11] *See Schechter*, 295 U.S. at 529–30 (citing Panama Ref. Co. v. Ryan, 293 U.S. 388, 421(1935)).

[12] *Mistretta*, 488 U.S. at 372.

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

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

[15] *Marshall Field & Co.*, 143 U.S. at 693; Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42 (1825).

[16] United States v. Grimaud, 220 U.S. 506, 517 (1911).

[17] *Wayman*, 23 U.S. (10 Wheat.) at 46. In attempts to draw the boundaries of legislative power, the Court has described Congress's "essential legislative functions" or "law-making" powers under Article I, Section 1 in various ways. *See, e.g.*, *Chadha*, 462 U.S. at 952, 954 (characterizing Congress's legislative duties as "altering the legal rights, duties, and relations of persons" and determining policy); United States v. Grimaud, 220 U.S. 506, 516 (1911)

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

> the only concern of courts is to ascertain whether the will of Congress has been obeyed. This depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to find but upon the determination whether the definition sufficiently marks the field within which the [delegee] is to act so that it may be known whether he has kept within it in compliance with the legislative will.[18]

In *Yakus*, the Court upheld the delegation of authority to the Price Administrator to fix commodity prices that "will be generally fair and equitable and will effectuate the purposes" of the statute.[19] The Court determined that standards in the statute were "sufficiently definite and precise to enable Congress, the courts and the public to ascertain whether the Administrator, in fixing the designated prices, has conformed to those standards."[20] Only the absence of standards or boundaries for the delegated authority, the Court reasoned, would justify "overriding" Congress's choice to effectuate its "legislative will."[21]

This focus on statutory boundaries rather than the legislative character of the delegation is seen in the Supreme Court's review of delegations of rulemaking authority.[22] While acknowledging that regulations are "binding rules of conduct,"[23] the Court has treated such regulations as "valid only as subordinate rules when found to be within the framework of the policy which the legislature has sufficiently defined."[24]

The extent to which Congress must constrain its policy judgments or explicitly define the scope of a delegee's discretion may depend on whether the delegee possesses inherent authority related to the delegated matter. For delegated matters that are within the expertise or independent authority of the delegee, the Supreme Court has not required that Congress provide detailed guidance or direction for the delegation.[25] For example, in *Loving v. United States*, the Court reviewed a challenge to Congress's delegation to the President of the authority to prescribe aggravating factors for military capital murder cases.[26] The Court reasoned that "[o]nce delegated that power by Congress, the President, acting in his

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(describing laws as "general rules with reference to rights of persons and property" that "create or regulate obligations and liabilities"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935) (explaining that "positive law" "bind[s] equally those who assent and those who do not assent").

[18] *Yakus*, 321 U.S. at 425.

[19] *Id.* at 457.

[20] *Id.* at 425–26.

[21] *Id.* at 426.

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

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

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

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

[26] Loving v. United States, 517 U.S. 748, 759 (1996).

constitutional office of Commander in Chief, had undoubted competency to prescribe those factors without further guidance."[27] The Court, however, cautioned that if the delegation called for "the exercise of judgment or discretion that lies beyond the traditional authority of the President," there may be a greater need to provide guiding principles to sustain the delegation.[28]

The modern application of the *J. W. Hampton* Court's intelligible principle test and the broad deference it affords congressional delegations of authority to the other branches has met with growing skepticism from some members of the Court.[29] The 2019 case of *Gundy v. United States* highlighted an emerging split on the High Court with respect its nondelegation doctrine jurisprudence.[30] In that case, a criminal defendant challenged a provision of the Sex Offender Registration and Notification Act (SORNA) allowing the Attorney General to (1) "specify the applicability" of SORNA's registration requirements to individuals convicted of a sex offense prior to the statute's enactment and (2) "prescribe rules for [their] registration" in jurisdictions where the offender resides, works, or is a student.[31] Writing for a four-Justice plurality, Justice Elena Kagan interpreted this provision as limiting the Attorney General's authority to "require pre-Act offenders to register as soon as feasible,"[32] concluding that the delegation "easily passe[d] constitutional muster."[33] For the plurality, the Attorney General's authority under SORNA, when compared to other delegations the Court had previously upheld, was "distinctly small-bore."[34]

Notably, Justice Kagan's opinion was met by a dissent, authored by Justice Neil Gorsuch and joined by Chief Justice John Roberts and Justice Clarence Thomas, which argued that the statute unconstitutionally provided the Attorney General "unfettered discretion."[35] Further, the dissenters claimed that the modern intelligible principle test has "no basis in the original meaning of the Constitution" or in historical practice.[36] In response, the plurality, noting that delegations akin to the one in SORNA are "ubiquitous in the U.S. Code," argued that as a matter of pragmatism the Court should afford deference to Congress's judgments that such broad delegations are necessary.[37] Providing the fifth vote to affirm the petitioner's conviction was Justice Samuel Alito, who, while agreeing that the plurality correctly applied the modern nondelegation case law, indicated he would "support [the] effort" of the dissenting Justices to

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

[28] *Loving*, 517 U.S. at 772.

[29] *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.R., No. 13-1080, slip op. at 12 (U.S. Mar. 9, 2015) (Thomas, J., concurring) (arguing that the Court should "return to the original understanding of the federal legislative power" and reject the "boundless standard the 'intelligible principle' test has become"); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1154 (10th Cir. 2016) (Gorsuch, J., concurring) (noting "thoughtful" commentary questioning whether the current intelligible principle test serves "as much as a protection against the delegation of legislative authority as a license for it, undermining the separation between the legislative and executive powers that the founders thought essential").

[30] *See* No. 17-6086, slip op. (U.S. June 20, 2019). While criticisms of the intelligible principle doctrine have become more pronounced in recent years, some former members of the Court had argued for striking down legislation on nondelegation grounds. *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring); Arizona v. California, 373 U.S. 546, 626–27 (1963) (Harlan, J., dissenting).

[31] 34 U.S.C. § 20913(d); *see also Gundy*, slip op. at 2 (plurality opinion) (discussing SORNA's "basic registration scheme").

[32] *See Gundy*, slip op. at 16 (plurality opinion).

[33] *Id.* at 1.

[34] *Id.* at 17.

[35] *Id.* at 24 (Gorsuch, J., dissenting).

[36] *Id.* at 17 (Gorsuch, J., dissenting).

[37] *Id.* at 17–18 (plurality opinion).

reconsider the intelligible principle test once a majority of the Court concurred in rethinking the doctrine.[38] Accordingly, *Gundy* witnessed the Court evenly split on how deferential the Court should be with regard to congressional delegations to the other branches, raising questions as to whether the nondelegation doctrine would remain moribund.

ArtI.S1.5.5 Agency Discretion and Chevron Deference

Article I, Section 1:

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

Challenges to delegations of legislative power often raise concerns regarding an administrative agency's discretion to interpret broad directives, ambiguities, or gaps in a statutory provision. An agency's degree of discretion that may be constitutionally "acceptable" under the nondelegation doctrine appears to be fairly broad. In *Whitman v. American Trucking Associations*, the Supreme Court rejected a challenge to the U.S. Environmental Protection Agency's (EPA's) authority to set national air quality standards at a level "'requisite' . . . to protect the public health."[1] The Court held that the "scope of discretion" given to the EPA under the Clean Air Act "fit[s] comfortably" and is "well within the outer limits of our nondelegation precedents."[2] In reviewing previous nondelegation cases, the Court reasoned that even in "sweeping regulatory schemes" that affect the entire economy, the Court has "never demanded . . . that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'"[3]

Congress has given considerable leeway to administrative agencies to interpret statutory ambiguities, which has been sustained by the Supreme Court under the *Chevron* doctrine. Under the *Chevron* doctrine, courts give special consideration or deference to administrative agencies to interpret statutory ambiguities within their delegated authorities.[4] Judicial review of such interpretations is governed by the framework set forth in *Chevron U.S.A. Inc., v. Natural Resources Defense Council*.[5] The *Chevron* case reviewed the EPA's definition of the term "stationary source" in a regulation promulgated under the Clean Air Act.[6] A unanimous Supreme Court upheld that regulation, determining that the EPA's definition was "a permissible construction of the statute."[7] In *Chevron*, the Court reasoned that

> If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. . . . Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.[8]

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[38] *Id.* at 1 (Alito, J., concurring). Justice Brett Kavanaugh took no part in the consideration or decision in *Gundy*, as he was appointed to the Supreme Court after oral argument occurred in the case.

[1] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475–76 (2001).

[2] *Id.* at 474, 476.

[3] *Id.* at 457, 474.

[4] United States v. Mead Corp., 533 U.S. 218, 227 (2001).

[5] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

[6] *Id.* at 840; 42 U.S.C. § 7502.

[7] *Chevron U.S.A., Inc.*, 467 U.S. at 866.

[8] *Id.* at 844.

The broad deference the "intelligible principle" standard affords congressional delegations of authority to the other branches has met with growing skepticism from some members of the Court.[9] The 2019 case of *Gundy v. United States* highlighted an emerging split on the High Court with respect its nondelegation doctrine jurisprudence.[10] In that case, a criminal defendant challenged a provision of the Sex Offender Registration and Notification Act (SORNA) allowing, among other things, the Attorney General to "specify the applicability" of SORNA's registration requirements to individuals convicted of a sex offense prior to the statute's enactment.[11] Writing for a four-Justice plurality, Justice Elena Kagan interpreted this provision as limiting the Attorney General's authority to "require pre-Act offenders to register as soon as feasible,"[12] concluding that the delegation "easily passe[d] constitutional muster."[13] For the plurality, the Attorney General's authority under SORNA, when compared to other delegations the Court had previously upheld, was "distinctly small-bore."[14]

Notably, Justice Kagan's opinion was met by a dissent, authored by Justice Neil Gorsuch and joined by Chief John Justice Roberts and Justice Clarence Thomas, which argued that the statute unconstitutionally provided the Attorney General "unfettered discretion."[15] Further, the dissenters claimed that the modern intelligible principle standard has "no basis in the original meaning of the Constitution" or in historical practice.[16] In response, the plurality, noting that delegations akin to the one in SORNA are "ubiquitous in the U.S. Code," argued that as a matter of pragmatism the Court should afford deference to Congress's judgments that such broad delegations are necessary.[17] Providing the fifth vote to affirm the petitioner's conviction was Justice Samuel Alito, who, while agreeing that the plurality correctly applied the modern nondelegation case law, indicated he would "support [the] effort" of the dissenting Justices to reconsider the intelligible principle test once a majority of the Court concurred in rethinking the doctrine.[18] Accordingly, the Court in *Gundy* was evenly split on how deferential the Court should be with regard to congressional delegations to the other branches, raising questions as to whether the nondelegation doctrine would remain moribund.[19]

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

[10] *See* Gundy v. United States, No. 17-6086, slip op. (2019). While criticisms of the intelligible principle doctrine have become more pronounced in the beginning of the 21st century, some former members of the Court had argued for striking down legislation on nondelegation grounds. *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 675 (1980) (Rehnquist, J., concurring); Arizona v. California, 373 U.S. 546, 626–27 (1963) (Harlan, J., dissenting).

[11] 34 U.S.C. § 20913(d); *see also Gundy*, slip op. at 2 (plurality opinion) (discussing SORNA's "basic registration scheme").

[12] *See Gundy*, slip op. at 16 (plurality opinion).

[13] *Id.* at 1.

[14] *Id.* at 17.

[15] *Id.* at 24 (Gorsuch, J., dissenting).

[16] *Id.* at 17 (Gorsuch, J., dissenting).

[17] *Id.* at 17–18 (plurality opinion).

[18] *Id.* at 1 (Alito, J., concurring). Justice Brett Kavanaugh took no part in the consideration or decision in *Gundy*, as he was appointed to the Supreme Court after oral argument occurred in the case.

[19] *See, e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 Harv. L. Rev. 1274, 1302 (2006) ("Commentators thus agree with near unanimity that the Constitution's nondelegation norm goes essentially unenforced."); Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 331 (2002) ("There is something very fundamental—indeed, almost primal—about the nondelegation doctrine that keeps resuscitating it when any rational observer would have issued a 'code blue' long ago."); Eric A. Posner & Adrian Vermeule, *Crisis*

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

Article I, Section 1:

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

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

These complementary canons and principles have restricted the powers delegated by Congress, indirectly enforcing the separation of powers principles of the nondelegation doctrine. For example, the Supreme Court has sometimes limited the scope of an agency's delegated authority (and *Chevron* deference[2]) under the so-called "major questions" doctrine.[3] Under this doctrine, the Court has vacated administrative regulations on the ground that "Congress could not have intended to delegate a decision of such economic and political significance to an agency" without a clear statement of its intention.[4]

For matters that "affect the entire national economy" or go beyond the "traditional authority" of the delegee, Congress, in the Court's opinion, must provide "substantial guidance."[5] This additional level of guidance appears to be a more stringent version of the

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Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008, 76 U. Chi. L. Rev. 1613, 1630 (2009) ("[T]he nondelegation doctrine is largely moribund at the level of constitutional law.").

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

[2] *See, e.g.*, Massachusetts v. EPA, 549 U.S. 497, 531 (2007) (invoking major questions doctrine in not affording deference to the agency's construction of the statute); Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 323–24 (2014) (same).

[3] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) (overruling administrative regulations on the ground that "Congress could not have intended to delegate a decision of such economic and political significance to an agency" without a clear statement of its intention). *See also id.* at 159, citing Hon. Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration.").

[4] FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000). *See also* King v. Burwell, 576 U.S. 473, 485–87, 498 (2015) (holding that the Court had "reason to hesitate before concluding that Congress" implicitly delegated to the IRS the authority to "'fill in the statutory gaps'" in determining whether states participating in a federal health care exchange were eligible for tax credits under the Patient Protection and Affordable Care Act) (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159); Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 573 U.S. 302, 323–24 (2014) (holding that the Environmental Protection Agency's (EPA's) regulations represented an unreasonable reading of the authority delegated in the statute because the agency's interpretation would have constituted "an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

[5] *See* Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'") (quoting *Brown & Williamson Tobacco*

"intelligible principle" standard that has been used by the Court for delegation challenges. In *West Virginia v. Environmental Protection Agency*, the Supreme Court expressed doubt that Congress intended to provide the Environmental Protection Agency with authority to cap carbon dioxide emissions so as to "force a nationwide transition" from fossil fuel-generated electricity.[6] The Court stated: "But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme . . . . A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[7] Similarly, in *King v. Burwell*,[8] the Court considered whether states participating in a federal health care exchange were eligible for tax credits under the Patient Protection and Affordable Care Act.[9] The Court declined to apply the *Chevron* deference to the statutory interpretation of the Internal Revenue Service (IRS), holding that this was an "'extraordinary case'" in which the Court had "'reason to hesitate before concluding that Congress'" implicitly delegated to the IRS the authority to "'fill in the statutory gaps.'"[10]

The Supreme Court has also enforced nondelegation principles through the canon of constitutional avoidance, taking a narrow view of a statutory delegation in order to avoid potential constitutional conflicts with the nondelegation doctrine.[11] In a 1974 case, *National Cable Television Association v. United States*, the Court avoided potential delegation concerns in a challenge to the Federal Communications Commission's (FCC's) authority to assess fees against regulated parties to cover their operating costs.[12] The Independent Offices Appropriations Act directed federal agencies to set fee levels by taking into consideration "direct and indirect cost[s] to the Government, value to the recipient, [and] public policy."[13] Relying on *Schechter Poultry* and *J.W. Hampton*, the Court declined to read the statute as raising a constitutional delegation question of whether the Act delegated taxing authority to the FCC, determining that "the [delegation] hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems."[14] The Court narrowly construed the

Corp., 529 U.S. at 160); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 475 (2001) ("[Congress] must provide substantial guidance on setting air standards that affect the entire national economy."). *See also* Loving v. United States, 517 U.S. 748, 772 (1996) ("Had the delegations here called for the exercise of judgment or discretion that lies beyond the traditional authority of the President, Loving's last argument that Congress failed to provide guiding principles to the President might have more weight.").

[6] West Virginia v. Env't Prot. Agency, No. 20-1530, slip op. at 31 (June 30, 2022).

[7] *Id.*

[8] 576 U.S. 473 (2015).

[9] 42 U.S.C. § 18031; 26 U.S.C. §§ 36B(b)–(c).

[10] *King*, 576 U.S. at 485–86 (quoting Brown & Williamson, 529 U.S. 120, 159 (2000)).

[11] *See* Mistretta v. United States, 488 U.S. 361, 373 n.7 (1989) ("[O]ur application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional."). *See also* Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 646 (1980) (acknowledging that the "sweeping delegation of legislative power [to the Secretary of Labor to set worker exposure standards] . . . might be unconstitutional" under the nondelegation doctrine and imposing a "construction of the [Occupational Safety and Health Act] that avoids this kind of open-ended grant" that required the Secretary to find a "significant risk" to employee health before adopting a standard). *See also* Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 4.8(b) (5th ed. 2012) ("The Supreme Court sometimes interprets grants of powers to agencies narrowly, so as to avoid constitutional issues regarding the scope of congressional power or constitutionality of the delegation to the agency."); John F. Manning, The Nondelegation Doctrine as a Canon of Avoidance, 2000 Sup. Ct. Rev. 223, 223, 242–43 (2000) ("The nondelegation doctrine . . . now operates exclusively through the interpretive canon requiring avoidance of serious constitutional questions. . . . Despite the Court's apparent refusal to enforce the nondelegation doctrine directly, cases such as *Brown & Williamson* illustrate the Court's modern strategy of using the canon of avoidance to promote nondelegation interests. Where a statute is broad enough to raise serious concerns under the nondelegation doctrine, the Court simply cuts it back to acceptable bounds.") (citing *Brown & Williamson Tobacco Corp.*, 529 U.S. 120).

[12] National Cable Television Ass'n v. United States, 415 U.S. 336, 337–41 (1974).

[13] *Id.* at 337.

[14] *Id.* at 342.

statute to limit the FCC's authority to set fees that reflect only the "value to the recipient" and not the full costs of regulating.[15] While the Supreme Court later distanced itself from the reasoning of *National Cable Television* in *Skinner v. Mid-America Pipeline Company*, explaining that "the delegation of discretionary authority under Congress's taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges,"[16] the 1974 decision illustrates that the nondelegation doctrine may not be "dead" but continues to survive through judicial canons and principles that sustain the separation of powers roots of the doctrine.[17]

ArtI.S1.6 Categories of Legislative Power Delegations

ArtI.S1.6.1 Criminal Statutes and Nondelegation Doctrine

Article I, Section 1:

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

The Supreme Court has held that only Congress has the power to declare any act or omission a criminal offense.[1] This limit derives from the due process and separation of powers principles that no one should be "subjected to a penalty unless the words of the statute plainly impose it."[2] The Supreme Court has held that Congress must "distinctly" define by statute what violations of the statute's provisions constitute a criminal offense.[3] At the same time, the Court has recognized that Congress may provide that violation of valid administrative regulations authorized by a statute shall be punished as a crime.[4]

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[15] *Id.* at 343–44.

[16] 490 U.S. 212, 221 (1989).

[17] *See* generally Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000); John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223 (2000).

[1] *See* Sessions v. Dimaya, No. 15-1498, slip op. at 5 (2018) (explaining that the void-for-vagueness doctrine is a "corollary of the separation of powers" that requires "Congress, rather than the executive or judiciary branch, define what conduct is [criminally] sanctionable or what is not"); Whitman v. United States, 574 U.S. 1003, 1004 (2014) ("[L]egislatures, not executive officers, define crimes."); United States v. Eaton, 144 U.S. 677, 688 (1892) ("It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offence . . . .").

[2] Tiffany v. Nat'l Bank of Missouri, 85 U.S. (18 Wall.) 409, 410 (1873). *See also* United States v. Robel, 389 U.S. 258, 272, 275 (1967) (Brennan, J., concurring) (noting that "indefinite[ ]" delegations "create the danger of overbroad, unauthorized, and arbitrary application of criminal sanctions in an area of [constitutionally] protected freedoms" and such "vague" delegations "are far more serious when liberty and the exercise of fundamental freedoms are at stake"). The Supreme Court has recognized that the void-for-vagueness doctrine may also serve to limit delegation of authority of criminal matters to other branches of the government. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) ("A vague [criminal] 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 application.").

[3] *See Eaton*, 144 U.S. at 688 ("It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offence . . . . If Congress intended to make to an offence [to violate] regulations . . . , it would have done so distinctly, in connection with an enactment [of the statute]."); *In re* Kollock, 165 U.S. 526 (1897) ("[T]he courts of the United States, in determining what constitutes an[ ] offence against the United States, must resort to the statutes of the United States, enacted in pursuance of the Constitution.").

[4] *See* United States v. Grimaud, 220 U.S. 506, 519 (1911) (explaining that the Forest Reserve Act clearly provided for punishment for violation of "rules and regulations of the Secretary"), *but see* United States v. Eaton, 144 U.S. 677 (1892) (holding the general statutory language authorizing punishment for failure to do what was "required by law" did not authorize criminal punishment for violation of a regulation because the statute did not explicitly provide for criminal sanctions for violations of regulations). Extension of the principle that penal statutes should be strictly construed requires that the prohibited acts be clearly identified in the regulation. M. Kraus & Bros. v. United States, 327 U.S. 614, 621 (1946). *See also* L. P. Steuart & Bro. v. Bowles, 322 U.S. 398, 404 (1944) ("[I]t is for Congress to prescribe the penalties for the laws which it writes. It would transcend both the judicial and the administrative function to make additions to those which Congress has placed behind a statute.").

Once Congress has exercised its power to declare certain acts criminal, the Supreme Court has generally upheld Congress's authority to delegate authority to further define what specific conduct is criminal pursuant to the statutory limits.[5] For example, the Supreme Court, in *Touby v. United States*, upheld a delegation of authority to the Attorney General to classify drugs as "controlled substances" under the Controlled Substances Act.[6] The Act prohibits, among other things, any person from knowingly or intentionally manufacturing, distributing a "controlled substance," and sets forth criminal penalties that vary according to the level of a drug's classification.[7] While acknowledged that its "cases are not entirely clear as to whether more specific guidance [than an 'intelligible principle'] is in fact required" for delegations that trigger statutorily prescribed criminal penalties, the Court concluded that the Act "passes muster even if greater congressional specificity is required in the criminal context."[8] The Court determined that the Act "placed multiple specific restrictions on the Attorney General's discretion to define criminal conduct," satisfying the "constitutional requirements of the nondelegation doctrine."[9]

The Supreme Court has also upheld the authority delegated to the Attorney General to apply criminal penalties retroactively. The 2019 case of *Gundy v. United States* centered on the application of registration requirements under the Sex Offender Registration and Notification Act (SORNA) to pre-act offenders.[10] Section 20913(d) of SORNA authorizes the Attorney General to "specify the applicability" of the registration requirements "to sex offenders convicted before the enactment" of the Act and to "prescribe rules for the registration of any such sex offenders" and for other offenders unable to comply with the initial registration requirements.[11] In his petition to the Supreme Court, Gundy, a convicted sex offender, argued, among other things, that SORNA's grant of "undirected discretion" to the Attorney General to decide whether to apply the statute to pre-SORNA offenders is an unconstitutional delegation of legislative power to the Executive Branch.

In a plurality opinion written on behalf of four Justices, Justice Elena Kagan concluded that SORNA's delegation "easily passes constitutional muster" and was "distinctly small-bore" when compared to the other broad delegations the Court has upheld since 1935.[12] Justice Kagan read SORNA as requiring the Attorney General to "apply SORNA's registration requirements as soon as feasible to offenders convicted before the statute's enactment."[13] Although the delegation in Section 20913(d) does not refer to a feasibility standard, Justice Kagan relied on the legislative history, definition of "sex offender," and SORNA's stated purpose (i.e., to establish a "comprehensive" registration system) as an "appropriate guide" to limit the Attorney General's discretion.[14] The plurality concluded that the Attorney General's "temporary authority" to delay the application of SORNA's registration requirements to

[5] Loving v. United States, 517 U.S. 748, 768 (1996) ("There is no absolute rule . . . against Congress's delegation of authority to define criminal punishments. We have upheld delegations whereby the Executive or an independent agency defines by regulation what conduct will be criminal, so long as Congress makes the violation of regulations a criminal offense and fixes the punishment, and the regulations 'confin[e] themselves within the field covered by the statute.'") (quoting *Grimaud*, 220 U.S. at 518).

[6] Touby v. United States, 500 U.S. 160, 165–69 (1991).

[7] 21 U.S.C. § 841(a)–(b).

[8] *Touby*, 500 U.S. at 166.

[9] *Id.* at 165–67.

[10] No. 17-6086, slip op. (2019).

[11] 34 U.S.C. § 20913(d).

[12] *Gundy*, No. 17-6086, slip op. at 1, 17 (plurality opinion).

[13] *Id.* at 1.

[14] *Id.* at 11–15.

pre-act offenders due to feasibility concerns "falls well within constitutional bounds."[15] Providing the fifth vote to affirm Gundy's conviction, Justice Samuel Alito concurred in the judgment only, declining to join Justice Kagan's opinion and indicating his willingness to rethink the Supreme Court's approach to the nondelegation doctrine.[16]

In his dissent joined by Chief Justice John Roberts and Justice Clarence Thomas, Justice Neil Gorsuch viewed the plain text of the delegation as providing the Attorney General limitless and "vast" discretion and "free rein" to impose (or not) selected registration requirements on pre-act offenders.[17] Justice Gorsuch concluded that SORNA's delegation was an unconstitutional breach of the separation between the legislative and Executive Branches.[18] In "a future case with a full panel," Justice Gorsuch hoped that the Court would recognize that "while Congress can enlist considerable assistance from the Executive Branch in filling up details and finding facts, it may never hand off to the nation's chief prosecutor the power to write his own criminal code. That 'is delegation running riot.'"[19]

Congress may also delegate authority to prescribe maximum and minimum penalty ranges for criminal sentences. The Court in *Mistretta v. United States* upheld Congress's conferral of "significant discretion" on the U.S. Sentencing Commission, an independent agency in the Judicial Branch, to develop and promulgate sentencing guidelines for federal judges.[20] These guidelines restricted a judge's discretion in sentencing criminal defendants by establishing a range of determinate sentences for all categories of federal offenses and defendants.[21]

The Court concluded that the statute "sets forth more than merely an 'intelligible principle' or minimal standards" by "explain[ing] what the Commission should do and how it should do it, and set[ting] out specific directives to govern particular situations."[22] Although Congress provided standards regarding the developing of the sentencing guidelines, the Court noted that the Commission has significant discretion in making policy judgments when considering the relative severity of different crimes and the weight of the characteristics of offenders, and stated that delegations may carry with them "the need to exercise judgment on matters of policy."[23] The Court also noted that the statute did not confer authority to create new crimes or to enact a federal death penalty for any offense.[24]

The Court has confessed that its "cases are not entirely clear as to whether more specific guidance is in fact required" for delegations relating to the imposition of criminal sanctions.[25] It is clear, however, that some essence of the power to define crimes and set a range of punishments is not delegable, but must be exercised by Congress. This conclusion derives in

[15] *Id.* at 17–18.

[16] *Id.* at 1 (concurring, Alito, J.).

[17] *Id.* at 3 (Gorsuch, J., dissenting).

[18] *Id.* at 27–33.

[19] *Id.* at 33 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring)).

[20] Mistretta v. United States, 488 U.S. 361, 371–79 (1989).

[21] *Id.* The Supreme Court in *United States v. Booker* held that the mandatory nature of the sentencing guidelines violated the Sixth Amendment. 543 U.S. 220, 246–46 (2005). The Court severed the mandatory provision to make the sentencing guidelines advisory. *Id.*

[22] *Id.* at 379.

[23] *Id.* at 378.

[24] *Id.* at 377–78. "As for every other offense within the Commission's jurisdiction, the Commission could include the death penalty within the guidelines only if that punishment was authorized in the first instance by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments." *Id.* at 378 n.11.

[25] Touby v. United States, 500 U.S. 160, 166 (1991).

part from the time-honored principle that penal statutes are to be strictly construed, and that no one should be "subjected to a penalty unless the words of the statute plainly impose it."[26] Both *Schechter*[27] and *Panama Refining*[28]—the only two cases in which the Court has invalidated delegations—involved broad delegations of power to "make federal crimes of acts that never had been such before."[29] Thus, Congress must provide by statute that violation of the statute's terms—or of valid regulations issued pursuant thereto—shall constitute a crime, and the statute must also specify a permissible range of penalties. Punishment in addition to that authorized in the statute may not be imposed by administrative action.[30]

However, once Congress has exercised its power to declare certain acts criminal, and has set a range of punishment for violations, authority to flesh out the details may be delegated. Congress may provide that violation of valid administrative regulations shall be punished as a crime.[31] For example, the Court has upheld a delegation of authority to classify drugs as "controlled substances," and thereby to trigger imposition of criminal penalties, set by statute, that vary according to the level of a drug's classification by the Attorney General.[32]

Congress may also confer on administrators authority to prescribe criteria for ascertaining an appropriate sentence within the range between the maximum and minimum penalties that are set by statute. The Court upheld Congress's conferral of "significant discretion" on the Sentencing Commission to set binding sentencing guidelines establishing a range of determinate sentences for all categories of federal offenses and defendants.[33] Although the Commission was given significant discretionary authority "to determine the relative severity of federal crimes, . . . assess the relative weight of the offender characteristics listed by Congress, . . . to determine which crimes have been punished too leniently and which too severely, [and] which types of criminals are to be considered similar," Congress also gave the Commission extensive guidance in the Act, and did not confer authority to create new crimes or to enact a federal death penalty for any offense.[34]

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[26] Tiffany v. Nat'l Bank of Mo., 85 U.S. (18 Wall.) 409, 410 (1873).

[27] A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[28] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935).

[29] Fahey v. Mallonee, 332 U.S. 245, 249 (1947).

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

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

[32] Touby v. United States, 500 U.S. 160 (1991).

[33] Mistretta v. United States, 488 U.S. 361 (1989).

[34] *Id.* at 377–78. "As for every other offense within the Commission's jurisdiction, the Commission could include the death penalty within the guidelines only if that punishment was authorized in the first instance by Congress and only if such inclusion comported with the substantial guidance Congress gave the Commission in fulfilling its assignments." *Id.* at 378 n.11.

ArtI.S1.6.2 Delegations of Foreign and Military Affairs to the President

Article I, Section 1:

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

That the delegation of discretion in dealing with foreign relations stands upon a different footing than the transfer of authority to regulate domestic concerns was asserted in *United States v. Curtiss-Wright Corporation*.[1] There the Court upheld a joint resolution of Congress making it unlawful to sell arms to certain warring countries upon certain findings by the President, a typically contingent type of delegation. But Justice George Sutherland for the Court proclaimed that the President is largely free of the constitutional constraints imposed by the nondelegation doctrine when he acts in foreign affairs.[2] Sixty years later, the Court, relying on *Curtiss-Wright*, reinforced such a distinction in a case involving the President's authority over military justice.[3] Whether or not the President is the "sole organ of the nation" in its foreign relations, as asserted in *Curtiss-Wright*,[4] a lesser standard of delegation is applied in areas of power shared by the President and Congress.

Superintendence of the military is another area in which shared power with the President is impacted by the delegation doctrine. The Court in *Loving v. United States*[5] approved a virtually standardless delegation to the President.

Article 118 of the Uniform Code of Military Justice (UCMJ)[6] provides for the death penalty for premeditated murder and felony murder for persons subject to the Act, but the statute does not comport with the Court's capital punishment jurisdiction, which requires the death sentence to be cabined by standards so that the sentencing authority must narrow the class of convicted persons to be so sentenced and must justify the individual imposition of the sentence.[7] However, the President in 1984 had promulgated standards that purported to supply the constitutional validity the UCMJ needed.[8]

The Court in *Loving* held that Congress could delegate to the President the authority to prescribe standards for the imposition of the death penalty—Congress's power under Article I, § 8, cl. 14, is not exclusive—and that Congress had done so in the UCMJ by providing that the punishment imposed by a court-martial may not exceed "such limits as the President may prescribe."[9] Acknowledging that a delegation must contain some "intelligible principle" to guide the recipient of the delegation, the Court nonetheless held this not to be true when the delegation was made to the President in his role as Commander in Chief. "The same limitations on delegation do not apply" if the entity authorized to exercise delegated authority itself possesses independent authority over the subject matter. The President's responsibilities

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[1] 299 U.S. 304, 319–29 (1936).

[2] *Id.* at 319–22. For a particularly strong, recent assertion of the point, see *Haig v. Agee,* 453 U.S. 280, 291–92 (1981). This view also informs the Court's analysis in *Dames & Moore v. Regan,* 453 U.S. 654 (1981). *See also* United States v. Chemical Foundation, 272 U.S. 1 (1926) (Trading With Enemy Act delegation to dispose of seized enemy property).

[3] Loving v. United States, 517 U.S. 748, 772–73 (1996).

[4] 299 U.S. at 319.

[5] 517 U.S. 748.

[6] 10 U.S.C. §§ 918(1), (4).

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

[8] Rule for Courts-Martial; *see* 517 U.S. at 754.

[9] 10 U.S.C. §§ 818, 836(a), 856.

as Commander in Chief require him to superintend the military, including the courts-martial, and thus the delegated duty is interlinked with duties already assigned the President by the Constitution.[10]

ArtI.S1.6.3 States and Legislative Power Delegations

Article I, Section 1:

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

Beginning in the Nation's early years, Congress has enacted hundreds of statutes that contained provisions authorizing state officers to enforce and execute federal laws.[1] Challenges to the practice have been uniformly rejected. Although the Court early expressed its doubt that Congress could compel state officers to act, it entertained no such thoughts about the propriety of authorizing them to act if they chose.[2] When, in the *Selective Draft Law Cases*,[3] the contention was made that the 1917 statute authorizing a military draft was invalid because of its delegations of duties to state officers, the argument was rejected as "too wanting in merit to require further notice." Congress continues to empower state officers to act.[4] Presidents who have objected have done so not on delegation grounds, but rather on the basis of the Appointments Clause.[5]

ArtI.S1.6.4 Quasi-Governmental Entities and Legislative Power Delegations

Article I, Section 1:

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

To define what constitutional limits could apply if Congress delegates authority to another entity to perform specified functions and duties, the Supreme Court has said that that it must first determine whether the entity in question is a private or governmental entity. The Court applies varying levels of scrutiny to a delegation depending on whether the delegation is made to a governmental, private, or quasi-governmental entity. For governmental entities such as federal agencies, the Court applies the lenient "intelligible principle" standard.[1]

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[10] 517 U.S. at 771–74. *See also* United States v. Mazurie, 419 U.S. 544, 556–57 (1974) (limits on delegation are "less stringent" when delegation is made to an Indian tribe that can exercise independent sovereign authority over the subject matter).

[1] *See* Charles Warren, *Federal Criminal Laws and the State Courts*, 38 Harv. L. Rev. 545 (1925); A. N. Holcombe, *The States as Agents of the Nation* (1921), *reprinted in* 3 Selected Essays on Constitutional Law 1187 (1938).

[2] Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842) (duty to deliver fugitive slave); Kentucky v. Dennison, 65 U.S. (24 How.) 66 (1861) (holding that Congress could not compel a governor to extradite a fugitive). Doubts over Congress's power to compel extradition were not definitively removed until Puerto Rico v. Branstad, 483 U.S. 219 (1987), in which the Court overruled *Dennison*.

[3] 245 U.S. 366, 389 (1918).

[4] *E.g.*, Pub. L. No. 94-435, title III, 90 Stat. 1394, 15 U.S.C. § 15c (state attorneys general may bring antitrust parens patriae actions); Medical Waste Tracking Act, Pub. L. No. 100-582, 102 Stat. 2955, 42 U.S.C. § 6992f (states may impose civil and possibly criminal penalties against violators of the law).

[5] *See* 24 Weekly Comp. of Pres. Docs. 1418 (1988) (President Reagan). The only judicial challenge to such a practice resulted in a rebuff to the presidential argument. Seattle Master Builders Ass'n v. Pacific N.W. Elec. Power Council, 786 F.2d 1359 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987).

[1] *See* ArtI.S1.5.3 Origin of Intelligible Principle Standard.

The Court has held that a provision of a statute that states an entity is either a private or governmental entity is not dispositive for constitutional purposes.[2] While certain entities such as federal agencies can be readily characterized as governmental entities,[3] the distinction between a public and a private entity is often unclear for government-created or government-appointed entities.[4] Nondelegation challenges involving quasi-governmental entities highlight "the judiciary's unsettled approach to analyzing the constitutional status of 'boundary agencies' that sit at the public-private border."[5]

The Supreme Court has examined the following factors to determine whether government-created entities[6] with varying degrees of governmental involvement and oversight are private or governmental entities:

- ownership and corporate structure;
- day-to-day management;
- statutory goals;
- political branches' supervision over the entities' priorities and operations; and
- federal financial support.[7]

These factors arose from two Supreme Court decisions involving the status of Amtrak, a federally chartered corporation. In its 1995 decision in *Lebron v. National Railroad Passenger Corp.*, the Supreme Court held that Amtrak "is an agency or instrumentality of the United States" for purposes of a First Amendment challenge.[8] After reviewing Amtrak's history and operations, the Court concluded that when the "Government creates a corporation [such as Amtrak] by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment."[9]

Twenty years later, the Supreme Court affirmed Amtrak's status as a governmental entity in a case involving nondelegation and Appointments Clause challenges. In *Department of Transportation v. Association of American Railroads*,[10] the Court relied on its analysis in

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[2] Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 52 (2015); Lebron v. National Railroad Passenger Corp., 513 U.S. 374, 394 (1995).

[3] *See, e.g.*, 5 U.S.C. §§ 101–105 (enumerating and defining executive and military departments, executive agencies, government corporations, and independent establishments). *See also* Ass'n of Am. R.R. v. Dep't of Transp., 821 F.3d 19, 39 (D.C. Cir. 2016) ("[T]he Due Process Clause effectively guarantees the regulatory power of the federal government will be wielded by 'presumptively disinterested' and 'duly appointed' actors who, in exercising that awesome power, are beholden to no constituency but the public good.").

[4] *See* Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 Harv. J.L. & Pub. Pol'y 931, 940 (2014) ("The public-private distinction is fuzzy, and statutory labels aren't always dispositive."); Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 Notre Dame L. Rev. 975, 1030 (2005) ("[E]xpanded privatization has served to blur the distinction between the spheres of public and private.").

[5] *The Supreme Court 2014 Term: Leading Case: Federal Statutes & Regulations: Passenger Rail Investment and Improvement Act—Nondelegation—Department of Transportation v. Association of American Railroads*, 129 Harv. L. Rev. 341, 350 (2015). *See e.g.*, S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 560 (1987) (determining that the United States Olympic Committee was not a governmental actor); *Ass'n of Am. R.R*, 821 F.3d 19 (holding that Amtrak was a self-interested governmental entity subject to the due process clause of the Fifth Amendment).

[6] *See* U.S. Gov't Accountability Off., GAO-16-464SP, Principles of Federal Appropriations Law, ch. 15, at 86–87 (3d. ed. 2008) (discussing how the distinction between what is public or private is "indistinct" for "quasi-private," "quasi-governmental," "hybrid organizations," and "twilight zone corporations") (internal quotations and citations omitted).

[7] Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 54–55 (2015) (citing Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 392–99 (1995)).

[8] Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 376–78 (1995).

[9] *Id.* at 400.

[10] *Ass'n of Am. R.R.*, 575 U.S. at 45–46.

Lebron to determine whether Amtrak was a governmental or private entity. The Association of American Railroads filed suit alleging that the Passenger Rail Investment and Improvement Act of 2008 unconstitutionally delegated authority to Amtrak to set certain standards.[11] The Court concluded that Amtrak was a governmental entity because the "political branches created Amtrak, control its Board, define its mission, specify many of its day-to-day operations, have imposed substantial transparency and accountability mechanisms, and, for all practical purposes, set and supervise its annual budget."[12] The Court did not explain the relative importance of the various factors in the *Amtrak* test, concluding that the "combination of these unique features and [Amtrak's] significant ties to the Government" established that it was not a private entity but a governmental entity that "was created by the Government, is controlled by the Government, and operates for the Government's benefit."[13] The Court did not reach the issue of whether the delegation of power given to Amtrak over its competitors violates the Due Process Clause or the nondelegation doctrine.[14]

Because case law on the threshold question of whether an entity is a private or governmental entity is limited and fact-dependent, it is difficult to conclude with any certainty how the Supreme Court would apply the *Amtrak* test with respect to other government-created corporations or other entities performing government functions.[15] In addition to nondelegation concerns, the growth of quasi-governmental entities[16] could also raise due process and other constitutional concerns.[17]

[11] The U.S. Court of Appeals for the District of Columbia Circuit concluded that Amtrak was a private entity "with respect to Congress's power to delegate regulatory authority." Ass'n of Am. R.R. v. Dep't of Transp., 721 F.3d 666, 677 (D.C. Cir. 2013), *vacated by* 575 U.S. 43 (2015).

[12] *Ass'n of Am. R.R.*, 575 U.S. at 55.

[13] *Id.* at 53–54.

[14] *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 45, 55–56 (2015). *See also Ass'n of Am. R.R. v. Dep't of Transp.*, 821 F.3d 19 (2016), *reh'g denied*, 2016 U.S. App. LEXIS 16669 (D.C. Cir., Sept. 9, 2016).

[15] *Id.* at 54. In general, when applying this multi-factor test, lower courts have examined these entities in a holistic manner rather than focus on the specific challenged action of the entity. *See, e.g.*, United States v. Ackerman, 831 F.3d 1292, 1297–98 (10th Cir. 2016) (examining the factors considered in the Supreme Court's decision in *Association of American Railroads* to determine that the National Center for Missing and Exploited Children was a government entity to which the Fourth Amendment applied).

[16] Congress has established such entities in the form of for- and nonprofit corporations that are managed by boards of directors and not (as declared in the enabling legislation) "agencies" or "instrumentalities" of the Government. *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 386–391 (1995) (discussing examples of corporations created by Congress). For example, Congress created Amtrak in 1970 as a for-profit corporation to provide railroad passenger service, requiring by law for Amtrak to "maximize its revenues." Rail Passenger Service Act of 1970 (RPSA), Pub. L. No. 91–518, § 101, 84 Stat. 1328 (1970). Congress established Amtrak in 1970 as a for-profit corporation to take over the passenger rail service that had been operated by private railroads because "the public convenience and necessity require the continuance and improvement" of railroad passenger service. *Id. See also* 49 U.S.C. §§ 24301(a)(2), 24101(d)).

[17] The potential self-interested nature of government-created entities may also raise concerns beyond violations of the nondelegation doctrine. *See generally* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. Pa. L. Rev. 841 (2014) (analyzing government-created corporations and organizations). These concerns include whether the self-interested nature of a government-created corporation combined with its coercive power over its competitors violate the Due Process Clause. *Id.* Also, delegation of authority to officers, members of the board of directors, or employees of government-created entities may implicate the Constitution's requirements regarding the appointment of certain federal officials under the Appointments Clause. The Appointments Clause applies to "officers" who wield "significant authority pursuant to the laws of the United States." Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam). For discussion of the Appointments Clause, see ArtII.S2.C2.3.1 Overview of Appointments Clause.

ArtI.S1.6.5 Private Entities and Legislative Power Delegations

Article I, Section 1:

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

In contrast to the relative latitude given to delegations to other branches of the government under the "intelligible principle" standard,[1] the Supreme Court has limited the types of authority and functions that Congress can delegate to a purely private entity.[2] The seminal case addressing delegations to a private entity is *Carter v. Carter Coal Co.*[3] In *Carter Coal*, the Supreme Court invalidated the Bituminous Coal Conservation Act of 1935, a law that granted a majority of coal producers and miners in a given region the authority to impose maximum hour and minimum wage standards on all other miners and producers in that region.[4] The Court reasoned that by conferring on a majority of private individuals the authority to regulate "the affairs of an unwilling minority," the law was "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."[5] The Court did not apply the "intelligible principle" standard, but instead focused on the regulatory and "coercive" power given to private entities over its competitors and the due process concerns raised by such delegations.[6]

Although *Carter Coal* concerned the delegation of authority to private entities and not governmental bodies, some courts and commentators have suggested that the *Carter Coal* decision may more accurately be viewed as a due process case.[7] The Fifth Amendment's Due Process Clause prohibits the Federal Government[8] from depriving any person of "life, liberty,

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[1] *See* ArtI.S1.5.3 Origin of Intelligible Principle Standard.

[2] *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935) (holding that delegation to trade and industrial associations of the power to develop codes of "fair competition" for the poultry industry "is unknown to our law and utterly inconsistent with the constitutional prerogatives and duties of Congress").

[3] 298 U.S. 238 (1936).

[4] *Id.* at 311–12.

[5] *Id.* at 311. The Court appeared to characterize the wage and hour provisions as an unlawful "delegation" to a private entity, but also held that the provision in question was "clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment," *id.* at 311–12, leading some to question whether *Carter* should be considered a nondelegation case at all.

[6] *See id.* at 311 ("The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor.").

[7] At least one court has debated on whether *Carter Coal* is a nondelegation or due process decision. *See* Ass'n of Am. R.R. v. Dep't of Transp., 821 F.3d 19, 31 (D.C. Cir. 2016) (explaining that it was unclear what aspect of the "delegation [in *Carter Coal*] offended the Court. By one reading, it was the Act's delegation to 'private persons rather than official bodies. By another, it was the delegation to persons 'whose interests may be and often are adverse to the interests of others in the same business' rather than persons who are 'presumptively disinterested,' as official bodies tend to be. Of course, the Court also may have been offended on both fronts. But as the opinion continues, it becomes clear that what primarily drives the Court to strike down this provision is the self-interested character of the delegatees' . . . .").

[8] The Fifth Amendment's Due Process Clause, by its very nature, only applies to the actions of the Federal Government. *See* Farrington v. Tokushige, 273 U.S. 284, 299 (1927) ("[T]he inhibition of the Fifth Amendment—'No person shall . . . be deprived of life, liberty or property without due process of law'—applies to the federal government and agencies set up by Congress for the government of the Territory."). For discussion of the Fifth Amendment's Due Process Clause, see Amdt5.5.1 Overview of Due Process. The Fourteenth Amendment's Due Process Clause as applied to actions of the states is discussed at Fourteenth Amendment, Section 1.

or property without due process of law,"[9] which the Court has interpreted as establishing certain principles of fundamental fairness, including the notion that decision makers must be disinterested and unbiased.[10] In striking down the delegation to coal producers and miners to impose standards on other producers and miners, the Supreme Court in *Carter Coal* centered its analysis on the coercive power that the majority could exercise over the "unwilling minority."[11] The opinion articulated the due process problems involved with providing regulatory authority to private entities, stating:

> The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.[12]

The Court's reasoning in *Carter Coal* suggests that delegating authority to coal producers and miners to impose standards on its competitors is in tension with both the nondelegation doctrine and the Due Process Clause.[13]

After its *Carter Coal* decision, the Supreme Court did not comprehensively ban private involvement in regulation. In the context of private parties aiding in regulatory functions and decisions, the Court has indicated that Congress may empower a private party to play a more limited and supervised role in the regulatory process. For example, in *Currin v. Wallace*,[14] the Court upheld a law that authorized the Secretary of Agriculture to issue a regulation respecting the tobacco market, but only if two-thirds of the growers in that market voted for the Secretary to do so.[15] In distinguishing *Carter Coal*, the Court stated that "this is not a case where a group of producers may make the law and force it upon a minority."[16] Rather, it was Congress that had exercised its "legislative authority in making the regulation and in prescribing the conditions of its application."[17]

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[9] U.S. Const. amend. V. *See also* Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) ("The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases."); *Carter Coal*, 298 U.S. at 311; Eubank v. City of Richmond, 226 U.S. 137, 143–44 (1912) (invalidating a city ordinance on the grounds that it established "no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest, or even capriciously. . . ."). *See* Amdt5.5.1 Overview of Due Process.

[10] *See, e.g.*, *Marshall*, 446 U.S. at 242.

[11] *Carter Coal*, 298 U.S. at 311.

[12] *Id.* at 311–12.

[13] The intersection of the Due Process Clause and the nondelegation doctrine as illustrated by the Court's decision in *Carter Coal* may arise when Congress delegates authority to government-created corporations that have both public and private aspects. For example, in *Department of Transportation v. Association of American Railroads*, the Supreme Court held that "Amtrak is a governmental entity, not a private one" for purposes of reviewing Congress's power to delegate regulatory authority to Amtrak, a for-profit entity created by Congress. Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 45, 54 (2015). The Court, however, did not reach the issue of whether the delegation of coercive power given to Amtrak over its competitors violates the Due Process Clause or the nondelegation doctrine. *Id.* at 55–56.

[14] 306 U.S. 1 (1939).

[15] *Id.* at 6.

[16] *Id.* at 15.

[17] *Id.* at 16.

Similarly, in *Sunshine Anthracite Coal Co. v. Adkins*,[18] the Supreme Court upheld a provision of the Bituminous Coal Act of 1937,[19] which authorized private coal producers to propose standards for the regulation of coal prices.[20] Those proposals were provided to a governmental entity, which was then authorized to approve, disapprove, or modify the proposal.[21] The Court approved this framework, heavily relying on the fact that the private coal producers did not have the authority to set coal prices, but rather acted "subordinately" to the governmental entity (the National Bituminous Coal Commission).[22] In particular, the *Sunshine Anthracite* Court noted that the Commission and not the private industry entity determined the final industry prices to conclude that the "statutory scheme" was "unquestionably valid."[23]

In the same vein as *Carter Coal*, the Supreme Court in *Currin* and *Sunshine Anthracite* did not evaluate whether Congress laid out an "intelligible principle" guiding the delegations to the private entities. Rather than applying the "intelligible principle" standard, the Court reviewed whether the responsibilities given to the private entities were acts of legislative or regulatory authority.[24] In these nondelegation cases involving private entities, the Court drew the "line which separates legislative power to make laws, from administrative authority" to administer laws.[25] In both *Currin* and *Adkins*, the Court reasoned that the private entities did not exercise legislative power because they did not impose or enforce binding legal requirements.[26] Because the private entity's responsibilities were primarily administrative or advisory, the Court determined that the statutes did not violate the nondelegation doctrine.[27]

ArtI.S1.6.6 Taxes and Delegations of Legislative Power Delegations

Article I, Section 1:

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

The Court has strongly implied that the same principles govern the validity of a delegation regardless of the subject matter of the delegation. "[A] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes."[1] Holding that "the delegation of discretionary authority under Congress's taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges," the Court explained in *Skinner v. Mid-America Pipeline Company*[2] that there was "nothing in the

[18] 310 U.S. 381 (1940).

[19] Pub. L. No. 75–48, 50 Stat. 72 (1937).

[20] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. at 388–89.

[21] *Id.* at 388.

[22] *Id.* at 399.

[23] *Id.*

[24] *Id.* at 388–89; Currin v. Wallace, 306 U.S. 1, 15–16 (1939).

[25] United States v. Grimaud, 220 U.S. 506, 517 (1911).

[26] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 388–89 (1940); *Currin*, 306 U.S. at 15–16.

[27] *Id.*

[1] Lichter v. United States, 334 U.S. 742, 778–79 (1948).

[2] 490 U.S. 212, 223 (1989). In *National Cable Television Ass'n v. United States,* 415 U.S. 336, 342 (1974), and *FPC v. New England Power Co.,* 415 U.S. 345 (1974), the Court had appeared to suggest that delegation of the taxing power would be fraught with constitutional difficulties. It is difficult to discern how this view could have been held after the many cases sustaining delegations to fix tariff rates, which are in fact and in law taxes. J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); Field v. Clark, 143 U.S. 649 (1892); *see also* FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976) (delegation to President to raise license "fees" on imports when necessary to protect national security). Nor

placement of the Taxing Clause" in Article I, § 8 that would distinguish it, for purposes of delegation, from the other powers enumerated in that clause.[3] Thus, the test in the taxing area is the same as for other areas—whether the statute has provided the administrative agency with standards to guide its actions in such a way that a court can determine whether the congressional policy has been followed.

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

ArtI.S1.6.7 Individual Liberties and Delegations of Legislative Power

Article I, Section 1:

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

Some Justices have argued that delegations by Congress of power to affect the exercise of "fundamental freedoms" by citizens must be closely scrutinized to require the exercise of a congressional judgment about meaningful standards.[1] The only pronouncement in a majority opinion, however, is that, even with regard to the regulation of liberty, the standards of the delegation "must be adequate to pass scrutiny by the accepted tests."[2] The standard practice of the Court has been to interpret the delegation narrowly so as to avoid constitutional problems.[3]

Perhaps refining the delegation doctrine, at least in cases where Fifth Amendment due process interests are implicated, the Court held that a government agency charged with the efficient administration of the Executive Branch could not assert the broader interests that Congress or the President might have in barring lawfully resident aliens from government employment. The agency could assert only those interests Congress charged it with promoting, and if the action could be justified by other interests, the office with responsibility for promoting those interests must take the action.[4]

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should doubt exist respecting the appropriations power. *See* Synar v. United States, 626 F. Supp. 1374, 1385–86 (D.D.C.) (three-judge court), *aff'd on other grounds sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986).

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

[1] United States v. Robel, 389 U.S. 258, 269 (1967) (Brennan, J., concurring). The view was specifically rejected by Justices White and Harlan in dissent, *id.* at 288–89, and ignored by the majority.

[2] Kent v. Dulles, 357 U.S. 116, 129 (1958).

[3] *Kent*, 357 U.S. 116; Schneider v. Smith, 390 U.S. 17 (1968); Greene v. McElroy, 360 U.S. 474, 506–08 (1959) (Court will not follow traditional principles of congressional acquiescence in administrative interpretation to infer a delegation of authority to impose an industrial security clearance program that lacks the safeguards of due process). More recently, the Court has eschewed even this limited mode of construction. Haig v. Agee, 453 U.S. 280 (1981).

[4] Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) (5-4 decision). The regulation was reissued by the President, E. O. 11935, 3 C.F.R. 146 (1976), reprinted in 5 U.S.C. § 3301 (app.), and sustained in *Vergara v. Hampton,* 581 F.2d 1281 (7th Cir. 1978).

Section 2—House of Representatives

Clause 1—Composition

ArtI.S2.C1.1 Congressional Districting

Article I, Section 2, Clause 1:

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

A major innovation in constitutional law was the development of a requirement that election districts in each state be structured so that each elected representative represents substantially equal populations. Although this requirement has generally been gleaned from the Equal Protection Clause of the Fourteenth Amendment,[1] in *Wesberry v. Sanders*,[2] the Court held that "construed in its historical context, the command of Art. I, § 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[3]

Court involvement in this issue developed slowly. In America's early history, state congressional delegations were generally elected at-large instead of by districts, and even when Congress required single-member districting[4] and later added a provision for equally populated districts[5] the relief sought by voters was action by the House refusing to seat Members-elect selected under systems not in compliance with the federal laws.[6] The first series of cases did not reach the Supreme Court until the states began redistricting through the 1930 Census, and these were resolved without reaching constitutional issues and indeed without resolving the issue whether such voter complaints were justiciable at all.[7] In the late 1940s and the early 1950s, the Court used the "political question" doctrine to decline to adjudicate districting and apportionment suits, a position it changed in its 1962 decision in *Baker v. Carr*[8] and subsequently modified again in its 2019 decision in *Rucho v. Common Cause*.[9]

For the Court in *Wesberry*,[10] Justice Hugo Black argued that a reading of the debates of the Constitutional Convention conclusively demonstrated that the Framers had meant, in using the phrase "by the People," to guarantee equality of representation in the election of Members of the House of Representatives.[11] Justice John Marshall Harlan in dissent argued that the statements on which the majority relied had uniformly been in the context of the Great Compromise—Senate representation of the states with Members elected by the state legislatures, House representation according to the population of the states, qualified by the

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[1] Reynolds v. Sims, 377 U.S. 533 (1964) (legislative apportionment and districting); Hadley v. Junior College Dist., 397 U.S. 50 (1970) (local governmental units).

[2] 376 U.S. 1 (1964). *See also* Martin v. Bush, 376 U.S. 222 (1964).

[3] 376 U.S. at 7–8.

[4] Act of June 25, 1842, 5 Stat. 491.

[5] Act of February 2, 1872, 17 Stat. 28.

[6] The House uniformly refused to grant any such relief. 1 A. Hinds' Precedents of the House of Representatives 310 (1907). *See* L. Schmeckebier, Congressional Apportionment 135–138 (1941).

[7] Smiley v. Holm, 285 U.S. 355 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Carroll v. Becker, 285 U.S. 380 (1932); Wood v. Broom, 287 U.S. 1 (1932); Mahan v. Hume, 287 U.S. 575 (1932).

[8] 369 U.S. 186 (1962).

[9] No. 18-422, slip op. (U.S. June 27, 2019) (holding that political gerrymandering claims are not justiciable).

[10] Wesberry v. Sanders, 376 U.S. 1 (1964).

[11] 376 U.S. at 7–18.

guarantee of at least one Member per state and the counting of slaves as three-fifths of persons—and not at all in the context of intrastate districting. Further, he thought the Convention debates clear to the effect that Article I, § 4, had vested exclusive control over state districting practices in Congress, and that the Court action overrode a congressional decision not to require equally populated districts.[12]

The most important issue, of course, was how strict a standard of equality the Court would adhere to. At first, the Justices seemed inclined to some form of de minimis rule with a requirement that the state present a principled justification for the deviations from equality which any districting plan presented.[13] But in *Kirkpatrick v. Preisler*,[14] a sharply divided Court announced the rule that a state must make a "good-faith effort to achieve precise mathematical equality."[15] Therefore, "[u]nless population variances among congressional districts are shown to have resulted despite such [good-faith] effort [to achieve precise mathematical equality], the state must justify each variance, no matter how small."[16] The strictness of the test was revealed not only by the phrasing of the test but by the fact that the majority rejected every proffer of a justification which the state had made and which could likely be made. Thus, it was not an adequate justification that deviations resulted from (1) an effort to draw districts to maintain intact areas with distinct economic and social interests,[17] (2) the requirements of legislative compromise,[18] (3) a desire to maintain the integrity of political subdivision lines,[19] (4) the exclusion from total population figures of certain military personnel and students not residents of the areas in which they were found,[20] (5) an attempt to compensate for population shifts since the last census,[21] or (6) an effort to achieve geographical compactness.[22]

Illustrating the strictness of the standard, the Court upheld a lower court's decision to void a Texas congressional districting plan in which the population difference between the most and least populous districts was 19,275 persons and the average deviation from the ideally populated district was 3,421 persons.[23] Adhering to the principle of strict population equality, the Court in a subsequent case refused to find a plan valid because the variations were smaller than the estimated census undercount. Rejecting the plan, the difference in population

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[12] 376 U.S. at 20–49.

[13] Kirkpatrick v. Preisler, 385 U.S. 450 (1967), and Duddleston v. Grills, 385 U.S. 455 (1967), relying on the rule set out in *Swann v. Adams*, 385 U.S. 440 (1967), a state legislative case.

[14] 394 U.S. 526 (1969). *See also* Wells v. Rockefeller, 394 U.S. 542 (1969).

[15] Kirkpatrick v. Preisler, 394 U.S. 526, 530 (1969).

[16] 394 U.S. at 531.

[17] 394 U.S. at 533. People vote as individuals, Justice William Brennan said for the Court, and it is the equality of individual voters that is protected.

[18] *Id.* Political "practicality" may not interfere with a rule of "practicable" equality.

[19] 394 U.S. at 533–34. The argument is not "legally acceptable."

[20] 394 U.S. at 534–35. Justice Brennan questioned whether anything less than a total population basis was permissible but noted that the legislature in any event had made no consistent application of the rationale.

[21] 394 U.S. at 535. This justification would be acceptable if an attempt to establish shifts with reasonable accuracy had been made.

[22] 394 U.S. at 536. Justifications based upon "the unaesthetic appearance" of the map will not be accepted.

[23] White v. Weiser, 412 U.S. 783 (1973). The Court did set aside the district court's own plan for districting, instructing that court to adhere more closely to the legislature's own plan insofar as it reflected permissible goals of the legislators, reflecting an ongoing deference to legislatures in this area to the extent possible. *See also* North Carolina v. Covington, 585 U.S. ___, No. 17-1364, slip op. at 910 (2018) (per curiam) ("The District Court's decision to override the legislature's remedial map . . . was clear error. '[S]tate legislatures have primary jurisdiction over legislative reapportionment,' and a legislature's 'freedom of choice to devise substitutes for an apportionment plan found unconstitutional, either as a whole or in part, should not be restricted beyond the clear commands' of federal law. A district court is 'not free . . . to disregard the political program of' a state legislature on other bases." (quoting *Weiser*, 412 U.S. at 795; Burns v. Richardson, 384 U.S. 73, 85 (1966); Upham v. Seamon, 456 U.S. 37, 43 (1982) (per curiam))).

between the most and least populous districts being 3,674 people, in a state in which the average district population was 526,059 people, the Court opined that, given rapid advances in computer technology, it is now "relatively simple to draw contiguous districts of equal population and at the same time . . . further whatever secondary goals the State has."[24]

Although the Supreme Court had suggested for a number of years that claims of unconstitutional partisan gerrymandering might be justiciable,[25] it held in *Rucho v. Common Cause* that such claims were nonjusticiable, saying that there was no "constitutional directive" nor any "legal standards to guide" the Court.[26] Quoting an earlier plurality opinion on the issue, the Court said that "neither § 2 nor § 4 of Article I 'provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.'"[27]

ArtI.S2.C1.2 Voter Qualifications for House of Representatives Elections

Article I, Section 2, Clause 1:

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

The Framers of the Constitution vested states with authority to determine qualifications for voters—referred to in the Constitution as electors—in congressional elections,[1] subject to the express requirement that a state can prescribe no qualifications other than those the state has stipulated for voters for the more numerous branch of the state legislature.[2] In *Husted v. A. Randolph Inst.*, the Court stated: "The Constitution gives States the authority to set the qualifications for voting in congressional elections as well as the authority to set the 'Times, Places and Manner' to conduct such elections in the absence of contrary congressional direction."[3]

State discretion is circumscribed, however, by express constitutional limitations[4] and judicial decisions interpreting them.[5] In some cases, Congress has passed legislation to

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[24] Karcher v. Daggett, 462 U.S. 725, 733 (1983). Illustrating the point about computer-generated plans containing absolute population equality is *Hastert v. State Bd. of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991) (three-judge court), in which the court adopted a congressional-districting plan in which eighteen of the twenty districts had 571,530 people each and each of the other two had 571,531 people.

[25] The Court held in *Davis v. Bandemer* that partisan or political gerrymandering claims were justiciable, but a majority of Justices failed to agree on a single test for determining whether partisan gerrymanders were unconstitutional. 478 U.S. 109, 125 (1986). *See* League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006); Vieth v. Jubelirer, 541 U.S. 267 (2004).

[26] No. 18-422, slip op. at 34 (U.S. June 27, 2019).

[27] *Id.* at 29–30 (quoting Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (plurality opinion)).

[1] The Voter Qualifications Clause refers only to elections to the House of Representatives as state legislatures originally selected Senators. Adopted in 1913, the Seventeenth Amendment has identical voter qualification requirements for Senate elections. *See* Amdt17.3 Doctrine on Popular Election of Senators.

[2] Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171 (1874); Breedlove v. Suttles, 302 U.S. 277, 283 (1937). *See* 2 Joseph Story, Commentaries on the Constitution of the United States 576–585 (1833).

[3] Husted v. A. Randolph Inst., No. 16-980, slip op. at (U.S. June 2018) (holding that Ohio's process of removing voters on the grounds that they have moved did not violate federal law).

[4] The Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments limited the states in the setting of qualifications in terms of race, sex, payment of poll taxes, and age.

[5] The Supreme Court's interpretation of the Equal Protection Clause has excluded certain qualifications. *E.g.*, Carrington v. Rash, 380 U.S. 89 (1965); Kramer v. Union Free School Dist., 395 U.S. 621 (1969); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970). The excluded qualifications were in regard to all elections.

address certain election requirements.[6] In the Voting Rights Act of 1965,[7] Congress legislated changes of a limited nature in the literacy laws of some of the states,[8] and in the Voting Rights Act Amendments of 1970,[9] Congress successfully lowered the minimum voting age in federal elections[10] and prescribed residency qualifications for presidential elections.[11] The Court struck down Congress's attempt to lower the minimum voting age for state and local elections.[12] These developments limited state discretion granted by the Voter Qualifications Clause of Article I, Section 2, Clause 1, and are more fully dealt with in the treatment of Section 5 of the Fourteenth Amendment.

While the Constitution grants states authority over voter qualifications, voting for Members of the House of Representatives is also governed by other provisions of the Constitution.[13] For instance, under the Elections Clause set forth at Article I, Section 4, Clause 1, Congress may preempt state laws governing the "Time, Place and Manner" of elections to protect the right to vote for Members of Congress from official[14] or private denial.[15]

Clause 2—Qualifications

ArtI.S2.C2.1 Overview of House Qualifications Clause

Article I, Section 2, Clause 2:

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

The House Qualifications Clause set forth at Article I, Section 2, Clause 2 requires a Member to be at least twenty-five years of age, a United States citizen for seven years, and an inhabitant of the state from which he or she is elected at the time of election. The Framers designed these minimal requirements to give people freedom to choose the person who would best represent their interests in Congress. Explaining the impetus behind the adoption of these requirements at the Constitutional Convention, the writer of the *Federalist No. 52* commented: "Under these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith."[1]

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[6] The power has been held to exist under Section 5 of the Fourteenth Amendment. Katzenbach v. Morgan, 384 U.S. 641 (1966); Oregon v. Mitchell, 400 U.S. 112 (1970); City of Rome v. United States, 446 U.S. 156 (1980).

[7] § 4(e), 79 Stat. 437, 439, 42 U.S.C. § 1973b(e), as amended.

[8] Upheld in *Katzenbach v. Morgan,* 384 U.S. 641 (1966).

[9] Titles 2 and 3, 84 Stat. 314, 42 U.S.C. § 1973bb.

[10] Oregon v. Mitchell, 400 U.S. 112, 119–131, 135–144, 239–281 (1970).

[11] *Id.* at 134, 147–150, 236–239, 285–292.

[12] *Id.* at 119–131, 152–213, 293–296.

[13] In *Ex Parte Yarbrough*, the Court stated: "The right to vote for members of the Congress of the United States is not derived merely from the constitution and laws of the state in which they are chosen, but has its foundation in the Constitution of the United States." *Ex parte* Yarbrough, 110 U.S. 651, 663 (1884). *See also* Wiley v. Sinkler, 179 U.S. 58, 62 (1900); Swafford v. Templeton, 185 U.S. 487, 492 (1902); United States v. Classic, 313 U.S. 299, 315, 321 (1941).

[14] United States v. Mosley, 238 U.S. 383 (1915).

[15] United States v. Classic, 313 U.S. 299, 315 (1941).

[1] The Federalist No. 52 (Alexander Hamilton). *See also* The Federalist No. 57 (Alexander Hamilton or James Madison) ("Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.").

ArtI.S2.C2.1
Overview of House Qualifications Clause

When determining the qualification requirements, the Framers gave careful consideration to what the office required.[2] The Framers reasoned that a twenty-five year age requirement would ensure that Members had sufficient maturity to perform their duties, while a seven-year citizenship requirement would allow foreign born citizens to participate in the government while ensuring they were knowledgeable about the United States and unlikely to be influenced by loyalty to the land of their birth.[3] Finally, the Framers required Members to be inhabitants[4] of the state from which they were elected so that they would be vested in representing the interests of the state. Discussing the residency requirements in his *Commentaries on the Constitution of the United States*, Justice Joseph Story stated:

> The object of this clause, doubtless, was to secure an attachment to, and a just representation of, the interests of the state in the national councils. It was supposed, that an inhabitant would feel a deeper concern, and possess a more enlightened view of the various interests of his constituents. And, in all events, he would generally possess more entirely their sympathy and confidence.[5]

While Article I, Section 2, Clause 2 expressly requires state inhabitancy at the time of the election, Congress has interpreted the House Qualifications Clause to require only that Members meet age and citizenship qualifications at the time they take the oath of office.[6] Thus, Congress has admitted persons, who were ineligible when elected, to the House of Representatives once they met age and citizenship criteria for membership in the House.[7] Further, the Supreme Court held in *Powell v. McCormack*[8] and *U.S. Term Limits, Inc. v. Thornton*[9] that neither Congress nor the states, respectively, can add to the qualifications stipulated in the Constitution for membership in Congress.

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[2] *See, e.g.,* 2 Records of the Federal Convention of 1787 215–19, 267–72 (Max Farrand ed., 1911).

[3] *See* Joseph Story, 2 Commentaries on the Constitution of the United States §§ 616, 617 (1833). Qualifications for the Senate were more rigorous than those for the House. The Framers required that Senators be at least thirty years of age and nine years a citizen as well as a resident of the state from which they were elected at the time of the election. U.S. Const. art. I, § 3, cl. 2. The author of the *Federalist No. 62* explained the difference in requirements for Representatives and Senators as arising from the nature of the senatorial trust, which, requiring greater extent of information and ability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages; and which, participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education. The Federalist No. 62 (Alexander Hamilton or James Madison).

[4] The Framers adopted the term "inhabitant" in favor of "resident" because, as understood at that time, "inhabitant" would not, in the words of James Madison, "exclude persons absent occasionally for a considerable time on public or private business." 2 Records of the Federal Convention of 1787 217 (Max Farrand ed., 1911).

[5] Joseph Story, 2 Commentaries on the Constitution of the United States § 618 (1833). *See also* Edward S. Corwin, The Constitution and What it Means Today 9 (Harold W. Chase & Craig R. Ducat eds. 1973) (1958) ("An 'inhabitant' is a resident.").

[6] *See* S. Rep. No. 904, 74th Congress, 1st sess. (1935), *reprinted in* 79 Cong. Rec. 9651–9653 (1935) (discussing provision's grammatical construction provided for habitancy "when elected" and that Constitutional Convention proceedings indicated that age and citizenship qualifications related solely "to actual and not potential senatorship.").

[7] *See, e.g.,* 1 Hinds' Precedents of the House of Representatives § 418 (1907) (discussing John Young Brown of Kentucky, who waited over a year from the time of his election before taking the oath of office on account of the age qualification requirement); 79 Cong. Rec. 9841–42 (1935) (same); *cf.* 1 Hinds, *supra* note 7, at § 429 (discussing the case of James Shields of Illinois who was disqualified from his Senate seat on account of not having met the citizenship requirement at the time he took the oath of office).

[8] Powell v. McCormack, 395 U.S. 486 (1969).

[9] U.S. Term Limits, Inc., v. Thornton, 514 U.S. 779 (1995).

ArtI.S2.C2.2 Ability of Congress to Change Qualifications for Members

Article I, Section 2, Clause 2:

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

The Framers appear to have intended that the House and Senate Qualifications Clauses would establish national standards for membership in Congress.[1] During debates over qualifications for Members of Congress, delegates to the Constitutional Convention considered and rejected giving Congress discretion to set qualifications requirements on the grounds that such discretion would be susceptible to manipulation and thereby would risk excluding otherwise qualified persons from the national legislature.[2] In the *Federalist No. 60*, Alexander Hamilton addressed the exclusivity of the constitutional qualification requirements, stating: "The qualifications of the persons who may . . . be chosen . . . are defined and fixed in the constitution; and are unalterable by the legislature."[3]

Pursuant to Article I, Section 5, Clause 1, the Constitution provides for each House of Congress to determine whether Members-elect have met the qualification requirements for congressional membership. Article I, Section 5, Clause 1 states: "Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members."[4]

In determining eligibility to serve in Congress, Congress does not appear to have deviated from Hamilton's position that qualifications for Congress "are unalterable by the legislature" until the Civil War.[5] But in July of 1862, Congress passed a law requiring all persons appointed or elected to the United States Government to take an oath—known as the "Ironclad Test Oath"[6]—that they had never been, nor ever would be, disloyal to the United States Government.[7] Subsequently, both Houses refused seats to several persons because of charges of disloyalty.[8] Thereafter, Members sometimes challenged seating Members-elect on grounds such as moral turpitude and bribery with disparate and unpredictable results.[9]

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[1] The Senate Qualifications Clause is set forth at Article I, Section 3, Clause 3.

[2] 2 Records of the Federal Constitution 248–51 (Max Farrand ed., 1911).

[3] The Federalist No. 60 (Alexander Hamilton). *See also* Joseph Story, Commentaries on the Constitution of the United States §§ 623–27 (1833).

[4] U.S. Const. art. I, § 5, cl. 1.

[5] All the instances appear to have involved an additional state qualification. Other cases involve challenges under Art. I, § 3, cl. 3. *See e.g.*, R. Hupman, Senate Election, Expulsion and Censure Cases From 1789 to 1960, S. Doc. No. 71 at 1, 87th Cong., 2d sess. (1962) (discussing Albert Gallatin of Pennsylvania).

[6] https://www.senate.gov/artandhistory/history/common/generic/Civil_War_TestOath1863.htm

[7] Act of July 2, 1862, 12 Stat. 502.

[8] 1 Hinds' Precedents of the House of Representatives §§ 449, 451, 457 (1907).

[9] In 1870, the House excluded a Member-elect who was re-elected after previously resigning when the House instituted expulsion proceedings against him for selling appointments to the Military Academy. *Id.* at § 464. In 1899, the Senate did not exclude a Member-elect because he practiced polygamy (*id.* at §§ 474–80) after adopting a rule requiring a two-thirds vote to exclude a Member-elect on those grounds. *Id.* at §§ 481–483. The House twice excluded a socialist Member-elect in the wake of World War I on allegations of disloyalty. 6 Cannon's Precedents of the House of Representatives §§ 56–58 (1935). *See also* S. Rep. No. 1010, 77th Congress, 2d sess. (1942); R. Hupman, Senate Election, Expulsion and Censure Cases From 1789 to 1960, S. Doc. No. 71, at 140, 87th Cong. 2d sess. (1962) (discussing House Committee voting that Senator William Langer of North Dakota was not entitled to a seat based on alleged moral turpitude, including embracing kickbacks, converting proceeds of legal settlements, accepting a bribe, and prematurely paying on advertising contracts and the Senate upholding Senator Langer's seat); *Id.* at 140–41 (discussing effort to exclude Senator Tom Stewart of Tennessee on grounds that he contracted with the Tennessee officials to promote candidacies and secure nominations of three men, and, as part of carrying out the agreements, the candidates illegally expended more than $200,000.00 in primary and general elections. The Petition for expulsion was submitted to the Committee and dismissed by unanimous vote without explanation).

ArtI.S2.C2.2
Ability of Congress to Change Qualifications for Members

In 1969, the Supreme Court conclusively established in *Powell v. McCormack*[10] that House qualification requirements set forth at Article I, Section 2, Clause 4, and possibly any other qualification requirements set forth in the Constitution, are exclusive[11] and Congress cannot exclude Members-elect, who meet such requirements.[12] In *Powell*, Adam Clayton Powell, Jr. was re-elected to serve in the House of Representatives for the 90th Congress. The House of Representatives, however, denied him a seat based on findings by a Special Subcommittee on Contracts of the Committee on House Administration that Powell had engaged in misconduct during the 89th Congress.[13]

In determining that Powell was entitled to a declaratory judgment that he had been unlawfully excluded from Congress, the Supreme Court examined the Constitution, Constitutional Convention debates, and how Congress had applied the House qualification requirements in the past. Looking to English parliamentary and colonial legislative practice, the Court noted that these bodies had only excluded officers when they failed to meet standing qualifications.[14] The Court further noted that the Constitutional Convention considered and rejected provisions that would have allowed Congress to create property or other qualification requirements without limitation as unworkable.[15] And the Court recognized that Alexander Hamilton and James Madison in the *Federalist Papers* and Hamilton at the New York ratifying convention had stated that the Constitution stipulated exclusive qualification requirements for Members of Congress.[16]

Examining early congressional practices, the Court noted that Members of Congress, many of whom had participated in the Constitutional Convention, generally took the view that Congress could only exclude Members-elect who failed to meet qualifications expressly prescribed in the Constitution and that this position went unchallenged until the Civil War.[17] Finally, the Court reasoned that qualification requirements should be construed narrowly because, to do otherwise, would deprive voters of their choice as to who should represent them in Congress. Referencing James Madison, the Court stated: "A fundamental principle of our representative democracy is . . . 'that the people should choose whom they please to govern them.' . . . [T]his principle is undermined as much by limiting whom the people can select as by limiting the franchise itself."[18] Thus, the Court reasoned, if the House excluded Powell based on qualifications other than those stipulated in the Constitution, the House would impinge on the interests of Powell's constituents to choose their preferred candidate.[19]

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[10] Powell v. McCormack, 395 U.S. 486 (1969). The Court divided 8-1 with Justice Potter Stewart dissenting on the ground that the case was moot. *Id.* In *U.S. Term Limits, Inc. v. Thornton*, the Court affirmed *Powell*, holding that the House and Senate Qualifications Clauses are exclusive and cannot be augmented by Congress or states. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 787–98 (1995). Dissenting, Justice Clarence Thomas joined by Justices Sandra Day O'Connor and Antonin Scalia reasoned that, while Congress could not add qualifications because the Constitution had not provided it such powers, the Constitution did not preclude states from doing so. *Id.* at 875–76, 883.

[11] The Court did not address if the Constitution imposes other qualifications, such as Article I, § 3, cl. 7 (disqualifying persons impeached); Article I, § 6, cl. 2 (incompatible offices); and § 3 of the Fourteenth Amendment. Powell v. McCormack, 395 U.S. 486, 520 n.41 (1969). Courts might also consider Article VI, cl. 3, to be a qualification. *See* Bond v. Floyd, 385 U.S. 116, 129–31 (1966).

[12] Powell v. McCormack, 395 U.S. 486, 550 (1969).

[13] See H. Rep. No. 27, 90th Cong., 1st sess. (1967); Powell v. McCormack, 395 U.S. 486, 489–90 (1969).

[14] *Id.* at 522–31.

[15] *Id.* at 532–39.

[16] *Id.* at 539–41.

[17] *Id.* at 541–47.

[18] *Id.* at 547 (citations omitted).

[19] Protecting the voters' interest in choosing their representatives is consistent with voters' constitutionally secured right to cast ballots and have them counted in general elections (*Ex parte* Yarbrough, 110 U.S. 651 (1884)); and primary elections (United States v. Classic, 313 U.S. 299 (1941)); to cast a ballot undiluted in strength because of

ArtI.S2.C2.3 Ability of States to Add Qualifications for Members

Article I, Section 2, Clause 2:

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

In 1969, the Supreme Court established in *Powell v. McCormack*[1] that Congress may not consider qualifications other than those set forth in the Constitution when judging whether Members-elect qualified for Congress pursuant to Article I, Section 5, Clause 1.[2] In 1995, the Supreme Court in *U.S. Term Limits, Inc. v. Thornton* extended its findings in *Powell* to prohibit states from imposing qualification requirements on congressional membership.

The Supreme Court's *Thornton* holding was consistent with long-established congressional practice not to weigh state-added qualifications when considering whether a Member-elect qualified for a congressional seat. For instance, in 1807, the House seated a Member-elect although he was in violation of a state law requiring Members of Congress to have resided in their congressional districts for at least twelve months, the House resolving that the state requirement was unconstitutional.[3]

In *Thornton*, Arkansas, along with twenty-two other states, limited the number of terms that Members of Congress could serve.[4] Reexamining *Powell* and "its articulation of the 'basic principles of our democratic system,'" the *Thornton* Court reaffirmed that "the qualifications for service in Congress set forth in the Constitution are 'fixed,'" in that Congress may not supplement them.[5] *Powell*, the Court found, however, did not conclusively resolve the *Thornton* issue as to whether, during the framing of the Constitution, the states had retained power to add qualification requirements for membership in Congress. Recognizing that the Framers clearly intended for the Constitution to be the exclusive source of congressional qualifications,[6] the Court reasoned that even *if* states had possessed some original power in this area, they had ceded that power to the Federal Government.[7] The Court, however, held that the power to add qualifications "is not within the 'original powers' of the States, and thus not reserved to the States by the Tenth Amendment."[8]

Both the *Thornton* majority and dissent hinged their analyses on whether states had power to impose additional qualification requirements on candidates for Congress and, if so, whether they had ceded such power when they ratified the Constitution. To this end, the Court explored the Constitution's text, drafting, and ratification, as well as early congressional and

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unequally populated districts (Wesberry v. Sanders, 376 U.S. 1 (1964)); and to cast a vote for candidates of their choice unfettered by onerous restrictions on candidate qualification for the ballot. Williams v. Rhodes, 393 U.S. 23 (1968).

[1] Powell v. McCormack, 395 U.S. 486 (1969).

[2] U.S. Const. art I., § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .").

[3] 1 Hinds' Precedents of the House of Representatives § 414 (1907). *See, e.g.,* Davis v. Adams, 400 U.S. 1203 (1970) (staying enforcement of statute requiring "incumbent of a state elective office to resign before he can become a candidate for another office" when election in which state officers were running for the House of Representatives was imminent but noting that the state could challenge the candidates as having failed to qualify in the event they won their elections).

[4] All but two of the state initiatives to impose term limits were citizen initiatives. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

[5] *Id.* at 798.

[6] *Id.*

[7] *Id.* at 801.

[8] *Id.* at 800.

state practices.[9] Observing that state powers were either (1) reserved by states from the Federal Government under the Constitution or (2) delegated to states by the Federal Government, the majority reasoned that states had no reserved powers that emanated from the Federal Government. Quoting Justice Joseph Story, the Court noted: "'[S]tates can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.'"[10] Because states had no powers to legislate on the Federal Government prior to the Nation's Founding and the Constitution did not delegate to states power to prescribe qualifications for Members of Congress, the Court held the states did not have such power.[11]

In contrast, the dissent reasoned that the Constitution precluded states only from exercising powers delegated to the Federal Government, either expressly or implicitly,[12] or which the states had agreed not to exercise themselves.[13] Consequently, states retained all other powers.[14] The dissent stated "Where the Constitution is silent about the exercise of a particular power-that is, where the Constitution does not speak either expressly or by necessary implication-the Federal Government lacks that power and the States enjoy it."[15] Accordingly, the dissent reasoned, the Constitution's silence on whether states could impose additional qualifications meant the states retained this power.

Thornton reaffirmed that any change to qualifications for membership in Congress cannot come from state or federal law, but only through the amendment process set forth in Article V of the United States Constitution.[16] Six years later, the Court relied on *Thornton* to invalidate a Missouri law requiring that labels be placed on ballots alongside the names of congressional candidates who had "disregarded voters' instruction on term limits" or declined to pledge support for term limits.[17]

The Supreme Court has distinguished state requirements for appearing on a ballot as a third-party candidate from qualification requirements for membership in Congress. In *Storer v. Brown*, the Court noted that a California law setting criteria to be listed as a third-party candidate did not violate Article I, Section 2, Clause 2. The Court reasoned that the plaintiffs would not have been disqualified if "they had been nominated at a party primary or by an adequately supported independent petition and then elected at the general election."[18] As

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[9] *See* Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78 (1995).

[10] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 802 (1995) (quoting Joseph Story, The Commentaries on the Constitution of the United States (1833)).

[11] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 798–805 (1995). *See also id.* at 838–45 (Kennedy, J., concurring). The Court applied similar reasoning in *Cook v. Gralike*, 531 U.S. 510, 522–23 (2001), invalidating ballot labels identifying congressional candidates who had not pledged to support term limits. Because congressional offices arise from the Constitution, the Court explained, states would have had no authority to regulate these offices prior to the Constitution that they could have reserved, and the ballot labels were not valid exercise of the power granted by Article I, § 4 to regulate the "manner" of holding elections.

[12] *E.g.,* U.S. Const. art. I, § 8.

[13] *E.g.,* U.S. Const. art. I, § 10.

[14] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 845 (1995) (Thomas, J., dissenting) ("Nothing in the Constitution deprives the people of each State of the power to prescribe eligibility requirements for the candidates who seek to represent them in Congress. The Constitution is simply silent on this question. And where the Constitution is silent, it raises no bar to action by the States or the people.").

[15] *Id.* at 848 (Thomas, J., dissenting). *See generally id.* at 846–65.

[16] *Id.* at 837.

[17] Cook v. Gralike, 531 U.S. 510 (2001).

[18] Storer v. Brown, 415 U.S. 724, 746 & n.16 (1974).

such, the Court recognized that state requirements for being listed on the ballot was consistent with the state's interest in ensuring that a candidate listed on a ballot is a "serious contender."[19]

Clause 3—Seats

ArtI.S2.C3.1 Enumeration Clause and Apportioning Seats in the House of Representatives

Article I, Section 2, Clause 3:

> *Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.*[1] *The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.*

Article I, Section 2, Clause 3, known as the Enumeration Clause or the Census Clause, "reflects several important constitutional determinations: that comparative state political power in the House would reflect comparative population, not comparative wealth; that comparative power would shift every 10 years to reflect population changes; that federal tax authority would rest upon the same base; and that Congress, not the states, would determine the manner of conducting the census."[2] These determinations "all suggest a strong constitutional interest in accuracy."[3]

Some contend that the language employed—"actual enumeration"—requires an actual count, but gives Congress wide discretion in determining the methodology of that count.[4] The word "enumeration" refers to a counting process without describing the count's methodological details, and the Court has held that the word "actual" refers to the enumeration that was to be used for apportioning the Third Congress, and thereby distinguishes "a deliberately taken

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[19] *Id.* at 746.

[1] The part of this clause relating to the mode of apportionment of representatives among the several States was replaced by the Fourteenth Amendment, Section 2, and the language regarding taxes on incomes without apportionment, by the Sixteenth Amendment, which allows for a federal income tax. Specifically, section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." The Thirteenth Amendment, ratified on December 6, 1865, abolished slavery, providing in Section 1, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist in the United States, or any place subject to their jurisdiction."

[2] Utah v. Evans, 536 U.S. 452, 476 (2002).

[3] *Id. But see* Karcher v. Daggett, 462 U.S. 725, 732 (1983) (recognizing that the census data provides "the only reliable—albeit less than perfect indication of . . . population levels," and that the "census count represents the 'best population data available.'" (quoting Kirkpatrick vs. Preisler, 394 U.S. 526, 528 (1969)).

[4] *Id.* at 474 ("The final part of the sentence says that the 'actual Enumeration' shall take place 'in such Manner as' Congress itself 'shall by Law direct,' thereby suggesting the breadth of congressional methodological authority, rather than its limitation.").

count" from the conjectural approach that had been used for the First Congress.[5] Finally, the conferral of authority on Congress to "direct" the "manner" of enumeration underscores "the breadth of congressional methodological authority."[6] In *Dep't of Commerce v. U.S. House of Representatives*, the Court held that the Census Act prohibits the use of statistical sampling to determine the population for congressional apportionment purposes, but declined to reach the constitutional question of whether the Census Clause's requirement for an "actual enumeration" foreclosed the use of statistical sampling in gathering census information.[7] In *Utah v. Evans*, the Court held that the use of "hot-deck imputation," a method used to fill in missing census data, did not run afoul of the "actual enumeration" requirement.[8] The Court determined that Constitution's text "uses a general word, 'enumeration,' that refers to a counting process without describing the count's methodological details."[9] The Court distinguished imputation from statistical sampling and indicated that its holding was relatively narrow[10]—that imputation was permissible under the Constitution in this case "where all efforts have been made to reach every household, where the methods used consist not of statistical sampling but of inference, where that inference involves a tiny percent of the population, where the alternative is to make a far less accurate assessment of the population, and where consequently manipulation of the method is highly unlikely."[11] Thus, the Court held that the Framers "did not write detailed census methodology into the Constitution" and methods, such as imputation, were constitutionally valid.[12]

Although the Census Clause expressly provides for an enumeration of persons, Congress has historically collected additional demographic information—in some years asking more detailed questions regarding the personal and economic affairs of a subset of respondents.[13]

The Court confirmed this understanding of the Enumeration Clause in *Department of Commerce v. New York*.[14] In an opinion on behalf of the Court, Chief Justice John Roberts considered whether the Secretary of Commerce's decision to ask a citizenship question on the census questionnaire violated the Enumeration Clause because the question did not relate to

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[5] *Id.* at 475.

[6] *Id.* at 474.

[7] 525 U.S. 316, 343 (1999); *see id.* at 346 (Scalia, J., concurring) ("[A] strong case can be made that an apportionment census conducted with the use of 'sampling techniques' is not the 'actual Enumeration' that the Constitution requires.").

[8] *Evans*, 536 U.S. at 452. "Hot-deck imputation" refers to the concurrent use of current census information as opposed to using information from prior censuses. *Id.* at 457–58. The concept of "imputation" refers to a methodology used by U.S. Census Bureau that "imputes the relevant information by inferring that the address or unit about which it is uncertain has the same population characteristics as those of a nearby sample or donor address or unit—e.g., its geographically closest neighbor of the same type. . . that did not return a census questionnaire by mail." *Id.* at 458 (internal quotation marks omitted).

[9] *Id.* at 474.

[10] *Id.* at 477 (holding that the Court need not decide whether statistical methods are authorized by the Constitution because the Court was not dealing with "the substitution of statistical methods for efforts to reach households and enumerate each individual").

[11] *See also* Wisconsin v. City of New York, 517 U.S. 1 (1996) (holding that the decision of the Secretary of Commerce not to conduct a post-enumeration survey and statistical adjustment for an undercount in the 1990 Census was reasonable and within the bounds of discretion conferred by the Constitution and statute); Franklin v. Massachusetts, 505 U.S. 788 (1992) (upholding the practice of the Secretary of Commerce in allocating overseas federal employees and military personnel to the states of last residence. The mandate of an enumeration of "their respective numbers" was complied with, it having been the practice since the first enumeration to allocate persons to the place of their "usual residence," and to construe both this term and the word "inhabitant" broadly to include people temporarily absent).

[12] *Evans*, 536 U.S. at 479.

[13] *See* Dep't of Commerce v. New York, No. 18-966, slip op. at 2 (U.S. June 27, 2019).

[14] *See Id.*

the accomplishment of an actual enumeration.[15] The Chief Justice began his analysis by recognizing that the Clause affords virtually limitless authority to Congress in conducting the census, which Congress has, in turn, largely delegated to the Secretary.[16] The Court observed that demographic questions have been asked in every census since 1790, providing a "long and consistent historical practice" that informed the permissibility of the underlying practice.[17] Because of this understanding of the Clause's meaning, the Court held that Congress, and by extension the Secretary, has the power to use the census for broader information-gathering purposes without running afoul of the Enumeration Clause.[18]

Although taking an enlarged view of its census power, Congress has not always complied with its positive mandate to reapportion representatives among the states after the census is taken.[19] It failed to make such a reapportionment after the census of 1920, being unable to reach agreement for allotting representation without further increasing the size of the House. Ultimately, by the Act of June 18, 1929,[20] it provided that the membership of the House of Representatives should henceforth be restricted to 435 members, to be distributed among the states by the so-called "method of major fractions," which had been earlier employed in the apportionment of 1911, and which has now been replaced with the "method of equal proportions." Following the 1990 census, a state that had lost a House seat as a result of the use of this formula sued, alleging a violation of the "one person, one vote" rule derived from Article I, Section 2. Exhibiting considerable deference to Congress and a stated appreciation of the difficulties in achieving interstate equalities, the Supreme Court upheld the formula and the resultant apportionment.[21] The goal of absolute population equality among districts "is realistic and appropriate" within a single state, but the constitutional guarantee of one Representative for each state constrains application to districts in different states and makes the goal "illusory for the Nation as a whole."[22]

Although requiring the election of Representatives by districts, Congress has left it to the states to draw district boundaries. This has occasioned a number of disputes. In *Ohio ex rel. Davis v. Hildebrant*,[23] a requirement that a redistricting law be submitted to a popular referendum was challenged and sustained. After the reapportionment made pursuant to the 1930 census, deadlocks between the Governor and legislature in several states produced a

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[15] *Id.* at 11. In so doing, the Court distinguished the instant challenge against the Secretary of Commerce's decision to collect certain demographic information during the census from prior case law involving the Secretary's decisions on how to *conduct the population count* for the census. *Id.* That case law required decisions about the population count to be reasonably related to accomplishing an actual enumeration. *Id.*

[16] *Id.*

[17] *Id.* at 12–13 ("That history matters. Here, as in other areas, our interpretation of the Constitution is guided by a Government practice that 'has been open, widespread, and unchallenged since the early days of the Republic. In light of the early understanding of and long practice under the Enumeration Clause, we conclude that it permits Congress, and by extension the Secretary, to inquire about citizenship on the census questionnaire.").

[18] *Id.* at 13. In a separate part of the opinion, the Court invalidated the inclusion of the question on procedural grounds, concluding that the Secretary violated the Administrative Procedure Act by failing to disclose the actual reason for adding the citizenship question on the census questionnaire. *Id.* at 28. *See also* Trump v. New York, No. 20-366, slip op. at 2 (2020) (per curiam) (ruling that challengers to a presidential memorandum directing the Secretary of Commerce to exclude "from the apportionment base aliens who are not in lawful immigration status" lacked standing and that the case was not ripe for adjudication, observing that "[e]veryone agrees by now that the Government cannot feasibly implement the memorandum by excluding the estimated 10.5 million aliens without lawful status.").

[19] For an extensive history of the subject, *see* L. Schmeckebier, Congressional Apportionment (1941).

[20] 46 Stat. 26, 22, *as amended by* 55 Stat. 761 (1941), 2 U.S.C. § 2a.

[21] U.S. Department of Commerce v. Montana, 503 U.S. 442 (1992).

[22] *Id.* at 463 ("[T]he need to allocate a fixed number of indivisible Representatives among 50 States of varying populations makes it virtually impossible to have the same size district in any pair of States, let alone in all 50").

[23] 241 U.S. 565 (1916).

series of cases in which the right of the Governor to veto a reapportionment bill was questioned. Contrasting this function with other duties committed to state legislatures by the Constitution, the Court decided that it was legislative in character and subject to gubernatorial veto to the same extent as ordinary legislation under the terms of the state constitution.[24]

Clause 4—Vacancies

ArtI.S2.C4.1 House Vacancies Clause

Article I, Section 2, Clause 4:

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

Contemplating that vacancies would arise in the House of Representatives from time to time,[1] the Framers specified in Section 2, Clause 4, of Article I that the "Executive Authority" of an affected state fill such vacancies through elections.[2] The House Vacancy Clause, however, gives states discretion over the particulars of such elections, allowing them to tailor their procedures, including the timing of elections, to their circumstances.[3] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story spoke approvingly of the flexibility the House Vacancy Clause provides states in managing their elections to fill vacancies. He commented: "The provision . . . has the strong recommendation of public convenience, and facile adaptation to the particular local circumstances of each state. Any general regulation would have worked with some inequality."[4] Perhaps because of this, adoption of the House Vacancy Clause at the Constitutional Convention appears to have been unexceptional.[5]

More controversial, however, has been whether the Framers intended for Member resignations to trigger the House Vacancy Clause.[6] While the Framers considered versions of the House Vacancy Clause that referred expressly to resignations,[7] the final language of the House Vacancy Clause did not address resignations or how vacancies might arise.[8] In 1791, the

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[24] Smiley v. Holm, 285 U.S. 355 (1932); Koenig v. Flynn, 285 U.S. 375 (1932); Carroll v. Becker, 285 U.S. 380 (1932).

[1] *See, e.g.*, 2 The Records of the Federal Convention of 1787, at 140 (Max Farrand ed., 1911).

[2] U.S. Const. art. I, § 2, cl. 4. A "writ of election" is a written order, in this case issued by the executive authority of the state, to hold a special election. Today the "executive authority" of a state is generally considered to be the state's governor. The Framers' use of the term "executive authority" reflected that early state constitutions often provided for an executive council to control or advise the state's chief executive. Charles C. Thach, Jr., The Creation of the Presidency, 1775–1789: A Study in Constitutional History 16–17 & n.7 (1923).

[3] Act of February 2, 1872, ch. 11, § 4, 17 Stat. 28, *codified at* 2 U.S.C. § 8(a), provides that state law may govern the timing of elections to fill vacancies in the House of Representatives. After September 11, 2001, Congress provided time frames for states to hold elections if House vacancies exceed 100. 2 U.S.C. § 8(b). *See* Thomas Neale, Cong. Rsch. Serv., IF11722, House of Representatives Vacancies: How Are They Filled? (2021), https://crsreports.congress.gov/product/pdf/IF/IF11722.

[4] Joseph Story, Commentaries on the Constitution of the United States § 683 (1833).

[5] *Id.* ("The propriety of adopting this clause does not seem to have furnished any matter of discussion either in, or out of the convention.").

[6] Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 Duke L.J. 177 (2008).

[7] 2 The Records of the Federal Convention of 1787, at 140 (Max Farrand ed., 1911) (considering text providing that "[v]acancies by death disability or resignation shall be supplied . . . ."); *id.* at 227 (considering text referencing "vacancies happening by refusals to accept resignations or otherwise . . . .").

[8] U.S. Const. art. I, § 2, cl. 4. By comparison, the Senate Vacancy Clause contemplated vacancies arising from resignations. U.S. Const. art. I, § 3, cl. 2 ("if Vacancies happen by Resignation, or otherwise . . . ."). One commentator has suggested that Senators were expected to resign if they refused to follow their state legislature's instructions. Chafetz, *supra* note 6, at 214. Early in U.S. history, Senators debated the the extent to which they were expected to comply with their state legislatures' instructions. David P. Currie, The Constitution in Congress: The Federalist Period

House of Representatives confronted the question of whether Member resignations triggered the Vacancy Clause when Rep. William Pinkney of Maryland resigned from Congress and the State of Maryland sought to replace him with John Francis Mercer.[9] While the House Committee on Elections supported Mercer taking Pinkney's seat, Rep. William Giles of Virginia objected because "a resignation [does] not constitute a vacancy" and the British House of Commons did not permit resignations.[10] Other Members reasoned, however, that prohibiting resignations would be inconvenient, especially "in cases of sickness or embarrassment"; there was no reason to distinguish the House from the Senate, for which the Constitution expressly contemplated resignations; and British House of Commons practice on resignations was not applicable to Congress.[11] Ultimately, the House found Mercer could replace Pinkney. Subsequent Member resignations and replacements do not appear to have faced serious challenge,[12] and resignations from the House for a wide range of reasons are routine.[13]

The Constitution treats vacancies in the House and the Senate differently. While the Seventeenth Amendment's Senate Vacancy Clause mirrors the House Vacancy Clause by requiring an affected state's Executive Authority to issue a writ of election to fill a vacancy,[14] the Seventeenth Amendment also empowers states to permit the Executive Authority to fill Senate vacancies temporarily pending an election. In contrast, the House Vacancy Clause does not contemplate state Executive Authorities filling House vacancies temporarily.[15]

1789–1801 15 & n.66 (1997). Unlike the Articles of Confederation, which provided states a right to recall delegates from Congress, the Constitution did not provide states a right to recall Senators. *Compare* Articles of Confederation art. V, § 5 *with* U.S. Const. art. I, § 3. In 1913, the Seventeenth Amendment superseded the Senate Vacancies Clause set forth at Article I, Section 3, Clause 2. Unlike Article I, Section 3, Clause 2, the Seventeenth Amendment does not refer to resignations and instead tracks the House Vacancy Clause language. It states: "When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies." U.S. Const. amend. XVII.

[9] Rep. Pinkney resigned prior to taking the oath of office.

[10] 3 Annals of the House of Representatives 205–07 (Nov. 22, 1791), *reprinted in* 2 The Founder's Constitution 146–47 (Philip B. Kurland & Ralph Lerner eds., 1987).

[11] *Id.*

[12] 3 Annals of the House of Representatives 207 (Nov. 23, 1791), *reprinted in* 2 The Founder's Constitution 147 (Philip B. Kurland & Ralph Lerner eds., 1987). *See also* Chafetz, *supra* note 6. Chaftez notes that Congress passed a law that "allows states to set the time for filling House vacancies 'whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected.'" *See also* Chafetz, *supra* note 6, at 224 (citing the Apportionment Act of 1872, ch. 11, § 4, 17 Stat. 28, 29, *codified at* 2 U.S.C. § 8(a)).

[13] *See, e.g.,* Neale, *supra* note 3; Chafetz, *supra* note 6, at 179.

[14] U.S. Const. amend. XVII ("When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies"). *See also* U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 896 (1995) (Thomas, J., dissenting) (noting that art. I, § 2, cl. 4 and art. I, § 3, cl. 3 provide for state Executives to issue writs of election to fill vacancies).

[15] U.S. Const. amend. XVII ("Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.").

Clause 5—Impeachment

ArtI.S2.C5.1 Overview of Impeachment

Article I, Section 2, Clause 5:

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

The Constitution confers upon Congress the power to impeach and thereafter remove from office the President,[1] Vice President, and other federal officers—including judges—on account of treason, bribery, or other high crimes and misdemeanors. In exercising this power, the House and the Senate have distinct responsibilities, with the House determining whether to impeach and, if impeachment occurs, the Senate deciding whether to convict the person and remove him or her from office. The impeachment process formulated by the Constitution stems from a tool used by the British Parliament to hold accountable ministers of the Crown thought to be outside the control of the criminal courts.[2] This tool was adopted and somewhat modified by the American colonies and incorporated into state constitutions adopted before the federal Constitution was formed.[3]

When bestowing on the House of Representatives the sole power of impeachment,[4] the Framers left to that body's discretion the important question of when impeachment proceedings are appropriate for treason, bribery, or other high crimes and misdemeanors.[5] The Constitution also gives the House of Representatives general authority to structure the rules of its own proceedings, and this authority seems understood to extend to those proceedings concerning impeachment.[6]

The Constitution's grant of the impeachment power to Congress is largely unchecked by the other branches of government. Impeachment is primarily a political process, in which judgments and procedures are left to the final discretions of the authorities vested with the powers to impeach and to try impeachments.[7] Accordingly, the nature and scope of the impeachment power has been shaped not only by congressional perceptions regarding the Framers' intent in crafting the Constitution's impeachment clauses, but also by shifting institutional relationships between the three branches of the government, evolving balances of power between political parties and interest groups, and the scope of accountability exercised

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[1] The Constitution contains a number of provisions that are relevant to the impeachment of federal officials. Article I, Section 2, Clause 5 grants the sole power of impeachment to the House of Representatives; Article I, Section 3, Clause 6 assigns the Senate sole responsibility to try impeachments; Article I, Section 3, Clause 7 provides that the sanctions for an impeached and convicted individual are limited to removal from office and potentially a bar from holding future office, but an impeachment proceeding does not preclude criminal liability; Article II, Section 2, Clause 1 provides that the President enjoys the pardon power, but it does not extend to cases of impeachment; and Article II, Section 4 defines which officials are subject to impeachment and what kinds of misconduct constitute impeachable behavior. Article III does not mention impeachment expressly, but Section 1, which establishes that federal judges shall hold their seats during good behavior, is widely understood to provide the unique nature of judicial tenure. And Article III, Section 2, Clause 3 provides that trials, "except in Cases of Impeachment, shall be by jury."

[2] *See* The Federalist Nos. 65, 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Raoul Berger, Impeachment: The Constitutional Problems 59–66 (1973); Charles Black, Impeachment: A Handbook 5–6 (1974).

[3] *See* Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805, at 15–95 (1984); Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 1–24 (2000); Josh Chafetz, Congress's Constitution 96–97 (2017).

[4] U.S. Const. art. I, § 3, cl. 5.

[5] *Id.* art. II, § 4.

[6] *Id.* art. I, § 5; *see* United States v. Ballin, 144 U.S. 1, 5 (1892) ("The constitution empowers each house to determine its rules of proceedings.").

[7] *See* Nixon v. United States, 506 U.S. 224, 237–38 (1993) (ruling that a challenge to the Senate's use of a committee to take evidence for an impeachment trial posed a nonjusticiable political question).

by the people over Congress and the Executive Branch.[8] Further, examination of attempted impeachments, as well as those which sparked the resignation of an official, can sometimes inform the scope of the impeachment power.[9]

While the House alone has the power to initiate impeachment proceedings, both houses of Congress may pursue other methods to voice opposition to the conduct of government actors. The House and Senate, separately or in conjunction, have sometimes formally announced their disapproval of a particular Executive Branch official by adopting a resolution censuring, condemning, or expressing a lack of confidence in the individual, essentially noting displeasure with the official's actions short of the sanction of impeachment and removal.[10]

ArtI.S2.C5.2 Historical Background on Impeachment

Article I, Section 2, Clause 5:

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

The concept of impeachment embodied in the federal Constitution derives from English,[1] colonial, and early state practice.[2] During the struggle in England by Parliament to impose legal restraints on the Crown's powers, extending back at least to the 1600s, the House of Commons impeached and tried before the House of Lords ministers of the Crown and influential individuals—but not the Crown itself[3]—often deemed beyond the reach of the criminal courts.[4] Parliament appeared to use impeachment as a tool to punish political offenses that damaged the state, although impeachment was not limited to government ministers.[5] Impeachment applied to illegal acts, which included, among other things, significant abuses of a government office, misapplication of funds, neglect of duty, corruption, abridgement of parliamentary rights, and abuses of the public trust.[6] Punishment for impeachment was not limited to removal from office, but could include a range of penalties upon conviction by the House of Lords, including imprisonment, fines, or even death.[7]

Inheriting this tradition, the American colonies adopted their own distinctive impeachment practices. The colonies largely limited impeachment to officeholders on the basis

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[8] Gerhardt, *supra* note 3, at ix–xiii.

[9] *See* ArtI.S2.C5.3 Impeachment Doctrine; ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860) et seq.

[10] *See* ArtI.S2.C5.4 Alternatives to Impeachment.

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

[2] The Federalist No. 65 (Alexander Hamilton); H. Comm. on the Judiciary, 93d Cong., Constitutional Grounds for Presidential Impeachment 4 (Comm. Print 1974) [hereinafter Constitutional Grounds].

[3] Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805, at 96–106 (1984).

[4] Constitutional Grounds, *supra* note 2, at 4–7; Raoul Berger, Impeachment: The Constitutional Problems 59–66 (1973); Josh Chafetz, Congress's Constitution 49–50 (2017). *But see* Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 Yale L.J. 1419 (1975) (arguing that impeachment during the Stuart period only applied to violations of existing law).

[5] Berger, *supra* note 4, at 59–66; Constitutional Grounds, *supra* note 2, at 4–5; 15 The American and English Encyclopedia of Law 1061, 1064 (David S. Garland & Lucius P. McGehee eds., 1900).

[6] Hoffer & Hull, *supra* note 3, at 3–14; Constitutional Grounds, *supra* note 2, at 4–7; *Compare* Berger, *supra* note 4, at 67–68 (claiming that impeachment during the Stuart period was not limited to indictable conduct) *with* Clayton Roberts, *The Law of Impeachment in Stuart England: A Reply to Raoul Berger*, 84 Yale L.J. 1419 (1975) (arguing that impeachment during the Stuart period only applied to violations of existing law).

[7] Berger, *supra* note 4, at 67.

of misconduct committed in office, and the available punishment for impeachment was limited to removal from office.[8] Likewise, many state constitutions adopted after the Declaration of Independence in 1776, but before the federal Constitution was ratified, incorporated impeachment provisions.[9]

This history thus informed the Framers' consideration and adoption of impeachment procedures at the Constitutional Convention.[10] The English Parliamentary structure of a bicameral legislature dividing the power of impeachment between the "lower" house, which impeached individuals, and an "upper" house, which tried them, was replicated in the federal system with the power to impeach given to the House of Representatives and the power to try impeachments assigned to the Senate.[11] Nonetheless, the Framers, guided by the impeachment experiences in the colonies, ultimately adopted an "Americanized" impeachment practice with a republican character, distinct from English practice. The Constitution established an impeachment mechanism exclusively geared towards holding public officials, including the President, accountable.[12] This contrasted with the English practice of impeachment, which could extend to any individual save the Crown and was not limited to removal from office, but could result in a variety of punishments.[13] Likewise, the Framers adopted a requirement of a two-thirds majority vote for conviction on impeachment charges, shielding the process from naked partisan control.[14] This, too, differed with the English practice, which allowed conviction on a simple majority vote.[15] Ultimately, the Framers' choices in crafting the Constitution's impeachment provisions provide Congress with a crucial check on the other branches of the Federal Government and inform the Constitution's separation of powers.[16]

ArtI.S2.C5.3 Impeachment Doctrine

Article I, Section 2, Clause 5:

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

While legal doctrine developed from judicial opinions informs much of constitutional law, the understood meaning of the Constitution's provisions is also shaped by institutional

[8] Hoffer & Hull, *supra* note 3, at 67.

[9] *See* Hoffer & Hull, *supra* note 3, at 57–95; Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 1–11 (2000); Chafetz, *supra* note 4, at 96–97. *See, e.g.*, Penn Const. of 1776, sec. 22 (placing the power of impeachment with the commonwealth's unicameral legislature).

[10] *See* discussion The Power to Try Impeachments: Historical Background and Impeachable Offenses: Historical Background; Gerhardt, *supra* note 9, at 1–11.

[11] *See* The Federalist Nos. 65, 81 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Berger, *supra* note 4, at 59–66; U.S. Const. art. I, § 2, cl. 5 (conferring the House with the sole power of impeachment); *id.* art. I, § 3, cl. 6 (providing that the Senate has the exclusive power to try impeachments).

[12] Hoffer & Hull, *supra* note 3, at 96–106. For a more thorough discussion of how the Framers envisioned the power of impeachment, see The Power to Try Impeachments: Historical Background and Impeachable Offenses: Historical Background.

[13] Hoffer & Hull, *supra* note 3, at 97.

[14] *Id.*

[15] *Id.*

[16] *See* The Federalist No. 65 (Alexander Hamilton) (describing the power of impeachment as a "bridle in the hands of the legislative body upon the executive servants of the government"); *id.* No. 66 (noting that impeachment is an "essential check in the hands of [Congress] upon the encroachments of the executive"); *id.* No. 81 (explaining the importance of the impeachment power in checking the Judicial Branch).

practices and political norms.[1] James Madison believed that the meaning of the Constitution would be "liquidated" over time or determined through a "regular course of practice."[2] Justice Joseph Story thought this principle applied to impeachment, noting for example that the Framers understood that the meaning of "high crimes and misdemeanors" constituting impeachable offenses would develop over time, much like the common law.[3] Indeed, Justice Story believed it would be impossible to precisely define the full scope of political offenses that may constitute impeachable behavior.[4] Consequently, the historical practices of the House with regard to impeachment flesh out the meaning of the Constitution's grant of the impeachment power to that body.

Generally speaking, the impeachment process has been initiated in the House by a Member via resolution or declaration of a charge,[5] although anyone—including House Members, a grand jury, or a state legislature—may *request* that the House investigate an individual for impeachment purposes.[6] Indeed, in modern practice, a number of impeachments have been sparked by referrals from an external investigatory body.[7] Beginning in the 1980s, the Judicial Conference has referred its findings to the House recommending an impeachment investigation into a number of federal judges who were eventually impeached.[8] Similarly, in the impeachment of President Bill Clinton, an independent counsel—a temporary prosecutor given statutory independence and charged with investigating certain misconduct when approved by a judicial body[9]—first conducted an investigation into a variety of alleged

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[1] *See* Keith Whittington, Constitutional Construction 3 (1999); II Joseph Story, Commentaries on the Constitution of the United States § 762 (1833) ("The offences, to which the power of impeachment has been, and is ordinarily applied, as a remedy, are of a political character.").

[2] The Federalist No. 37 (Alexander Hamilton); Letter to Spencer Roane (Sept. 2, 1819), in 8 Writings of James Madison 450 (G. Hunt ed. 1908).

[3] Story, *supra* note 1, at § 797; ("[N]o previous statute is necessary to authorize an impeachment for any official misconduct."); *id.* at § 798 ("In examining the parliamentary history of impeachments, it will be found, that many offences, not easily definable by law, and many of a purely political character, have been deemed high crimes and misdemeanours worthy of this extraordinary remedy."); *see also* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 104–05 (2000).

[4] Story, *supra* note 1, at § 762 ("Not but that crimes of a strictly legal character fall within the scope of the power, (for, as we shall presently see, treason, bribery, and other high crimes and misdemeanours are expressly within it;) but that it has a more enlarged operation, and reaches, what are aptly termed, political offences, growing out of personal misconduct, or gross neglect, or usurpation, or habitual disregard of the public interests, in the discharge of the duties of political office. These are so various in their character, and so indefinable in their actual involutions, that it is almost impossible to provide systematically for them by positive law."); *id.* at § 795 ("Again, there are many offences, purely political, which have been held to be within the reach of parliamentary impeachments, not one of which is in the slightest manner alluded to in our statute book. And, indeed, political offences are of so various and complex a character, so utterly incapable of being defined, or classified, that the task of positive legislation would be impracticable, if it were not almost absurd to attempt it.").

[5] *See* 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States §§ 2342, 2400, 2469 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf [hereinafter Hinds]; 116 Cong. Rec. 11,941–42 (1970); 119 Cong. Rec. 74,873 (1974); *see also* Wm. Holmes Brown et al., House Practice: A Guide to the Rules, Precedents, and Procedures of the House ch. 27 § 6 (2011), https://www.govinfo.gov/content/pkg/GPO-HPRACTICE-112/pdf/GPO-HPRACTICE-112.pdf [hereinafter House Practice].

[6] *See* Gerhardt, *supra* note 3, at 25; 3 Lewis Deschler, Precedents of the United States of the House of Representatives, H.R. Doc. No. 94-661, at Ch. 14 §§ 5, 5.10–5.11 (1974), https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3.pdf [hereinafter Deschler].

[7] The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 authorizes the Judicial Conference to forward a certification to the House that impeachment of a federal judge may be warranted. 28 U.S.C. § 355.

[8] *See* Gerhardt, *supra* note 3, at 176.

[9] *See* 28 U.S.C. §§ 591–99. The statute authorizing the appointment of an independent counsel expired in 1999. *Id.* § 599.

activities on the part of the President and his associates, and then delivered a report to the House detailing conduct that the independent counsel considered potentially impeachable.[10]

Regardless of the source requesting an impeachment investigation, the House has sole discretion under the Constitution to actually begin any impeachment proceedings against an individual.[11] In practice, impeachment investigations are often handled by an already existing or specially created subcommittee of the House Judiciary Committee.[12] The scope of the investigation can vary. In some instances, an entirely independent investigation may be initiated by the relevant House committee or subcommittee. In other cases, an impeachment investigation may rely on records delivered by outside entities, such as that delivered by the Judicial Conference or an independent counsel.[13] Following this investigation, the full House may vote on the relevant impeachment articles. If articles of impeachment are approved, the House chooses managers to bring the case before the Senate.[14] The managers then present the articles of impeachment to the Senate, request that the body order the appearance of the accused,[15] and typically act as prosecutors in the Senate trial.[16]

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[10] *See* Gerhardt, *supra* note 3, at 176. The impeachment investigation of President Nixon also began with the referral by special prosecutor Leon Jaworski of material relating to possible impeachable conduct to the House Judiciary Committee. Gerhardt, *supra* note 3, at 176.

[11] U.S. Const. art. I, § 2, cl. 5.

[12] *See* Gerhardt, *supra* note 3, at x--xi; *see, e.g.*, Report of the Impeachment Trial Comm. on the Articles Against Judge G. Thomas Porteous, Jr., 111th Cong., 2d Sess., S. Rep. No. 111-347, at 6 (2010) [hereinafter Porteous Impeachment] (describing the creation by the House Judiciary Committee of an Impeachment Task Force to investigate allegations against Judge Porteous). The investigations that ultimately led to the first impeachment of President Donald Trump were carried out by multiple House committees, including the Permanent Select Committee on Intelligence and the Committees on Financial Services, Foreign Affairs, Judiciary, Oversight and Reform, and Ways and Means. *See* Staff of H. Perm. Select Comm. on Intelligence, et al., 116th Cong., The Trump-Ukraine Impeachment Inquiry Report: Report for the H. Perm. Select Comm. on Intelligence Pursuant to H. Res. 660 in Consultation with the H. Comm. on Oversight and Reform and the H. Comm. on Foreign Affairs (Comm. Print 2019). The early stages of this investigation saw some controversy over whether the House must explicitly authorize the initiation of an impeachment investigation. While the House committees had previously been investigating possible misconduct by President Trump, on September 24, 2019, the Speaker of the House announced that these investigations constituted an "official impeachment inquiry." Press Release, Nancy Pelosi, Speaker of the House, Pelosi Remarks Announcing Impeachment Inquiry (Sept. 24, 2019), https://www.speaker.gov/newsroom/92419-0. The House, as an institution, did not take action to approve explicitly the impeachment investigation until October 31, 2019, when the body adopted a resolution formally authorizing the House committees "to continue their ongoing investigations as part of the existing House of Representatives inquiry into whether sufficient grounds exist for the House of Representatives to exercise its Constitutional power to impeach Donald John Trump, President of the United States of America." H.R. Res. 660, 116th Cong. (2019). Although the Department of Justice, Office of Legal Counsel concluded that the House "must expressly authorize a committee to conduct an impeachment investigation," *see* House Committees' Authority to Investigate for Impeachment, 44 Op. O.L.C., slip op. at *53 (Jan. 19, 2020), https://www.justice.gov/olc/opinion/house-committees-authority-investigate-impeachment, it would appear that such an authorization is not strictly necessary given the existing tools and authority available to House committees to conduct more traditional legislative investigations into Executive Branch misconduct. For a more thorough discussion of this subject, see Todd Garvey, Cong. Rsch. Serv., R45983, Congressional Access to Information in an Impeachment Investigation (2019), https://crsreports.congress.gov/product/pdf/R/R45983.

[13] *See* Gerhardt, *supra* note 3, at 26. The House also did not conduct independent fact finding in the impeachments of President Bill Clinton, President Andrew Johnson, and Judge Harry E. Claiborne. *Id.* at 177. In the second impeachment of President Trump, the House conducted no formal impeachment investigation, but the staff of the Committee on the Judiciary presented the House with a report supporting the impeachment and outlining the events of January 6, 2020. *See* Staff of H. Comm. on the Judiciary, 116th Cong., Materials in Support of H. Res. 24 Impeaching Donald John Trump, President of the United States, for High Crimes and Misdemeanors (Comm. Print 2021).

[14] House Practice, *supra* note 5, at 616–19.

[15] Gerhardt, *supra* note 3, at 33. During the first impeachment of President Trump, the impeachment articles were adopted by the House on December 18, 2019, H.R. Res. 755, 116th Cong. (2019), but the managers were not appointed and the articles not delivered to the Senate until January 15, 2020. H. R. Res. 798, 116th Cong. (2020).

[16] 3 Hinds, *supra* note 5, at §§ 2303, 2370, 2390, 2420, 2449.

The House has impeached twenty individuals: fifteen federal judges, one Senator, one Cabinet member, and three Presidents.[17] The consensus reflected in these proceedings is that impeachment may serve as a means to address misconduct that does not necessarily give rise to criminal sanction. The types of conduct that constitute grounds for impeachment in the House appear to fall into three general categories: (1) improperly exceeding or abusing the powers of the office; (2) behavior incompatible with the function and purpose of the office; and (3) misusing the office for an improper purpose or for personal gain.[18] Consistent with scholarship on the scope of impeachable offenses,[19] congressional materials have cautioned that the grounds for impeachment "do not all fit neatly and logically into categories" because the remedy of impeachment is intended to "reach a broad variety of conduct by officers that is both serious and incompatible with the duties of the office."[20]

While successful impeachments and convictions of federal officials represent some clear guideposts as to what constitutes impeachable conduct,[21] impeachment processes that do not result in a final vote for impeachment also may influence the understanding of Congress, Executive and Judicial Branch officials, and the public regarding what constitutes an impeachable offense.[22] A prominent example involves the first noteworthy attempt at a presidential impeachment, which was aimed at John Tyler in 1842. At the time, the presidential practice had generally been to reserve vetoes for constitutional, rather than policy, disagreements with Congress.[23] Following President Tyler's veto of a tariff bill on policy grounds, the House endorsed a select committee report condemning President Tyler and suggesting that he might be an appropriate subject for impeachment proceedings.[24] The possibility apparently ended when the Whigs, who had led the movement to impeach, lost their House majority in the midterm elections.[25] In the years following the aborted effort to impeach President Tyler, presidents have routinely used their veto power for policy reasons. This practice is generally seen as an important separation of powers limitation on Congress's ability to pass laws rather than a potential ground for impeachment.[26]

Likewise, although President Richard Nixon resigned before impeachment proceedings were completed in the House, the approval of three articles of impeachment by the House

[17] *See* List of Individuals Impeached by the House of Representatives, U.S. House of Representatives, http://history.house.gov/Institution/Impeachment/Impeachment-List/ (last visited Dec. 7, 2021).

[18] House Practice, *supra* note 5, at 608–13. For examples of impeachments that fit into these categories, see Cong. Globe, 40th Cong., 2d Sess. 1400 (1868) (impeaching President Andrew Johnson for violating the Tenure of Office Act); 132 Cong. Rec. H4710–22 (daily ed. July 22, 1986) (impeaching Judge Harry E. Claiborne for providing false information on federal income tax forms); 156 Cong. Rec. 3155–57 (2010) (impeaching Judge G. Thomas Porteous for engaging in a corrupt relationship with bail bondsmen where he received things of value in return for helping bondsmen develop relationships with state judges).

[19] Gerhardt, *supra* note 3, at 48.

[20] H. Comm. on the Judiciary, 93d Cong., Constitutional Grounds for Presidential Impeachment 17 (Comm. Print 1974).

[21] *See* ArtII.S4.4.2 Historical Background on Impeachable Offenses.

[22] *See generally* ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860) et seq. In 1970, for instance, a Subcommittee of the House Judiciary Committee was authorized to conduct an impeachment investigation into the conduct of Justice William O. Douglas, but ultimately concluded that impeachment was not warranted. Associate Justice William O. Douglas, Final Report by the Special Subcomm. on H. Res. 920 of the Comm. on the Judiciary, 91st Cong., 2d Sess. (Comm. Print 1970).

[23] *See generally* Michael Gerhardt, Forgotten Presidents 41–47 (2013) [hereinafter Gerhardt, Forgotten Presidents].

[24] Oliver P. Chitwood, John Tyler: Champion of the Old South 299–300 (1939).

[25] Gerhardt, Forgotten Presidents, *supra* note 23, at 57.

[26] Randall K. Miller, *Presidential Sanctuaries After the Clinton Sex Scandals*, 22 Harv. J.L. & Pub. Pol'y 647, 706–07 (1999) ("The Senate acquittal of President Andrew Johnson and the House's failed attempt to impeach President John Tyler implies that even a deeply felt congressional disagreement with a target's policies or political philosophies alone is not enough to justify removal.").

Judiciary Committee against him may inform lawmakers' understanding of conduct that constitutes an impeachable offense.[27] The approved impeachment articles included allegations that President Nixon obstructed justice by using the office of the presidency to impede the investigation into the break-in of the Democratic National Committee headquarters at the Watergate Hotel and Office Building and authorized a cover-up of the activities that were being investigated. President Nixon was alleged to have abused the power of his office by using federal agencies to punish political enemies and refusing to cooperate with the Judiciary Committee's investigation.[28] While no impeachment vote was taken by the House, the Nixon experience nevertheless established what some would call the paradigmatic case for impeachment—a serious abuse of the office of the presidency that undermined the office's integrity.[29]

However, one must be cautious in extrapolating wide-ranging lessons from the lack of impeachment proceedings in the House. Specific behavior not believed to constitute an impeachable offense in prior contexts might be deemed impeachable in a different set of circumstances. Moreover, given the variety of contextual permutations, the full scope of impeachable behavior resists specification,[30] and historical precedent may not always serve a useful guide to whether conduct is grounds for impeachment For instance, no President has been impeached for abandoning the office and refusing to govern. The fact that this event has not occurred, however, hardly indicates that such behavior would not constitute an impeachable offense meriting removal from office.[31]

ArtI.S2.C5.4 Alternatives to Impeachment

Article I, Section 2, Clause 5:

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

As an alternative to the impeachment process, both houses of Congress have occasionally formally announced their disapproval of a particular Executive Branch official by adopting a resolution censuring, condemning, or expressing a lack of confidence in the official.[1] No constitutional provision expressly authorizes or prohibits such actions, and the propriety of using resolutions to condemn practices (which some describe as censure) has been the subject of some debate.[2] Nevertheless, both the House and the Senate have passed such resolutions throughout the Nation's history. For instance, the Senate censured President Andrew Jackson

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[27] *See* H. Comm. on the Judiciary, Impeachment of Richard M. Nixon, President of the United States, 93d Cong., 2d Sess., H.R. Rep. No. 93–1305, at 6–11 (1974) [hereinafter Nixon Impeachment]; United States v. Nixon, 418 U.S. 683, 713–14 (1974).

[28] Nixon Impeachment, *supra* note 27, at 6–11; *see* ArtII.S4.4.7 President Richard Nixon and Impeachable Offenses.

[29] *See* ArtII.S4.4.7 President Richard Nixon and Impeachable Offenses.

[30] *See* Gerhardt, *supra* note 3, at 106.

[31] *See* Charles Black, Impeachment: A Handbook 33–36 (1974).

[1] *See, e.g.*, Cong. Globe, 36th Cong., 1st Sess. 2951 (1860) ("Resolved, That the President and Secretary of the Navy, by receiving and considering the party relations of bidders for contracts with the United States, and the effect of awarding contracts upon pending elections, have set an example dangerous to the public safety, and deserving the reproof of this House."); 17 Cong. Rec., 1584–91, 2784–10 (1886) ("Resolved, That the Senate hereby expresses its condemnation of the refusal of the Attorney-General, under whatever influence, to send to the Senate copies of papers called for by its resolution of the twenty-fifth of January, and set forth in the report of the Committee on the Judiciary, is in violation of his official duty and subversive of the fundamental principles of the Government and of a good administration thereof.").

[2] *See* 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 1569 (1907); Condemning and Censuring William Jefferson Clinton, H.J. Res. 140, 105th Cong., 2d Sess. (1998). Letter from Rep.

in 1834 for refusing to turn over a document relating to his veto of an act to re-charter the United States Bank.[3] In 1860, the House adopted a resolution stating that the actions of President James Buchanan and the Secretary of the Navy Isaac Toucey, regarding the issuance of government contracts on political grounds, were deserving of reproof.[4] And the Senate in 1886 adopted a resolution condemning Attorney General A.H. Garland for refusing to provide records to the Senate concerning President Grover Cleveland's removal of a district attorney.[5] Importantly, because such resolutions are not subject to the constitutional requirements of bicameralism and presentment, they impose no formal legal penalties or consequences for any party.[6] Instead, they function primarily to express the sense of Congress on a matter and signal disagreement with the actions of the named individual.[7]

Section 3—Senate

Clause 1—Composition

ArtI.S3.C1.1 Equal Representation of States in the Senate

Article I, Section 3, Clause 1:

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

Ratified in 1913, the Seventeenth Amendment superseded Article I, Section 3, Clause 1, providing for Senators to be popularly elected rather than selected by state legislatures.[1] The Seventeenth Amendment, however, incorporated other provisions of Article I, Section 3, Clause 1: equal suffrage among states, each state accorded two Senators, each of whom would have one vote and serve a six-year term.[2]

Adopted by the Constitutional Convention and incorporated in the Seventeenth Amendment, the text set forth in Article I, Section 3, clause 1, providing that "[t]he Senate of the United States shall be composed of two Senators from each State . . . and each Senator shall have one vote"[3] is foundational to the federal nature of the U.S. Government. By providing for each state to be represented in the Senate by two Senators, each with a single vote, the Constitution ensures that all states are equal in the Senate regardless of their

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William D. Delahunt to Rep. Henry J. Hyde, Chair, House Judiciary Committee (Dec. 4, 1998); Peter Baker & Juliet Eilperin, *GOP Blocks House Censure Alternative*, Wash. Post (Dec. 13, 1998), https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/impeach121398.htm.

[3] 10 Reg. Deb. 1187 (1834); Senate Censures President, U.S. Senate, https://www.senate.gov/artandhistory/history/minute/Senate_Censures_President.htm (last visited Jan. 24, 2018). In 1850, the House passed a resolution censuring three members of President Zachary Taylor's Cabinet for involvement in a scandal regarding the payment of a claim against the United States, when much of the payment went to a Cabinet member. The House considered censuring President Taylor himself, but he died in office without any such action being taken. Michael Gerhardt, Forgotten Presidents 77 (2013).

[4] Cong. Globe, 36th Cong., 1st Sess. 2951 (1860).

[5] 17 Cong. Rec., 1584–91, 2784–2810 (1886).

[6] *See* Michael J. Gerhardt, *The Constitutionality of Censure*, 33 U. Rich. L. Rev. 33, 35 (1999).

[7] The House of Representatives also issued a report critical of President Tyler following his veto of a tariff bill. Oliver P. Chitwood, John Tyler: Champion of the Old South 299–300 (1939); Gerhardt, Forgotten Presidents, *supra* note 3, at 57.

[1] U.S. Const. amend. XVII.

[2] *Id.* ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote.").

[3] U.S. Const. art. I, § 3, cl. 1; U.S. Const. amend. XVII.

relative population, wealth, power, or size.[4] By allocating power in the Senate equally among the states, the Framers counterbalanced allocating power in the House based on a state's share of the national population.[5]

The different compositions of the House of Representatives and Senate reflect the Framers' conception of the U.S. Government as both national and federal.[6] Consistent with a National Government, the Constitution provides for the American people to be equally represented in the House.[7] Consistent with a federation of states, the Constitution provides for equal representation of states in the Senate.[8] Stressing that equal suffrage is critical to state sovereignty in his *Commentaries on the Constitution of the United States*, Justice Joseph Story stated: "The equal vote allowed in the senate is . . . at once a constitutional recognition of the sovereignty remaining in the states, and an instrument for the preservation of it. It guards them against (what they meant to resist as improper) a consolidation of the states into one simple republic."[9] By arranging for the House and Senate to exercise legislative power jointly, the Framers required U.S. law to have both national and federal approval—a majority vote in the House of Representatives demonstrates national approval while a majority vote in the Senate expresses federal approval.[10]

ArtI.S3.C1.2 Historical Background on State Voting Rights in Congress

Article I, Section 3, Clause 1:

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

The allocation of voting rights, often referred to as suffrage, in the two Houses of Congress was among the most contentious issues the Framers had to resolve at the Constitutional Convention.[1] Under the Articles of Confederation, each state had a single vote in a unicameral Congress.[2] Smaller states viewed this arrangement as essential to maintaining their

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[4] *See, e.g.*, Joseph Story, Commentaries on the Constitution of the United States § 691 (1833) ("[E]ach state in its political capacity is represented upon a footing of perfect equality, like a congress of sovereigns, or ambassadors, or like an assembly of peers.").

[5] *Compare* U.S. Const. art. I, § 3, cl. 1 *with* U.S. Const. art. I, § 2, cl. 3.

[6] Joseph Story, Commentaries on the Constitution of the United States § 696 (1833) ("[T]he very structure of the general government contemplated one partly federal, and partly national.").

[7] U.S. Const. art. I, § 2, cl. 3.

[8] U.S. Const. art. I, § 3, cl. 1.

[9] Joseph Story, Commentaries on the Constitution of the United States § 696 (1833). *See also* The Federalist No. 62 (James Madison) ("[T]he equal vote allowed to each State is at once a constitutional recognition of that portion of sovereignty remaining in the individual States, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small States; since they are not less solicitous to guard, by every possible expedient, against an improper consolidation of the States into one simple republic.").

[10] The Federalist No. 62 (James Madison) ("No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States."). The Framers also saw the division of power between the House and Senate as ensuring that they would check abuses of power by the other. *Id.* ("[A] senate, as a second branch of the legislative assembly, distinct from, and dividing the power with, a first, must be in all cases a salutary check on the government. It doubles the security to the people, by requiring the concurrence of two distinct bodies in schemes of usurpation or perfidy, where the ambition or corruption of one would otherwise be sufficient.").

[1] Joseph Story, Commentaries on the Constitution of the United States § 692 (1833). *See also* Max Farrand, The Framing of the Constitution 93 (1913) (referring to "'the most fundamental points, the rules of suffrage in the two branches.'") (quotation retained).

[2] The Articles of Confederation of 1781, art. V, *reprinted in* Max Farrand, The Framing of the Constitution app. I (1913) ("In determining questions in the united states, in Congress assembled, each state shall have one vote."). The Articles of Confederation further provided that each state legislature would determine how its delegates would be appointed; appointments would be on an annual basis; and that states could recall their delegates and replace them at

autonomy from wealthier, more populated states. The concern of small states that the Constitutional Convention would eliminate Articles of Confederation language providing for equal suffrage among states was such that Delaware, in commissioning its delegates to the Convention, prohibited them from agreeing to any deviation from the principle of state equal suffrage.[3]

More populated states, however, viewed the Articles of Confederation's provision of equal suffrage among the states to be unjust because people in less populated states had relatively more influence in the U.S. legislature than people in more populated states. Accordingly, delegates from more populated states argued that state representation in Congress should reflect the relative sizes of state populations. For example, the Virginia delegates to the Constitutional Convention proposed, among other things, a bicameral Congress in which votes in both houses would be allocated among states in accordance with "the Quotas of contribution or to the number of free inhabitants, or to both."[4] After a proposal for proportional representation in the Senate won initial approval at the Constitutional Convention by a vote of six to five,[5] New Jersey proposed to retain the Articles of Confederation provision of equal suffrage among states.[6]

After further debate on congressional representation and equal suffrage among the states, the Constitutional Convention ground to a "standstill," at which point a committee, often

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any time during the year. *Id.* Finally, the Articles provided that states could send between two to seven delegates to Congress, limited delegates to serving no more than three terms in any six-year period, and proscribed delegates from holding any office in the United States "for which he, or another for his benefit receives any salary, fees or emoluments of any kind." *Id.*

[3] Max Farrand, The Framing of the Constitution 24 (1913) (noting that the Delaware commission provided "that such Alterations or further Provisions, or any of them, do not extend to that part of the Fifth Article of the Confederation . . . which declares that 'In determining Questions in the United States Congress Assembled each State shall have one Vote'").

[4] The Virginia Plan, *reprinted in* Max Farrand, The Framing of the Constitution app. II, arts. 2 & 4 (1913). Article 2 of the Virginia Plan circulated by Edmund Randolph of Virginia on May 29, 1787, provided: "[T]he rights of suffrage in the National Legislature ought to be proportioned to the Quotas of contributions, or to the number of free inhabitants, as the one or the other rule may seem best in different cases." *Id. See also* Max Farrand, The Framing of the Constitution 69 (1913). The "Quotas of contributions" to which the Virginia Plan referred were the shares or taxes that the states were to contribute to pay the expenses of the U.S. Government. Under the Articles of Confederation, the states' shares were determined generally "in proportion to the value of surveyed land within their borders." From the Declaration of Independence to the Constitution, the Roots of American Constitutionalism xliii (C.J. Friedrich & Robert G. McCloskey eds., 1954). Article VIII of the Articles of Confederation stated:

All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several states, *in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements* thereon shall be estimated according to such mode as the United States in Congress assembled from time to time direct and appoint.

The Articles of Confederation of 1781, art. VIII, *reprinted in* Max Farrand, Framing of the Federal Constitution, app. I (1913) (emphasis added).

Rufus King of Massachusetts objected to the Virginia Plan's use of "Quotas of contribution"on the grounds that the amounts for which each state would be responsible would constantly fluctuate. 1 The Records of the Federal Convention of 1787, at 36 (Max Farrand ed., 1911) ("Mr. King observed that the quotas of contribution which would alone remain as the measure of representation, would not answer; because waiving every other view of the matter, the revenue might hereafter be so collected by the general Govt. that the sums respectively drawn from the States would [not] appear; and would besides be continually varying."). In light of King's concerns, the "Quotas of contribution" language was removed. *Id.* ("Mr. Madison admitted the propriety of the observation, and that some better rule ought to be found. Col. Hamilton moved to alter the resolution so as to read 'that the rights of suffrage in the national Legislature ought to be proportioned to the number of free inhabitants.' Mr. Saight 2ded. the motion."). Notwithstanding, debate over the role that wealth should play in how states were represented in the National Government continued. *See, e.g.*, *id.* at 541–542, 567 (James Madison's notes, July 6, 1787; James Madison's notes, July 10, 1787).

[5] Max Farrand, The Framing of the Constitution 75 (1913).

[6] 1 The Records of the Federal Convention of 1787, at 242–245 (Max Farrand ed., 1911) (James Madison's notes, June 15, 1787).

referred to as the Committee of Eleven, was formed to develop a compromise.[7] The Committee of Eleven proposed that (1) representatives would be allocated in the House in proportion to the number of inhabitants and (2) each state would have an equal vote in the Senate.[8] After further debate and modification, the Great Compromise was adopted by a vote of 5-4 with Connecticut, New Jersey, Delaware, Maryland, and North Carolina in favor; Pennsylvania, Virginia, South Carolina, and Georgia against; Massachusetts divided; and New York absent, its delegation having left the Convention "because of their dissatisfaction with the way things were tending and because of their belief that they were unwarranted in supporting action taken in excess of their instructions."[9] Key to the Constitution's adoption,[10] equal suffrage among the states in the Senate ensured that the new American government would remain a federation of states.[11]

The importance of equal suffrage among the states set forth at Article I, Section 3, Clause 1 to the Constitution's adoption and ratification is further underscored by Article V of the Constitution. Article V, which provides for amending the Constitution, distinguishes equal suffrage among the states from the rest of the Constitution by making it unamendable, stating: "[N]o State, without its Consent, shall be deprived of equal suffrage in the Senate."[12] According to James Madison, Roger Sherman of Connecticut, who was one of the architects of the Great Compromise, raised this issue during debate on Article V. Madison stated:

> Mr. Sherman expressed his fears that three fourths of the States might be brought to do things fatal to particular States, as abolishing them altogether or depriving them of their equality in the Senate. He thought it reasonable that the proviso . . . should be extended so as to provide that no State . . . should be deprived of its equality in the Senate.[13]

After some debate, Gouverneur Morris proposed the language that the Convention ultimately adopted.[14]

ArtI.S3.C1.3 Selection of Senators by State Legislatures

Article I, Section 3, Clause 1:

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

By providing for Senators to be selected by popular vote, the Seventeenth Amendment superseded the Framers' decision—set forth in Article I, Section 3, Clause 1—that state

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[7] Max Farrand, The Framing of the Constitution 97 (1913). The Committee of Eleven was comprised of Gerry, Ellsworth, Yates, Paterson, Franklin Bedford, Martin, Mason, Davie, Rutledge, and Baldwin. 1 The Records of the Federal Convention of 1787, at 509 (Max Farrand ed., 1911) (Journal, July 2, 1787).

[8] *See* ArtI.S1.2.3 The Great Compromise of the Constitutional Convention. *See also* Max Farrand, The Framing of the Constitution 99 (1913).

[9] Max Farrand, The Framing of the Constitution 105 (1913).

[10] *See* ArtI.S1.2.3 The Great Compromise of the Constitutional Convention. The Great Compromise is also referred to as the Connecticut Compromise because of the Connecticut delegation's role in its adoption. Max Farrand, The Framing of the Constitution 106–107 (1913). *See also id.* at 146 ("The great compromise had provided that direct taxation should be proportioned to population . . . .").

[11] Max Farrand, The Framing of the Constitution 134 (1913).

[12] U.S. Const. art. V.

[13] 2 The Records of the Federal Convention of 1787, at 629 (Max Farrand ed., 1911) (James Madison's notes, Sept. 15, 1787).

[14] *Id.* at 631.

legislatures choose Senators.[1] The Seventeenth Amendment thereby harmonized selection of the Senate with that of the House, the Members of which the Framers provided to be elected by popular vote.[2]

During the Constitutional Convention, the Framers considered several methods for selecting Senators.[3] While James Wilson, James Madison, and George Mason supported direct election of Senators through popular votes,[4] other proposals provided for the House of Representatives to elect Senators directly or from a pool of nominees chosen by state legislatures.[5] Ultimately, the Framers agreed that state legislatures would select Senators.[6]

The Framers' decision to distinguish selection of the Senate from selection of the House of Representatives was consistent with established practices. Following the example of the British House of Commons, colonial charters and state constitutions generally provided for one branch of their legislatures to be selected by popular vote.[7] Popular votes were not the only method of selecting representatives of the people, however. For instance, under the Articles of Confederation, state legislatures selected delegates to Congress, while the Maryland House of Delegates appointed the Maryland Senate.[8] Thus, popular votes influenced selection of—rather than selected—Congress under the Articles of Confederation and the Maryland Senate. The Framers, moreover, appear to have viewed both direct elections of Members of the House through popular votes and selections of Senators by state legislatures, members of which had been directly elected by popular vote, as consistent with republican government. Although James Madison advocated for direct election of Senators at the Constitutional Convention, he observed in the *Federalist No. 39* that "[i]t is SUFFICIENT for such a [republican] government that the persons administering it be appointed, either directly or indirectly by the people . . . ."[9]

Although the Constitution has provided for the Senate to be popularly elected since 1913, at the time of the Nation's inception, selection of the Senate by state legislatures provided certain benefits both to states and the new U.S. Government. By selecting Senators, state legislatures could directly impact Senate decisions, which, in turn, strengthened ties and improved communication with Congress. Because Senators owed their appointments to state legislatures, they had incentives to be responsive to the needs of their states. Consequently, state legislatures had greater ability to advance their interests in Congress.[10] Describing this benefit, James Madison wrote: "It is recommended by the double advantage of favouring a

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[1] U.S. Const. amend. XVII.

[2] *Compare* U.S. Const. amend. XVII *with* U.S. Const. art. I, § 2, cl. 4.

[3] Max Farrand, The Framing of the Constitution 76 (1913).

[4] *Id.*

[5] *Id. See also* Joseph Story, Commentaries on the Constitution of the United States § 701 (1833).

[6] Joseph Story, Commentaries on the Constitution of the United States § 701 (1833).

[7] Popular votes did not mean universal suffrage. For instance, as the author of the *Federalist No. 57* notes, participation in county elections for the British House of Commons was limited to "persons having a freehold estate of the annual value of more than twenty pounds sterling, according to the present rate of money." The Federalist No. 57 (Alexander Hamilton or James Madison). *See also* The Federalist No. 63 (Alexander Hamilton or James Madison) ("But if anything could silence the jealousies on this subject, it ought to be the British example. The Senate there instead of being elected for a term of six years, and of being unconfined to particular families or fortunes, is an hereditary assembly of opulent nobles. The House of Representatives, instead of being elected for two years, and by the whole body of the people, is elected for seven years, and in very great proportion, by a very small proportion of the people.").

[8] The Federalist No. 39 (James Madison) ("The Senate, like the present Congress, and the Senate of Maryland, derives its appointment indirectly from the people.").

[9] *Id.*

[10] *See* Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 Duke L.J. 177, 214 (2008) (noting that Senators who refused to follow their state legislature's directions were expected to resign).

select appointment, and of giving to the state governments such an agency in the formation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems."[11] Finally, by requiring no specific selection process, Article I, Section 3, Clause 1 allowed state legislatures to tailor the process of selecting Senators to the state's unique circumstances.

ArtI.S3.C1.4 Six-Year Senate Terms

Article I, Section 3, Clause 1:

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

Although the Seventeenth Amendment superseded Article I, Section 3, Clause 1, it incorporated the six-year Senate term the Framers had provided in Article I, Section 3, Clause 1.

During the Constitutional Convention, the Framers discussed extensively the appropriate term for Senators and Representatives to serve in Congress. Proposals for Senate terms ranged from life terms subject to good behavior[1] to limited terms ranging from three to nine years.[2] The Framers appear to have recognized a relationship between the length of Senate and House terms and the respective roles of the two houses. For instance, after reducing a proposed three-year House term to two years in order to compromise with advocates for one-year House terms,[3] the Framers reduced the seven-year Senate term, which had been discussed in conjunction with the three-year House term, to six years.[4] In the Federalist Papers, James Madison noted that the six-year Senate term was consistent with state senate terms.[5]

Commentators have viewed the six-year Senate term and two-year House term as striking a careful balance between institutional stability provided by a longer Senate term and legislative responsiveness provided by shorter House terms punctuated by frequent elections. Explaining the Senate's greater permanence as moderating more volatile short-term House interests, Justice Joseph Story stated in his *Commentaries on the Constitution of the United States*: "[The Senate's] value would be incalculably increased by making its term in office such, that with moderate industry, talents, and devotion to the public service, its members could scarcely fail of having the reasonable information, which would guard them against gross errors, and the reasonable firmness, which would enable them to resist visionary speculations, and popular excitement."[6]

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[11] Joseph Story, Commentaries on the Constitution of the United States § 702 (1833); The Federalist Nos. 62 (Alexander Hamilton) & 27 (Alexander Hamilton).

[1] Joseph Story, Commentaries on the Constitution of the United States § 707 & n.1 (1833).

[2] *Id.*

[3] Max Farrand, The Framing of the Constitution 76 (1913).

[4] *Id.* at 91. The *Federalist Papers* discuss state practices with respect to their "most numerous branches," stating: "In Connecticut and Rhode Island, the periods are half-yearly. In the other States, South Carolina excepted, they are annual. In South Carolina they are biennial as is proposed in the federal government." The Federalist No. 53 (Alexander Hamilton or James Madison).

[5] The Federalist No. 39 (James Madison) ("The Senate is elective, for the period of six years; which is but one year more than the period of the Senate of Maryland, and but two more than that of the Senates of New York and Virginia.").

[6] Joseph Story, Commentaries on the Constitution of the United States § 712 (1833). Justice Story continued: "If public men know, that they may safely wait for the gradual action of a sound public opinion, to decide upon the merit of their actions and measures, before they can be struck down, they will be more ready to assume responsibility, and pretermit present popularity for future solid reputation." *Id.*

Clause 2—Seats

ArtI.S3.C2.1 Staggered Senate Elections

Article I, Section 3, Clause 2:

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

The Framers provided for change in the Senate to occur gradually while ensuring that the Senate remained responsive to popular interests by providing for one-third of Senate seats to be filled every two years.[1] Consequently, the Framers adopted Article I, Section 3, Clause 2, which provided, among other things, a mechanism for staggering Senate terms. This clause provided that one-third of Senators selected to the First Congress would serve a two-year term, one-third of Senators would serve a four-year term, and one-third of Senators would serve a six-year term. After these initial terms concluded, all Senate seats would have six-year terms. In dividing the Senate seats into the three classes, Congress allocated them so "that both senators from the same state should not be in the same class, so that there never should be a vacancy, at the same time, of the seats of both senators."[2]

By staggering the filling of Senate seats so that only one-third of Senate seats may be changed at any time, Article I, Section 3, Clause 2, ensured that modifications to the Senate's membership would be gradual and occur over a series of elections.[3] Discussing the benefits of this system, Justice Story noted:

> [I]t is nevertheless true, that in affairs of government, the best measures, to be safe, must be slowly introduced; and the wisest councils are those, which proceed by steps, and reach, circuitously, their conclusion. It is, then, important in this general view, that all the public functionaries should not terminate their offices at the same period. The gradual infusion of new elements, which may mingle with the old, secures a gradual renovation, and a permanent union of the whole.[4]

Moreover, because all Members of the House of Representatives are subject to election every two years, the make-up of the House and its agenda may change significantly from election to election. As such, six-year staggered Senate terms provide Congress an institutional stability anchored by the Senate that may counterbalance rapid, fluctuating changes in the House. Discussing this balance in his *Commentaries on the Constitution of the United States*, Justice Joseph Story stated: "[The Senate] combines the period of office of the executive with that of the members of the house; while at the same time, from its own biennial changes, . . . it is silently subjected to the deliberate voice of the states."[5]

Staggering when Senate seats are filled also ensures that states have at least one Senator with previous experience in the Senate. States may realize benefits from their Senators acquiring seniority in the Senate. Committee chairmanships and other leadership roles allow

[1] *See, e.g.,* 2 The Records of the Federal Convention of 1787, at 418, 435 (Max Farrand ed., 1911).

[2] Joseph Story, Commentaries on the Constitution of the United States § 724 (1833).

[3] *Id.* at § 712.

[4] *Id.* at § 713.

[5] *Id.* at § 712.

Senators to prioritize their states' interests. Moreover, institutional knowledge of, and greater experience with, the Senate facilitates the ability of Senators to advance state interests. By providing that Senators from the same state were not assigned the same term (two, four, or six years) at the first Congress, Congress ensured that states did not have two senators who were new to the Senate at the same time.[6]

Finally, because Senate elections are staggered, the Senate is a continuing body. Consequently, while each election cycle ushers in a new House of Representatives, there has only been one Senate. As the Supreme Court observed in *McGrain v. Daugherty*, the Senate "is a continuing body whose members are elected for a term of six years and so divided into classes that the seats of one-third only become vacant at the end of each Congress, two-thirds always continuing into the next Congress, save as vacancies may occur through death or resignation."[7] Consequently, because the Senate is a continuing body, the Supreme Court has reasoned that expiration of Congress did not moot a warrant for a witness who had refused to testify before a Senate committee.[8]

ArtI.S3.C2.2 Senate Vacancies Clause

Article I, Section 3, Clause 2:

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

The Seventeenth Amendment's ratification in 1913 provided for the Senate to be elected by popular vote rather than chosen by state legislatures, thereby harmonizing the Senate selection process with that of the House.[1] Consistent with this, the Seventeenth Amendment set aside the Senate Vacancy Clause set forth at Article I, Section 3, Clause 2, which provided for state legislatures to fill Senate vacancies, mandating, instead, that a state's Executive Authority[2] fill vacant Senate seats through popular elections. Accordingly, the Seventeenth Amendment's Senate Vacancy Clause mirrors the House Vacancy Clause by providing that "the executive authority of such State shall issue writs of election to fill vacancies . . . ."[3] The Seventeenth Amendment, however, provides state legislatures greater flexibility to address Senate vacancies by allowing state legislatures to authorize state Governors to fill Senate vacancies temporarily until the election.[4]

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[6] *Id.* at § 724 ("In arranging the original classes, care was taken, that both senators from the same state should not be in the same class, so that there never should be a vacancy, at the same time, of the seats of both senators.").

[7] McGrain v. Daugherty, 273 U.S. 135, 181 (1927). *See also* Edward S. Corwin, The Constitution and What it Means Today 12 (Harold W. Chase & Craig R. Ducat eds., 1973) (1958) ("While there have been 92 Congresses to date, there has only been one Senate, and this will apparently be the case till the crack of doom.").

[8] *McGrain*, 273 U.S. 135.

[1] U.S. Const. amend. XVII. *See* U.S. Const. art. I, § 2, cl. 4.

[2] The Framers' use of the term "executive authority" reflected that early state constitutions often provided for an executive council to control or advise the state's chief executive. Charles C. Thach, Jr., The Creation of the Presidency, 1775–1789: A Study in Constitutional History 16–17 & n.7 (Johns Hopkins U. Press 1969) (1923).

[3] U.S. Const. amend. XVII.

[4] *Id.* ("Provided, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.").

The Framers distinguished the Senate Vacancy Clause set forth at Article I, Section 3, Clause 2, from the House Vacancy Clause set forth at Article I, Section 2, Clause 4, by expressly contemplating that vacancies in the Senate might arise from resignations. By contrast, the House Vacancies Clause does not refer to resignations. Because state legislatures selected their state's Senators prior to the 1913 ratification of the Seventeenth Amendment, the express discussion of resignations in the Senate Vacancy Clause may have tacitly recognized, as one commentator has noted, that Senators who declined to follow directions of their state legislatures were expected to resign.[5]

Clause 3—Qualifications

ArtI.S3.C3.1 Overview of Senate Qualifications Clause

Article I, Section 3, Clause 3:

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

Under the Senate Qualifications Clause set forth at Article I, Section 3, Clause 3, Senators must be at least thirty years of age, a citizen for at least nine years, and an inhabitant of the state from which he or she is elected. While the Senate Qualifications Clause expressly requires inhabitancy at the time of the election, Congress has interpreted the Clause to require that Senators meet age and citizenship qualifications only at the time they take the oath of office.[1] Pursuant to Article I, Section 5, the Senate determines whether Senators-elect meet the required qualifications to be seated in the Senate.[2]

During the Constitutional Convention, the Framers adopted a minimum age requirement of thirty to ensure that Senators had sufficient maturity to perform their duties. Similarly, the Framers adopted a nine-year citizenship requirement to ensure that foreign-born Senators were loyal to, and knowledgeable about, the United States. Senate qualification requirements were more strenuous than those for the House, which required only that Members be twenty-five years of age and a citizen for at least seven years.[3] Alexander Hamilton explained the disparity in the Senate and House age requirements as due to "the nature of the senatorial trust, which requiring greater extent of information and ability of character, requires at the same time that the senator should have reached a period of life most likely to supply these advantages . . . ."[4]

Fixing the appropriate length of citizenship to be a Member of the Senate or House appears to have been the subject of significant debate at the Constitutional Convention, in part, because of the delegates' different backgrounds. Pennsylvania delegate James Wilson, an immigrant from Scotland, a signatory to the Declaration of Independence, and a future Supreme Court Justice, argued for a minimal citizenship requirement based on his personal

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[5] Josh Chafetz, *Leaving the House: The Constitutional Status of Resignation from the House of Representatives*, 58 Duke L.J. 177, 214 (2008).

[1] S. Res. 155, 79th Cong. (1935). *See also* 79 Cong. Rec. 9824–42 (June 21, 1935); 9 Cong. Rec. 9651–57 (June 19, 1935).

[2] U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns, and Qualifications of its own Members.").

[3] U.S. Const. art. I, § 2, cl. 2.

[4] The Federalist No. 62 (Alexander Hamilton). *See also* Joseph Story, Commentaries on the Constitution of the United States § 726 (1833) (explaining that the Roman senate had similar qualifications).

experiences of having been precluded from office earlier in his career because of citizenship requirements.[5] Other delegates proposed much lengthier terms.[6]

Having considered terms ranging from four to fourteen years, the Framers' adoption of a nine-year requirement appears to have compromised conflicting views on the subject. Explaining the adoption of a nine-year term in the *Federalist No. 62*, Alexander Hamilton wrote: "The term of nine years appears to be a prudent mediocrity between a total exclusion of adopted citizens, whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them, which might create a channel for foreign influence in the national councils."[7] Hamilton stressed the Senate's role in foreign affairs as further justifying a longer citizenship requirement, stating that "participating immediately in transactions with foreign nations, ought to be exercised by none who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education."[8]

By adopting an inhabitancy requirement, the Framers sought to ensure that Senators would represent the interests of their states.[9] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story noted "[I]t is manifestly proper, that a state should be represented by one, who, besides an intimate knowledge of all its wants and wishes, and local pursuits, should have a personal and immediate interest in all measures touching its sovereignty."[10]

ArtI.S3.C3.2 When Senate Qualifications Requirements Must Be Met

Article I, Section 3, Clause 3:

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

While the Senate Qualifications Clause expressly requires a Senator-elect to reside in the state from which he is elected at the time of the election, it is less clear when a Senator-elect must meet the age and citizenship requirements. However, in 1935, the Senate established that a Senator-elect must only meet age and citizenship qualifications at the time he or she takes the oath of office.[1]

In 1935, the Senate considered when a Senator-elect must meet the qualification requirements when former Senator Henry D. Hatfield of West Virginia and various West Virginia citizens challenged the seating of Senator-elect Rush Holt of West Virginia on the

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[5] Max Farrand, The Framing of the Constitution 137 (1913). A member of the Continental Congress and a leading legal scholar, James Wilson had immigrated to the colonies in 1765. 1 Collected Works of James Wilson xvi (Kermit L. Hall & Mark David Hall eds., 2007).

[6] *See, e.g.,* 2 The Records of the Federal Convention of 1787, at 243 (1911) (Gouverneur Morris stating: "Foreigners will not learn our laws & Constitution under 14 yrs.—7 yrs must be applied to learn to be a Shoe Maker—14 at least are necessary to learn to be an Amer. Legislator—Again—that period will be requisite to eradicate the Affections of Education and native Attachments—").

[7] The Federalist No. 62 (Alexander Hamilton).

[8] *Id. See also* 2 Joseph Story, Commentaries on the Constitution of the United States § 728 (1833) (commenting that the citizenship requirement freed a naturalized Senator "from all prejudices, resentments, and partialities, in relation to the land of his nativity" and allowed him to "have acquired a thorough knowledge of the institutions and interests of a country").

[9] The Framers adopted the term "inhabitant" in favor of "resident" because, as understood at that time, "inhabitant" would not, in the words of James Madison, "exclude persons absent occasionally for a considerable time on public or private business." 2 The Records of the Federal Convention of 1787, at 217 (Max Farrand ed., 1911).

[10] 2 Joseph Story, Commentaries on the Constitution of the United States § 729 (1833).

[1] S. Res. 155, 79th Cong. (1935).

grounds that he had been elected to the Senate at the age of twenty-nine.[2] While Senator-elect Holt acknowledged that he had not been thirty at the time of the general election on November 7, 1934, or at the convening of the Seventy-Ninth Congress on January 3, 1935, he argued that he met the Senate qualification requirements because he did not seek to take the oath of office until after he turned thirty on July 19, 1935.[3] In finding that Senator-elect Holt was entitled to the seat, the Committee on Privileges and Elections considered House of Representatives practices.[4] The Committee observed that while Rep. John Young Brown of Kentucky was elected to the Thirty-Sixth Congress despite being underage, he qualified for a seat because he had waited until he was twenty-five to take the oath of office.[5] Similarly, the Committee noted that while Austrian immigrant Henry Ellenbogen of Pennsylvania was elected to the House of Representatives in 1932 and his term began on March 4, 1933, Rep. Ellenbogen had waited until January 3, 1934 to take his oath of office and be seated in order to comply with the citizenship requirement.[6]

The Committee on Privileges and Elections also noted that Senators Henry Clay of Kentucky, Armistead Mason of Virginia, and John Eaton of Tennessee had been elected and "assumed the duties of the senatorial office before they were 30 years of age," but concluded that their examples were not precedential as no one had challenged their seats in the Senate.[7] In contrast, Albert Gallatin of Pennsylvania and General James A. Shields of Illinois were elected to the Senate, but were denied their seats because they did not meet the citizenship requirement.[8] The Committee on Privileges and Elections distinguished Gallatin and Shields from Holt on the grounds that they had taken their seats despite not having met the citizenship requirement whereas Holt "'was 30 years of age at the time when he presented himself to the Senate to take the oath and to assume the duties of the office.'"[9]

Ultimately, the Senate voted 62-17 in favor of Senator-elect Holt taking the oath of office.[10] Consequently, the Senate has allowed Senators to be seated once they meet age and citizenship qualification requirements rather than requiring them to have met those requirements at the time of the election or at the beginning of the session of Congress for which they were elected.

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[2] 79 Cong. Rec. 9650 (June 19, 1935). Senator Hatfield, who was a Republican, had lost the November 7, 1934, general election to Senator-elect Holt, who was a Democrat.

[3] S. Rep. No. 904, 74th Cong., 1st Sess. (1935), *as reprinted in* 79 Cong. Rec. 9651–57 (June 19, 1935).

[4] *Id.* The Committee on Privileges and Elections considered three possible times at which a Senator-elect must have filled the requirement: (1) at the time of election, (2) at the time the congressional term commenced, or (3) at the time the Senator-elect took his oath of office. *Id.* at 9652.

[5] *Id.* at 9652 (citing Cong. Globe, 36th Cong., 1st Sess. 25, 31 and quoting from Jefferson's House Manual that "'A Member-elect not being of the required age, he was not enrolled by the Clerk and did not take the oath until he had reached the required age'").

[6] S. Rep. No. 904, 74th Cong., 1st Sess. (1935), *as reprinted in* 79 Cong. Rec. 9652 (June 19, 1935).

[7] *Id.* ("No objection was made to the seating of Henry Clay, and it appears that he himself was probably unaware of the age qualification. His case is not relied upon as precedent. Likewise, the case of Mason and Eaton are not cited as precedents because, no question having been raised, each of these cases is at most a mere physical precedent.").

[8] *Id.* at 9653. In the case of Shields, he subsequently won the special election to fill the Senate vacancy occasioned by his disqualification this time meeting the citizenship requirement.

[9] *Id.* at 9652 (quoting S. Res. 155, 79th Cong. (1935)). The minority on the Committee on Privileges and Elections argued that the standard should be commencement of the term for which the Senator was elected. *Id.* at 9653. Senator Hiram W. Johnson noted that prior Senate practice indicated that commencement of the term of office should be the date by which a Senator-elect must meet the qualification requirements. *Id.* at 9652.

[10] 79 Cong. Rec. 9842 (June 21, 1935).

ArtI.S3.C3.3 Congress's Ability to Change Qualifications Requirements for Senate

Article I, Section 3, Clause 3:

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

The Supreme Court has held that Congress cannot legislate changes to Article I, Section 3, Clause 3 qualification requirements, which require a Senator to be at least thirty years of age, a United States citizen for nine years, and an inhabitant of the state from which he or she is elected.[1]

During the Constitutional Convention, the Framers had debated whether Congress should have discretion to adopt additional qualification requirements for congressional membership but ultimately decided that such discretion would be too vulnerable to manipulation and might cause otherwise qualified persons to be excluded from Congress.[2] In particular, the Framers considered including a property requirement but the committee charged with recommending an appropriate amount could not agree and instead proposed that Congress decide.[3] Rejecting granting Congress power to determine qualifications for membership, James Madison reasoned:

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[1] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 827 (1995) ("[T]he available historical and textual evidence, read in light of the basic principles of democracy underlying the Constitution and recognized by this Court in *Powell*, reveal the Framers' intent that neither Congress nor the States should possess the power to supplement the exclusive qualifications set forth in the text of the Constitution."). *See* Powell v. McCormack, 395 U.S. 486 (1969) (holding that Article I, Section 2, Clause 2 prevented the House of Representatives from adding qualification requirements for Article 1, Section 5 judgments). In *Thornton*, the Court "reaffirm[ed]" that "*Powell*'s historical analysis and its articulation of the 'basic principles of our democratic system'" established that "the qualifications for service in Congress set forth in the text of the Constitution are 'fixed' at least in the sense that they may not be supplemented by Congress." *Thornton*, 514 U.S. at 798. See also Nixon v. United States, 506 U.S. 224, 237 (1993) ("[I]n light of the three requirements specified in the Constitution, the word 'qualifications'—of which the House was to be the Judge—was of a precise limited nature.").

Unresolved is whether the reference to "Qualifications" in Article I, Section 5 includes other constitutional stipulations. In *U.S. Term Limits, Inc. v. Thornton*, the Court identified provisions that might be disqualifying: U.S. Const. art. I, § 3, cl. 7 (impeachment judgment against); *id.* art. I, § 6, cl. 2 (U.S. Government office holder); *id.* amdt. 14, (broke oath to support the Constitution through insurrection, rebellion, or assisting enemies); *id.* art. IV (Guarantee Clause); *id.* art. VI, cl. 3 (failed to swear to support the Constitution). *Thornton*, 514 U.S. at 787, n.2 (1995). The Court noted: In *Powell*, we saw no need to resolve the question whether those additional provisions constitute 'qualifications' because 'both sides agree that Powell was not ineligible under any of these provisions.' We similarly have no need to resolve that question today: Because these additional provisions are part of the text of the Constitution, they have little bearing on whether "Congress and the states may add qualifications to those that appear in the Constitution." *Id.* (citations omitted).

[2] 2 The Records of the Federal Convention of 1787, at 248–51 (Max Farrand ed.,1911).

[3] *Id.* at 248–49. Discussing the committee report, John Rutledge of Georgia, a future Supreme Court Justice, observed that "the Committee had reported no qualifications because they could not agree on any among themselves, being embarrassed by the danger on [one] side of displeasing the people by making them [high], and on the other of rendering them nugatory by making them low." *Id.* at 249.

Oliver Ellsworth of Connecticut, another future Supreme Court Justice noted that: "The different circumstances of different parts of the U.S. and the probable difference between the present and future circumstances of the whole, render it improper to have either *uniform* or *fixed* qualifications. Make them so high as to be useful in the S. Sates, and they will be inapplicable to the E. States. Suit them to the latter, and they will serve no purpose in the former. In like manner what may be accommodated to the existing State of things among us, may be very inconvenient in some future state of them." *Id.*

Benjamin Franklin objected to a property requirement based on "his dislike of every thing that tended to debase the spirit of the common people." *Id.* He stated: "If honesty was often the companion of wealth, and if poverty was exposed to peculiar temptation, it was not less true that the possession of property increased the desire of more property—Some of the greatest rogues he was ever acquainted with, were the richest rogues. We should remember the character which the Scripture requires in Rulers, that they should be men hating covetousness—This Constitution

> The qualifications of electors and elected were fundamental articles in a Republican Govt. and ought to be fixed by the Constitution. If the Legislature could regulate those of either, it can by degrees subvert the Constitution. . . . Qualifications founded on artificial distinctions may be devised, by the stronger in order to keep out partizans [sic] of [a weaker] faction.[4]

Similarly, in the *Federalist No. 60*, Alexander Hamilton emphasized that stipulating qualification requirements in the Constitution would preclude wealthy citizens from using their influence to add property ownership criteria to be a Member of Congress at a later date.[5]

Until the Civil War, Congress appears to have generally conformed to the position adopted by Hamilton that the Constitution fixed the qualification requirements for membership in the Senate. But in July 1862, Congress passed a law requiring all persons appointed or elected to the United States Government to take an oath—known as the "Ironclad Test Oath"—that they had never been, nor ever would be, disloyal to the United States Government.[6] Subsequently, the Senate denied seats to certain Senators-elect following the Civil War. For instance, in 1868, the Senate voted to deny a seat to Philip F. Thomas of Maryland for "having voluntarily given aid, countenance, and encouragement to persons engaged in armed hostility to the United States . . . ."[7]

In 1969, the Supreme Court held in *Powell v. McCormack* that the House of Representatives could not impose additional qualification requirements.[8] In 1995, the Supreme Court revisited *Powell* more broadly in *U.S. Term Limits, Inc. v. Thornton* where it considered whether States could impose additional qualifications for membership in the House of Representatives and Senate.[9] In holding that the States could not, the Court reaffirmed its *Powell* holding as broadly applicable to Congress. The Court stated: "[W]e reaffirm that the qualifications for service in Congress are 'fixed,' at least in the sense that they may not be supplemented by Congress."[10] Consequently, Congress cannot legislate changes to the Senate's qualification requirements.

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will be much read and attended to in Europe, and if it should betray a great partiality to the rich—will not only hurt us in esteem of the most liberal and enlightened men there, but discourage the common people from removing to this Country." *Id.*

[4] *Id.* at 250–51.

[5] The Federalist No. 60 (Alexander Hamilton) ("[There is no method of securing to the rich the preference apprehended, but by prescribing qualifications of property either for those who may elect or be elected. But this forms no part of the power to be conferred on the national government. . . . The qualifications of the persons who may choose or be chosen . . . are defined and fixed in the Constitution, and are unalterable by the legislature."). *See also* The Federalist No. 52 (James Madison) (discussing the House Qualifications Clause and stating "[u]nder these reasonable limitations, the door of this part of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession or religious faith.").

[6] Act of July 2, 1862, 12 Stat. 502.

[7] 1 Hind's Precedents of the House of Representatives § 458 (1907). *See also id.* at § 477 (referring to "John M. Niles, Philip F. Thomas, and Benjamin Stark in the Senate, and the Kentucky cases and those of Whittemore and George Q. Cannon in the House" and noting "that the Senate and the House have taken the ground that they had the right to exclude for insanity, for disloyalty, and for crime, including polygamy, and as we believe, there is no case in either the House or the Senate, where the facts were not disputed, in which either the Senate or House has denied that it had the right to exclude a man, even though he had the three constitutional qualifications").

[8] Powell v. McCormack, 395 U.S. 486 (1969).

[9] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

[10] *Id.* at 798.

ArtI.S3.C3.4 States' Ability to Change Qualifications Requirements for Senate

Article I, Section 3, Clause 3:

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

In 1969, the Supreme Court established in *Powell v. McCormack*,[1] that the House of Representatives could not consider qualifications other than those set forth in Article I, Section 2, Clause 2 of the Constitution when judging whether Members-elect qualified for a seat in the House.[2] In 1995, the Supreme Court extended its *Powell* ruling in *U.S. Term Limits, Inc. v. Thornton* to hold that States cannot impose qualification requirements on membership in Congress.[3]

The Supreme Court's *Thornton* ruling was consistent with the established congressional practice of not weighing state-added qualification requirements when considering whether Senators-elect qualified for Senate seats. In determining the eligibility of Senators-elect, the Senate appears to have conformed to Hamilton's position in the *Federalist No. 60* that the Constitution fixed the qualification requirements for Senators. Accordingly, the Senate allowed Senators-elect who had violated state qualification requirements to be seated. For instance, in 1856, the Senate seated Lyman Trumbull of Illinois although he had violated the Illinois constitution which barred state judges, such as Trumbull, from standing for election while a judge or the following year.[4]

In *Thornton*, Arkansas, along with twenty-two other states limited the number of terms Members of Congress could serve.[5] Reexamining *Powell* and "its articulation of the 'basic principles of our democratic system,'" the *Thornton* Court reaffirmed that "the qualifications for service in Congress set forth in the Constitution are 'fixed'" in that Congress may not supplement them.[6] *Powell*, the Court found, however, did not conclusively resolve whether States had retained power to add qualification requirements for membership in Congress. Recognizing that the Framers clearly intended for the Constitution to be the exclusive source of congressional qualifications,[7] the Court reasoned that even *if* states had possessed some original power in this area, they had ceded that power to the Federal Government.[8] The Court, however, held that the power to add qualifications "is not within the 'original powers' of the states, and thus not reserved to the states by the Tenth Amendment."[9]

In reaching its decision, the *Thornton* Court explored the Constitution's text, drafting, and ratification, as well as early congressional and state practices.[10] Observing that state powers were either (1) reserved by states from the Federal Government under the Constitution or (2) delegated to states by the Federal Government, the majority reasoned that states could have no reserved powers that were derived from the federal government. Quoting Justice Joseph

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[1] Powell v. McCormack, 395 U.S. 486 (1969).

[2] U.S. Const. art. I, § 5, cl. 1 ("Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . . .").

[3] U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995).

[4] Hind's Precedents of the House of Representatives § 416 (1907).

[5] All but two of the state initiatives to impose term limits were citizen initiatives. *Thornton*, 514 U.S. 779.

[6] *Id.* at 798.

[7] *Id.*

[8] *Id.* at 801.

[9] *Id.* at 800.

[10] *See* Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78 (1995).

Story, the Court noted: "'[S]tates can exercise no powers whatsoever, which exclusively spring out of the existence of the national government, which the constitution does not delegate to them. . . . No state can say, that it has reserved, what it never possessed.'"[11] Because States could not have passed laws governing the National Government before the Nation's Founding and the Constitution did not delegate power to states to set qualifications for Members of Congress, the states could not have such power.[12]

Thornton clarified that changing qualification requirements for Congress must be accomplished by constitutional amendment.[13] In 2001, the Court relied on *Thornton* to invalidate a Missouri law requiring labels to be placed on ballots alongside the names of congressional candidates who had "disregarded voters' instruction on term limits" or declined to pledge support for term limits.[14]

Clause 4—President

ArtI.S3.C4.1 President of the Senate

Article I, Section 3, Clause 4:

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

During the Constitutional Convention, the Framers initially contemplated that the Senate would choose its president; however, after the Framers decided to have a Vice President, they decided by a vote of eight to two that the Vice President would be President of the Senate.[1] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story notes that the Framers may have made this decision to give the Vice President a role in the government. Justice Story stated:

> It has also been coldly remarked by a learned commentator, that "the necessity of providing for the case of a vacancy in the office of president doubtless gave rise to the creation of that officer; and for want of something else for him to do, whilst there is a president in office, he seems to have been placed, with no very great propriety, in the chair of the senate."[2]

Justice Story further reasoned, however, that by making the Vice President, President of the Senate, the Framers saved the Senate from the difficulties of selecting a President of the

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[11] *Thornton*, 514 U.S. at 802 (quoting Joseph Story, The Commentaries on the Constitution of the United States (1833)).

[12] *Id.* at 798–805. *See also id.* at 838–45 (Kennedy, J., concurring). The Court applied similar reasoning in Cook v. Gralike, 531 U.S. 510, 522–23 (2001), invalidating ballot labels identifying congressional candidates who had not pledged to support term limits. Because congressional offices arise from the Constitution, the Court explained, states would have had no authority to regulate these offices prior to the Constitution that they could have reserved, and the ballot labels were not a valid exercise of the power granted by Article I, § 4 to regulate the "manner" of holding elections.

[13] *Id.* at 837.

[14] Cook v. Gralike, 531 U.S. 510 (2001).

[1] Joseph Story, Commentaries on the Constitution of the United States § 732 (1833). During the Constitutional Convention, several delegates expressed concern that having the Vice President serve as President of the Senate would excessively involve the Executive Branch in the Legislative Branch's activities. *See also* 2 Records of the Federal Convention of 1787 536 (Max Farrand ed., 1911) (Elbridge Gerry of Massachusetts commenting that "We might as well put the President himself at the head of the Legislature. The close intimacy that must subsist between the President & vice-president makes it absolute improper;" George Mason of Virginia described as thinking that "the office of vice-President an encroachment on the rights of the Senate; and that it mixed too much the Legislative & Executive, which as well as the Judiciary departments, ought to be kept as separate as possible.").

[2] Joseph Story, Commentaries on the Constitution of the United States § 733 (1833).

Senate from among themselves, which would have given the state from which the president was selected either more or less influence than the other states. If the President of the Senate retained his right to vote as a Senator, the state he represented would have three votes in the event a vote was tied. If the President of the Senate was only allowed to cast a vote when there was a tie, then his state would have one less vote than other states absent a tie.[3] Justice Story, moreover, notes that the states would likely have a high regard for the Vice President of the United States as they would have selected him for the office of Vice President.[4]

In addition to casting the tie-breaking vote when the Senate is divided equally, the President of the Senate also, among other things, conducts the electoral count[5] and attests that an enrolled bill has been passed by the Senate.[6] By affixing his or her signatures to an enrolled bill the President of the Senate along with the Speaker of the House indicates that the bill has passed Congress and is ready for presentment to the President. Describing this process in *Marshall Field & Co. v. Clark*, Justice John Marshall Harlan stated:

> The signing by the speaker of the house of representatives, and by the president of the senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed congress. It is a declaration by the two houses through their presiding officers, to the president, that a bill, thus attested, has received, in due form, the sanction of the Legislative Branch of the government, and that it is delivered to him in obedience to the constitutional requirement that all bills which pass congress shall be presented to him. And when a bill, thus attested, receives his approval, and is deposited in the public archives, its authentication as a bill that has passed congress should be deemed complete and unimpeachable.[7]

The signing by the President of the Senate and Speaker of the House of an enrolled bill is not mandated by the Constitution, but instead is a legislative practice.[8] The Court in *Marshall Field*, however, found that a bill with the official attestations of the President of the Senate, Speaker of the House, and President was "sufficient evidence of itself . . . that it passed Congress."[9] More important, even if a discrepancy arose between an officially attested bill and

[3] *Id.* at § 736.

[4] *Id.* at § 735 ("A citizen who was deemed worthy of being one of the competitors for the presidency, could scarcely fail of being distinguished by private virtues, by comprehensive acquirements, and by eminent services. In all questions before the senate he might safely be appealed to, as a fit arbiter upon an equal division, in which case alone he is entrusted with a vote.").

[5] U.S. CONST. amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;-The person having the greatest number of votes for President, shall be the President . . . .").

[6] *See, e.g.,* Marshall Field & Co. v. Clark, 143 U.S. 649 (1892). In the event the Vice President is unable to fulfill his duties as President of the Senate, Article I, Section 3, Clause 5, provides for the Senate to choose a "President pro tempore, in the Absence of the Vice President or when he shall exercise the Office of the President of the United States." U.S. CONST. art. I, § 3, cl.4.

[7] *Id.* at 672. The Court continued: "As the president has no authority to approve a bill not passed by congress, an enrolled act in the custody of the secretary of state, and having the official attestations of the speaker of the house of representatives, of the president of the senate, and of the president of the United States, carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by congress." *Id.*

The Court noted, however, that "[t]here is no authority in the presiding officers of the house of representatives and the senate to attest by their signatures, not in the president to approve, nor in the secretary of state to receive and cause to be published, as a legislative act, any bill not passed by Congress." *Id. See also* Harwood v. Wentworth, 162 U.S. 547 (1896).

[8] *Marshall Field & Co.*, 143 U.S. at 671.

[9] *Id.* at 672.

House or Senate journals of proceedings mandated by Article I, Section 5,[10] the Court could not resolve such a dispute as "[j]udicial action, based upon such a suggestion [that "the presiding officers, committees on enrolled bills, and the clerks of the two houses" conspired to thwart a law intended by Congress], is forbidden by the respect due to a co-ordinate branch of the government."[11]

Clause 5—Officers

ArtI.S3.C5.1 Senate Officers

Article I, Section 3, Clause 5:

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

Article I, Section 3, Clause 5, provides for the Senate to choose officers[1] and a President pro tempore, who would serve as the President of the Senate when the Vice President of the United States is unable to fill that role.[2] Unlike the President of the Senate, who may only vote in the Senate when there is a tie, the President pro tempore may "vote upon all questions before the Senate."[3] The importance of the President pro tempore in the constitutional framework was underscored in 1792 when Congress provided for the President pro tempore to serve as President of the United States if neither the President nor the Vice President were able to do so.[4] Pursuant to the Succession Act of 1947, the President pro tempore is now third in the chain of succession to the presidency of the United States after the Vice President and Speaker of the House.[5]

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[10] U.S. Const. art. I, § 5, cl. 3 ("Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment requie Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal.").

[11] *Id.* at 673. *See also* Baker v. Carr, 369 U.S. 186 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.").

[1] Senate officers include the Secretary of the Senate, Sergeant at Arms and Doorkeeper, chaplain, and majority and minority party secretaries. Ida Brudnick, Cong. Rsch. Serv., R43532, Offices and Officials in the Senate: Roles and Duties (2015), https://crsreports.congress.gov/product/pdf/R/R43532. *See also* Valerie Heitshusen, Cong. Rsch. Serv., RS20722, The First Day of a New Congress: A Guide to Proceedings on the Senate Floor (2020), https://crsreports.congress.gov/product/pdf/RS/RS20722.

[2] For additional discussion on the role of the President pro tempore, see Christopher Davis, Cong. Rsch. Serv., RL30960, The President Pro Tempore of the Senate: History and Authority of the Office (2015), https://crsreports.congress.gov/product/pdf/RL/RL30960.

[3] Roger Foster, Commentaries on the Constitution of the United States, Historical and Juridical, with Observations upon the Ordinary Provisions of State Constitutions and a Comparison with the Constitutions of Other Countries § 84 (1895). *See also* U.S. Const. art. I, § 3, cl. 4.

[4] Act of Mar. 1, 1792, ch. VIII, § 9, 1 Stat. 240 (providing that "in case of removal, death, or inability of both the President and the Vice President of the United States, the President of the Senate pro tempore, and in the case there shall be no President of the Senate, then the Speaker of the House of Representatives shall act as President of the United States until the disability be removed or a President shall be elected.").

[5] Christopher Davis, Cong. Rsch. Serv., RL30960, The President Pro Tempore of the Senate: History and Authority of the Office (2015), https://crsreports.congress.gov/product/pdf/RL/RL30960. The Succession Act of 1886 replaced the President pro tempore and Speaker of the House of Representatives with members of the President's cabinet in the order in which their respective departments had been established. Act of Jan. 19, 1886, ch. 4, § 1, 24 Stat. 1.

ArtI.S3.C5.1
Senate Officers

Pursuant to Article I, Section 3, Clause 5, the Senate has discretion to choose and remove its officers.[6] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story noted that the benefits of allowing the Senate to choose its officers and a President pro tempore were "so obvious, that it is wholly unnecessary to vindicate it."[7] He further stated: "Confidence between the senate and its officers, and the power to make a suitable choice, and to secure a suitable responsibility for the faithful discharge of the duties of office, are so indispensable for the public good, that the provision will command universal assent, as soon as it is mentioned."[8]

Clause 6—Impeachment Trials

ArtI.S3.C6.1 Overview of Impeachment Trials

Article I, Section 3, Clause 6:

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

Just as the Constitution vests the House with "sole"[1] authority to impeach government officials,[2] it entrusts the Senate with the "sole" power to try impeachments.[3] And just as the Constitution authorizes the House to establish its own procedures, including for impeachments, it empowers the Senate to determine its own rules for impeachment trial proceedings.[4] The Senate's impeachment rules have remained largely the same since their adoption during the trial of President Andrew Johnson.[5] However, while most impeachment trials were historically conducted on the Senate floor with the entire Senate participating, the Senate adopted Rule XI in 1935, which permits a committee to take evidence during impeachment trials.[6] This rule was first implemented in the trial of Judge Claiborne in 1986; and the contemporary practice, at least with respect to the more common impeachment of federal judges, is for the Senate to appoint a special trial committee to receive and report

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[6] Roger Foster, Commentaries on the Constitution of the United States, Historical and Juridical, with Observations upon the Ordinary Provisions of State Constitutions and a Comparison with the Constitutions of Other Countries § 85 (1895).

[7] Joseph Story, Commentaries on the Constitution of the United States § 739 (1833).

[8] *Id.*

[1] The Constitution contains a number of provisions that are relevant to the impeachment of federal officials. Article I, Section 2, Clause 5 grants the sole power of impeachment to the House of Representatives; Article I, Section 3, Clause 6 assigns the Senate sole responsibility to try impeachments; Article I, Section 3, Clause 7 provides that the sanctions for an impeached and convicted individual are limited to removal from office and potentially a bar from holding future office, but an impeachment proceeding does not preclude criminal liability; Article II, Section 2, Clause 1 provides that the President enjoys the pardon power, but it does not extend to cases of impeachment; and Article II, Section 4 defines which officials are subject to impeachment and what kinds of misconduct constitute impeachable behavior. Article III does not mention impeachment expressly, but Section 1, which establishes that federal judges shall hold their seats during good behavior, is widely understood to provide the unique nature of judicial tenure. And Article III, Section 2, Clause 3 provides that trials, "except in Cases of Impeachment, shall be by jury."

[2] *See* ArtI.S2.C5.1 Overview of Impeachment.

[3] U.S. Const. art. I, § 3, cl. 6.

[4] *Id.* § 5, cl. 2.

[5] *See* Procedure and Guidelines for Impeachment Trials in the Senate, S. Doc. No. 93-33, 99th Cong., 2d Sess. (1986); Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 33 (2000).

[6] Impeachment: Senate Impeachment Trials, U.S. Senate, https://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm (last visited Jan. 24, 2018) (citing S. Res. 242, 73d Cong. (1934)).

evidence.[7] After issuance of a report, the full Senate then convenes to consider the report and, after a closed deliberative session, publicly votes on the impeachment articles. The immediate effect of conviction upon an article of impeachment is removal from office,[8] although the Senate may subsequently vote on whether the official shall be disqualified from again holding an office of public trust under the United States.[9] If future disqualification from office is pursued, a simple majority vote by the Senate is required.[10]

Because impeachment is a political process largely unchecked by the judiciary, the role of the Senate in impeachment proceedings is primarily determined by historical practice rather than judicial interpretation.[11] Examination of the Senate's practices is thus central to understanding the Constitution's provision granting that body power to conduct impeachment trials.

ArtI.S3.C6.2 Historical Background on Impeachment Trials

Article I, Section 3, Clause 6:

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

The federal impeachment process stems originally from English practice,[1] where the House of Commons could impeach individuals and the House of Lords would convict or acquit.[2] Most of the American colonies and early state constitutions adopted their own impeachment procedures before the establishment of the federal constitution, with the power to try impeachments located in various bodies.[3] At the Constitutional Convention, the proper body to try impeachment posed a difficult question.[4] A number of proposals were considered that would have assigned responsibility for trying impeachments to different bodies, including the Supreme Court, a panel of state court judges, or a combination of these bodies.[5] One objection to granting the Supreme Court authority to try impeachments was that Justices were to be appointed by the President, calling into question their ability to be independent in an

[7] *See* ArtI.S3.C6.3 Impeachment Trial Practices. This practice has not been extended to presidential impeachments. *See* ArtII.S4.4.8 President Bill Clinton and Impeachable Offenses and ArtII.S4.4.9 President Donald Trump and Impeachable Offenses.

[8] U.S. Const. art. II, § 4.

[9] *See* 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 2397 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf; 6 Clarence Cannon, Cannon's Precedents of the House of Representatives of the United States § 512 (1936), https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6.pdf [hereinafter Cannon].

[10] *See* 6 Cannon, *supra* note 9, § 512. *See, e.g.*, 49 Cong. Rec. 1447–48 (1913) (vote to disqualify Judge Robert W. Archbald, thirty-nine yeas, thirty-five nays).

[11] *See* Nixon v. United States, 506 U.S. 224, 226 (1993); *see* ArtII.S4.4.1 Overview of Impeachable Offenses.

[1] For more on the historical background of the Constitution's impeachment provisions, see ArtIII.S1.10.2.2 Historical Background on Good Behavior Clause; ArtI.S2.C5.2 Historical Background on Impeachment; ArtI.S3.C6.2 Historical Background on Impeachment Trials.

[2] *See* ArtII.S4.4.2 Historical Background on Impeachable Offenses. Charles Black, Impeachment 5–14 (1974).

[3] *See* Gordon S. Wood, The Creation of the American Republic 141 (1969); *see, e.g.*, N.Y. Const. of 1777 arts. XXXII–XXXIII (providing that impeachments be tried before a court composed of state senators, judges of the New York Supreme Court, and the state chancellor).

[4] *See Nixon*, 506 U.S. at 233.

[5] *See id.* at 243–44 (White, J., joined by Blackmun, J., concurring); Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805 at 96–100 (1984); Black, *supra* note 2, at 10.

impeachment trial of the President or another executive official.[6] Further, a crucial legislative check in the Constitution's structure against the Judicial Branch is impeachment, as Article III judges cannot be removed by other means.[7] To permit the judiciary to have the ultimate say in one of the most significant checks on its power would subvert the purpose of that important constitutional limitation.[8] Rather than allowing a coordinate branch to play a role in the impeachment process, the Framers decided that Congress alone would determine who is subject to impeachment. This framework guards against, in the words of Alexander Hamilton, "a series of deliberate usurpations on the authority of the legislature" by the judiciary as Congress enjoys the power to remove federal judges.[9] Likewise, the Framers' choice to place both the accusatory and adjudicatory aspects of impeachment in the legislature renders impeachment "a bridle in the hands of the legislative body upon the executive" branch.[10]

The Framers' choice also imposed institutional constraints on the process.[11] Dividing the power to impeach from the authority to try and convict guards against "the danger of persecution from the prevalency of a fractious spirit in either" body.[12] Likewise, the requirement of a two-thirds majority in the Senate to convict and remove an official ensures (at least in the absence of one political faction gaining a supermajority) that impeachment and removal is not a strictly partisan affair and is limited to situations where consensus is possible.[13]

Finally, the Framers made one exception to the legislature's exclusive role in the impeachment process that promotes integrity in the proceedings. While the Presiding Officer of the Senate (typically the Vice President of the United States) usually presides at impeachment trials, the Chief Justice of the Supreme Court presides in the event that the President of the United States is tried.[14] This provision ensures that a Vice President shall not preside over proceedings that could result in his own elevation to the presidency, a particularly important concern at the time of the founding, when Presidents and Vice Presidents were not elected on the same ticket and could belong to rival parties.[15]

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[6] 2 Records of the Federal Convention of 1787, at 511 (Max Farrand ed., 1911).

[7] While Congress enjoys the power of the purse, U.S. Const. art. I, § 9, cl. 7, this authority is less pronounced relative to the Judiciary than the Executive Branch as the Constitution provides that the salary of federal judges cannot be reduced "during their continuance in office." *Id.* art. III, § 1.

[8] *See Nixon*, 506 U.S. at 235; The Federalist No. 81 (Alexander Hamilton).

[9] *See* The Federalist No. 81 (Alexander Hamilton).

[10] *See Id.* No. 65; *id.* No. 66 (noting that impeachment is an "essential check in the hands of [Congress] upon the encroachments of the executive"); *see Nixon*, 506 U.S. at 242–43 (White, J., joined by Blackmun, J., concurring) ("[T]here can be little doubt that the Framers came to the view at the Convention that . . . the impeachment power must reside in the Legislative Branch to provide a check on the largely unaccountable Judiciary.").

[11] Black, *supra* note 2, at 5–14.

[12] The Federalist No. 66 (Alexander Hamilton).

[13] *See id.*

[14] U.S. Const. art. I, § 3, cls. 6, 7. While it is clear that the Chief Justice must preside over the impeachment trial of a sitting President, the Chief Justice did not preside over the second impeachment trial of *former* President Trump. 167 Cong. Rec. S142 (daily ed. Jan. 26, 2021) (swearing in Patrick Leahy (D-VT), President pro tempore of the United States Senate, as presiding officer).

[15] *Compare id.* § 1, cl. 3, *with id.* amend. XII. *See* Wood, *supra* note 3, at 212.

ArtI.S3.C6.3 Impeachment Trial Practices

Article I, Section 3, Clause 6:

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

The Senate enjoys broad discretion in establishing procedures to be undertaken in an impeachment trial. For instance, in a lawsuit challenging the Senate's use of a trial committee to take and report evidence, the Supreme Court in *Nixon v. United States* unanimously ruled that the suit posed a nonjusticiable political question and was not subject to judicial resolution.[1] The Court explained that the term "try" in the Constitution's provisions regarding impeachment was textually committed to the Senate for interpretation and lacked sufficient precision to enable a judicially manageable standard of review.[2] In reaching this conclusion, the Court noted that the Constitution imposes three precise requirements for impeachment trials in the Senate: (1) Members must be under oath during the proceedings; (2) conviction requires a two-thirds vote; and (3) the Chief Justice must preside if the President is tried.[3] Given these three clear requirements, the Court reasoned that the Framers "did not intend to impose additional limitations on the form of the Senate proceedings by the use of the word 'try.'"[4] Accordingly, subject to these three clear requirements of the Constitution, the Senate enjoys substantial discretion in establishing its own procedures during impeachment trials.

The Senate's discretion to establish procedures for an impeachment trial extends to how the body will receive evidence. In addition to relying on the evidentiary record prepared by the House, Senate impeachment trials have generally involved the presentation of additional evidence by witnesses appearing before either the Senate or a trial committee. The different approaches adopted in past presidential impeachment trials, however, display the scope of the Senate's discretion in this regard. In the trial of Andrew Johnson, the Senate took live testimony from more than forty witnesses.[5] In the trial of Bill Clinton the Senate chose to hear from three witnesses through videotaped depositions rather than through live questioning.[6] In contrast, the Senate chose not to obtain witness testimony in either of the two trials of Donald Trump.[7] While the Senate determines for itself how to conduct impeachment proceedings, the nature and frequency of Senate impeachments trial are largely dependent on the impeachment charges brought by the House. The House has impeached thirteen federal district judges, a judge on the Commerce Court, a Senator, a Supreme Court Justice, the

[1] 506 U.S. 224, 238 (1993).

[2] *Id.* at 229–30.

[3] *Id.* at 230.

[4] *Id.*

[5] *See* Impeachment Trial of President Andrew Johnson, 1868, U.S. Senate, https://www.senate.gov/about/powers-procedures/impeachment/impeachment-johnson.htm (last visited Dec. 14, 2021).

[6] *See* Proceedings of the United States Senate in the Impeachment Trial of President William Jefferson Clinton, Vol. III: Depositions and Affidavits, 106th Cong., 1st Sess., S. Doc. No. 106-4 (1999). The Senate also received three affidavits. *Id.* at 2534–36.

[7] *See* Proceedings of the United States Senate in the Impeachment Trial of President Donald John Trump, Vol. II: Floor and Trial Proceedings, 116th Cong., S. Doc. No. 116-18, at 1498–99 (2020). In the second impeachment trial, the House Managers sought to obtain a Senate subpoena for testimony from Congresswoman Jaime Herrera Beutler (D-WA). The Senate approved a motion making it in order to debate such a subpoena, but the Senate instead agreed to a stipulation allowing introduction of Rep. Herrera Beutler's existing public statement. 167 Cong. Rec. S717–19 (daily ed. Feb. 13, 2021).

secretary of an executive department, and three Presidents.[8] But the Senate ultimately has only convicted and removed from office seven federal district judges and a Commerce Court judge.[9] While this pattern obviously does not mean that Presidents or other civil officers are immune from removal based on impeachment,[10] the Senate's acquittals may be deemed to have precedential value when assessing whether particular conduct constitutes a removable offense. For instance, the first subject of an impeachment by the House involved a sitting U.S. Senator for allegedly conspiring to aid Great Britain's attempt to seize Spanish-controlled territory.[11] The Senate voted to dismiss the charges,[12] and no Member of Congress has been impeached since. The House also impeached Supreme Court Justice Samuel Chase, who was widely viewed by Jeffersonian Republicans as openly partisan for, among other things, misapplying the law.[13] The Senate acquitted Justice Chase, establishing a general principle that impeachment is not an appropriate remedy for disagreement with a judge's judicial philosophy or decisions.[14]

ArtI.S3.C6.4 Oath or Affirmation Requirement in Impeachment Trials

Article I, Section 3, Clause 6:

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

The Constitution requires Senators sitting as an impeachment tribunal to take a special oath distinct from the oath of office that all Members of Congress must take.[1] This requirement underscores the unique nature of the role the Senate plays in impeachment trials, at least in comparison to its normal deliberative functions.[2] The Senate practice has been to require each Senator to swear or affirm that he will "do impartial justice according to the Constitution and laws."[3] The oath was originally adopted by the Senate before proceedings in the impeachment of Senator Blount in 1798 and has remained largely unchanged since.[4]

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[8] *See* List of Individuals Impeached by the House of Representatives, U.S. House of Representatives, http://history.house.gov/Institution/Impeachment/Impeachment-List/ (last visited Jan. 24, 2018).

[9] *See* Impeachment, Complete List of Senate Impeachment Trials, U.S. Senate, https://www.senate.gov/artandhistory/history/common/briefing/Senate_Impeachment_Role.htm#4 (last visited Jan. 24, 2018).

[10] U.S. Const. art. II, § 4.

[11] *See* ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860); David Currie, The Constitution in Congress: The Federalist Period 1789–1801, at 275–81 (1997).

[12] 8 Annals of Cong. 2318 (1799).

[13] *See* ArtII.S4.4.3 Jurisprudence on Impeachable Offenses (1789–1860).

[14] *See* Keith E. Whittington, *Reconstructing the Federal Judiciary: The Chase Impeachment and the Constitution*, 9 Stud. Am. Pol. Dev. 55 (1986); William H. Rehnquist, Grand Inquests: The Historic Impeachments 134 (1992).

[1] U.S. Const. art. I, § 3, cl. 6.

[2] *See* Charles Black, Impeachment 9–10 (1974).

[3] *See* Procedure and Guidelines for Impeachment Trials in the Senate, S. Doc. No. 93-33, 99th Cong., 2d Sess., at 61 (1986).

[4] *See* Senate Adopts First Impeachment Rules, U.S. Senate, https://www.senate.gov/artandhistory/history/minute/Senate_Adopts_First_Impeachment_Rules.htm (last visited Jan. 24, 2018).

ArtI.S3.C6.5 Impeaching the President

Article I, Section 3, Clause 6:

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

The Senate has held impeachment trials for three Presidents. The first was the trial of President Andrew Johnson,[1] who was impeached in the shadow of the Civil War and significant disputes with Congress over the policy of Reconstruction.[2] In the first major impeachment trial of a President, the Senate formed a committee to adopt procedures for use at trial. The procedures adopted during the Johnson impeachment are largely unchanged today.[3] Chief Justice Salmon Chase administered the oath to the Senate sitting as an impeachment trial and presided over the proceedings.

The primary issue at the trial was whether President Johnson's violation of the Tenure of Office Act was an impeachable offense. The statute barred the removal of federal officeholders absent Senate approval; Johnson violated it by removing Secretary of War Edwin Stanton without the Senate's consent.[4] The Johnson Administration thought the law unconstitutional,[5] and there was disagreement about the applicability of the Act to Stanton because he had been appointed by President Lincoln, rather than Johnson.[6] Counsel for Johnson at the Senate trial argued that impeachment was inappropriate for violating a statute whose meaning was unclear and that the law itself was unconstitutional.[7] The Senate voted to acquit President Johnson by one vote.[8] The failure to convict Johnson seems to have established a precedent that impeachment is not appropriate for political or policy disagreements with the President; instead, impeachment is reserved for serious abuses of the office.[9]

The impeachment trial of President Bill Clinton was the second Senate trial of a president.[10] The impeachment of President Clinton stemmed from the investigation by an independent counsel into a wide range of alleged scandals in the Clinton Administration. Independent Counsel Kenneth Starr's investigation eventually expanded into whether President Clinton committed perjury in his response to a civil suit regarding the existence of a

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[1] For a more thorough examination of the Johnson impeachment, see ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses.

[2] *See* Michael J. Gerhardt, Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson; William H. Rehnquist, 16 Const. Comment. 433, 435 (1999); Eric Foner, A Short History of Reconstruction (2015).

[3] *See* Michael J. Gerhardt, The Federal Impeachment Process: A Constitutional and Historical Analysis 33 (2000); Procedure and Guidelines for Impeachment Trials in the Senate, S. Doc. No. 93-33, 99th Cong., 2d Sess., at 61 (1986).

[4] Tenure of Office Act, ch. 154, 14 Stat. 430 (1867) (amended by Act of Apr. 5, 1869, ch. 10, 16 Stat. 6, repealed by Act of Mar. 3, 1887, ch. 353, 24 Stat. 500); *see* ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses.

[5] Such tenure protections were later invalidated as unconstitutional by the Supreme Court. *See* Myers v. United States, 272 U.S. 52 (1926).

[6] William H. Rehnquist, Grand Inquests: The Historic impeachments 228–29 (1992).

[7] *Id.* at 228–30.

[8] *Id.* at 234.

[9] Peter Hoffer & N.E.H. Hull, Impeachment in America, 1635–1805, at 101 (1984); Michael J. Gerhardt, *Putting the Law of Impeachment in Perspective*, 43 St. Louis U. L.J. 905, 921–22 (1999).

[10] For a more thorough examination of the Clinton impeachment, see ArtII.S4.4.4 President Andrew Johnson and Impeachable Offenses.

sexual relationship he had with a White House staffer and obstructed justice by encouraging others to lie about his relationship with the staffer.[11]

Starr referred a report to the House of Representatives on September 9, 1998, noting that under the Independent Counsel Act in effect at the time, his office was required to notify Congress about potentially impeachable behavior discovered during the course of the independent counsel investigation.[12] The House eventually impeached President Clinton for perjury to a grand jury and obstruction of justice.[13] In a departure from past impeachment trials of judges and Executive Branch officials, the Senate voted to require separate votes to approve each individual witness offered by the House managers.[14] Due to the infrequency of presidential impeachments, the relevance of the Senate's decisions concerning the procedures employed in the Clinton trial for future impeachments is uncertain.

The constitutional significance of the Clinton impeachment experience is still a matter of dispute. To the extent the impeachment of President Clinton stemmed from behavior arguably unconnected to the office, some might view the ultimate acquittal of President Clinton by the Senate as evidence that impeachment only applies to behavior distinctly public in nature.[15] However, the majority report of the House Judiciary Committee argued that just as perjury, for example, was an impeachable offense for a federal judge, so it was also an impeachable offense for a President because it was "just as devastating to our system of government."[16] In addition, the charge of obstruction of justice brought by the House alleged that President Clinton used the powers of his office to impede and conceal the existence of evidence in both a civil lawsuit brought against him and during the investigation of the independent counsel.[17] Complicating matters further, the acquittal might not represent any particular view of the standards for impeachable behavior, but simply either that the House managers did not prove their case, or that other considerations drove the votes of certain Senators.[18]

The third President to face a Senate impeachment trial was Donald Trump—the only President to be impeached, tried, and acquitted twice. The first impeachment trial stemmed primarily from a telephone conversation President Trump had with President Volodymyr Zelenskyy of Ukraine in which President Trump asked the Ukrainian President to announce two investigations: one involving President Trump's potential opponent in the upcoming 2020 presidential election and a second into unsubstantiated allegations that entities within Ukraine had interfered in the 2016 presidential election.[19] At the time of the phone call, the Office of Management and Budget had frozen $400 million in military aid to Ukraine at the

[11] The Starr Report, Wash. Post (1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/icreport.htm.

[12] The Starr Report, Introduction, Wash. Post (1998), http://www.washingtonpost.com/wp-srv/politics/special/clinton/icreport/5intro.htm; *see* 28 U.S.C. § 595(c) (1994). The independent counsel statute expired in 1999. 28 U.S.C. § 599.

[13] H.R. Rep. No. 105–830, at 28 (1998).

[14] 5 Cong. Rec. S50 (daily ed. Jan. 8, 1999).

[15] *See* Michael J. Gerhardt, *The Perils of Presidential Impeachment*, 67 U. Chi. L. Rev. 293, 300–01 (2000) ("[M]ost senators who voted to acquit President Clinton explained that they did not perceive his misconduct as having a sufficiently public dimension or injury to warrant his removal from office. The former decision, coupled with Clinton's acquittal, likely signals that there is a zone of a president's private life that will be treated as largely off limits in the federal impeachment process.").

[16] H. Comm. on the Judiciary, Impeachment of William Jefferson Clinton, President of the United States, 105th Cong., 2d Sess., H.R. Rep. No. 105-830, at 110–18 (1998).

[17] *Id.* at 63–64.

[18] *See generally* Gerhardt, *supra* note 3, at 175–85.

[19] H.R. Rep. No. 116-346, at 81–83 (2019).

direction of the President.[20] Revelations about the phone call, first brought to light by a whistleblower, prompted the initiation of a number of House investigations that eventually evolved into an impeachment investigation.

The House ultimately approved two articles of impeachment against the President. The first charged the President with abuse of power, alleging that he had used the powers of his office to solicit Ukraine's interference in the 2020 election and had conditioned official acts, including the release of military aid to Ukraine and a White House meeting, on President Zelenskyy agreeing to announce the investigations.[21] "President Trump," the article alleged, "engaged in this scheme or course of conduct for corrupt purposes in pursuit of personal political benefit."[22] The second article charged the President with obstruction of the House impeachment investigation by directing the "unprecedented, categorical, and indiscriminate defiance of subpoenas issued by the House of Representatives."[23]

The second Trump impeachment occurred a year later following the events on January 6, 2021, at the U.S. Capitol in which some supporters of President Trump attempted to disrupt the congressional certification of the 2020 presidential election as having been won by Joseph Biden.[24] One week after that event, the House introduced and approved a single article of impeachment charging the President with "incitement to insurrection."[25] Specifically, the article alleged that in the months running up to January 6 the President had consistently "issued false statements asserting that the Presidential election results were the product of widespread fraud and should not be accepted by the American people."[26] He then repeated those claims when addressing a crowd on January 6, and "willfully made statements that, in context, encouraged—and foreseeably resulted in—lawless action at the Capitol . . . ."[27] Notably, although the House ultimately impeached President Trump prior to the expiration of his term of office, the Senate did not commence a trial until after President Trump had left office and become a private citizen.[28]

In both impeachments, the Senate tried and acquitted President Trump on all charges.[29] Both trials, however, saw at least one member of the President's own party vote to convict, and the second trial saw a majority of Senators vote to convict,[30] though the fifty-seven votes was short of the two-thirds required for conviction under the Constitution.[31] Like most acquittals, the constitutional implications and precedential impact of the Trump trials is difficult to assess.

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[20] *Id.* at 82.

[21] H.R. Res. 755, 116th Cong. (2019).

[22] *Id.*

[23] *Id.*

[24] H.R. Rep. No. 117-2, at 4–21 (2021).

[25] H.R. Res. 24, 117th Cong. (2021).

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] 166 Cong. Rec. S937 (daily ed. Feb. 5, 2020) (acquitting President Trump on Article I by a vote of 48-52); *id.* at S938 (acquitting President Trump on Article II by a vote of 47-53); 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021) (acquitting former President Trump by a vote of 57-43). Although the second Trump impeachment saw a majority of Senators vote to convict the former President, the Constitution requires the "Concurrence of two thirds" of the Senate to convict an impeached official. U.S. Const. art. I, § 3 cl. 6.

[30] In the first trial, one member of the President's party voted to convict, while in the second trial seven members of the President's party voted to convict. *See* 166 Cong. Rec. S937–38 (daily ed. Feb. 5, 2020); 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021).

[31] 167 Cong. Rec. S733 (daily ed. Feb. 13, 2021) (acquitting former President Trump by a vote of 57-43); U.S. Const. art. I, § 3 cl. 6.

The first impeachment trial was characterized by deep partisan divides and complicated disagreements over questions of fact, law, and presidential motive. But one clear constitutional conflict that arose during the trial involved the proper relationship between impeachment and the criminal law. Trial briefs and debate made clear that the House managers and President Trump's attorneys reached different conclusions on the question of whether "high crimes and misdemeanors" require evidence of a criminal act.[32] The House, consistent with past impeachment practice, asserted that for purposes of Article II "high Crimes and Misdemeanors" "need not be indictable criminal offenses."[33] In response, however, the President's attorneys asserted that an "impeachable offense must be a violation of established law," and that the articles "fail[ed] to allege any crime or violation of law whatsoever, let alone 'high Crimes and Misdemeanors,' as required by the Constitution."[34] The acquittal provided no clear resolution to these conflicting positions, but the debate over a link between illegal acts and impeachable acts appears to have had some impact on individual Senators. Indeed, the House's managers' failure to allege a criminal act appears, along with what has been criticized as shortcomings in the House investigation and failure of the House to prove its case, to have been among the primary reasons given by Senators who favored acquittal.[35]

The second trial displayed the legal and practical import of impeaching a former official. After briefing and debate on the question of whether the Senate had the constitutional authority to try a former President for acts that occurred during his tenure in office, the Senate explicitly determined by a vote of fifty-six to forty-four that it had jurisdiction and authority to do so.[36] Thus a majority of Senators, as they have on previous occasions, determined that former officials may be tried by the Senate and remain—as provided in Article I, Section 3—subject to disqualification from holding future office if convicted.[37] However, the majority of the forty-three Senators who voted to acquit the President did so at least partly on the basis that they disagreed with that decision and instead viewed the trial of a former President as

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[32] U.S. Const. art. II, § 4.

[33] Proceedings of the United States Senate in the Impeachment Trial of President Donald John Trump, Vol. I: Preliminary Proceedings, 116th Cong., S. Doc. No. 116-18, at 416 (2020).

[34] *Id.* at 471.

[35] *See, e.g.*, Proceedings of the United States Senate in the Impeachment Trial of President Donald John Trump, Vol. IV: Statements of Senators, 116th Cong., S. Doc. No. 116-18, at 1915 (2020) (statement of Senator James M. Inhofe) ("Each of the past impeachment cases in the House of Representatives accused Presidents Johnson, Nixon, and Clinton of committing a crime. This President didn't commit a crime."); *id.* at 1984 (statement of Senator Ted Cruz) ("Indeed, in the Articles of Impeachment they sent over here, they don't allege any crime whatsoever. They don't even allege a single Federal law that the President violated."); *id.* at 1990 (statement of Senator David Perdue) ("President Trump is the first President ever to face impeachment who was never accused of any crime in these proceedings, whatsoever. These two Articles of Impeachment simply do not qualify as reasons to impeach any President"); *id.* at 2034 (statement of Senator John Cornyn) ("But they failed to bring forward compelling and unassailable evidence of any crime—again, the Constitution talks about treason, bribery, or other high crimes and misdemeanors; clearly, a criminal standard . . . ."). Other Senators identified the non-existence of a crime as an important factor in their vote, but nevertheless made clear their belief that a crime is not constitutionally required. *See, e.g.*, *id.* at 1937 (statement of Senator Mitch McConnell) ("Now, I do not subscribe to the legal theory that impeachment requires a violation of a criminal statute, but there are powerful reasons why, for 230 years, every Presidential impeachment did in fact allege a criminal violation."); *id.* at 2016 (statement of Senator Rob Portman) ("In this case, no crime is alleged. Let me repeat. In the two Articles of Impeachment that came over to us from the House, there is no criminal law violation alleged. Although I don't think that that is always necessary—there could be circumstances where a crime isn't necessary in an impeachment . . . .").

[36] 167 Cong. Rec. S609 (daily ed. Feb. 9, 2021) (determining that "Donald John Trump is subject to the jurisdiction of a Court of Impeachment for acts committed while President of the United States, notwithstanding the expiration of his term in that office").

[37] *See* Jared P. Cole & Todd Garvey, Cong. Rsch. Serv., R46013, Impeachment and the Constitution 47–48 (2019), https://crsreports.congress.gov/product/pdf/R/R46013.

"unconstitutional."[38] As a result, it appears that while the Senate may have legal authority to try a former official, current disagreement on the matter may be widespread enough to create a practical obstacle to obtaining the supermajority necessary to convict a former official.

Clause 7—Impeachment Judgments

ArtI.S3.C7.1 Overview of Impeachment Judgments

Article I, Section 3, Clause 7:

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

The immediate effect of conviction upon an article of impeachment is removal from office,[1] although the Senate may subsequently vote on whether the official shall be disqualified from again holding an office of public trust under the United States.[2] If this latter option is pursued, a simple majority vote by the Senate is required.[3] If not, an individual who has been impeached and removed may remain eligible to serve in an office in the future, including as a Member of Congress.[4]

By design,[5] impeachment is separate and distinct from a criminal proceeding. Impeachment and conviction by Congress operates to remove an individual from office; it does not, however, preclude criminal consequences for an individual's actions.[6] Those who have been impeached and removed from office are still subject to criminal prosecutions for the same underlying factual matters, and individuals who have already been convicted of crimes may be

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[38] *See, e.g.*, Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Vol. II: Visual Aids from the Trial and Statements of Senators, 117th Cong., S. Doc. No. 117-3, at 879 (2021) (statement of Senator Roger Marshall) (stating that "the lone Article passed out of the House as well as the subsequent trial in the Senate, was unconstitutional . . . Donald J. Trump is no longer the President of the United States and therefore can no longer be removed from office. He is a private citizen."). One survey has found that thirty-eight of the forty-three Senators who voted to acquit did so in part because of concerns that the Senate lacked jurisdiction over the former President. *See* Ryan Goodman & Josh Asabor, *In Their Own Words: The 43 Republicans' Explanations of Their Votes Not to Convict Trump in Impeachment Trial*, Just Security (Feb. 15, 2021), https://www.justsecurity.org/74725/in-their-own-words-the-43-republicans-explanations-of-their-votes-not-to-convict-trump-in-impeachment-trial/.

[1] U.S. Const. art. II, § 4; 3 Lewis Deschler, Precedents of the United States of the House of Representatives, H.R. Doc. No. 94–661, at Ch. 14 § 3.8 (1974), https://www.govinfo.gov/content/pkg/GPO-HPREC-DESCHLERS-V3/pdf/GPO-HPREC-DESCHLERS-V3.pdf.

[2] *See* 3 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 2397 (1907), https://www.govinfo.gov/content/pkg/GPO-HPREC-HINDS-V3/pdf/GPO-HPREC-HINDS-V3.pdf; 6 Clarence Cannon, Cannon's Precedents of the House of Representatives of the United States § 512 (1936), https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6.pdf [hereinafter Cannon].

[3] *See* 6 Cannon, *supra* note 2, at § 512. *See, e.g.*, 49 Cong. Rec. 1447–48 (1913) (vote to disqualify Judge Robert W. Archbald, thirty-nine yeas, thirty-five nays).

[4] *See* Waggoner v. Hastings, 816 F. Supp. 716 (S.D. Fla. 1993).

[5] The Constitution contains a number of provisions that are relevant to the impeachment of federal officials. Article I, Section 2, Clause 5 grants the sole power of impeachment to the House of Representatives; Article I, Section 3, Clause 6 assigns the Senate sole responsibility to try impeachments; Article I, Section 3, Clause 7 provides that the sanctions for an impeached and convicted individual are limited to removal from office and potentially a bar from holding future office, but an impeachment proceeding does not preclude criminal liability; Article II, Section 2, Clause 1 provides that the President enjoys the pardon power, but it does not extend to cases of impeachment; and Article II, Section 4 defines which officials are subject to impeachment and what kinds of misconduct constitute impeachable behavior. Article III does not mention impeachment expressly, but Section 1, which establishes that federal judges shall hold their seats during good behavior, is widely understood to provide the unique nature of judicial tenure. And Article III, Section 2, Clause 3 provides that trials, "except in Cases of Impeachment, shall be by jury."

[6] U.S. Const. art. II, § 4.

impeached for the same underlying behavior later.[7] A number of federal judges, in fact, have been indicted and convicted for conduct which has formed the basis for a subsequent impeachment proceeding.[8]

The text of the Constitution does not address the sequencing of impeachment and other legal proceedings. Generally speaking, historical practice has been to impeach individuals after the conclusion of any related criminal proceedings, although this might simply reflect practical convenience as such proceedings can alert Congress of improper behavior that may warrant impeachment. Nonetheless, nothing in the Constitution demands this order of events.

The Constitution bars the President from using the pardon power to shield individuals from impeachment or removal from office.[9] A President could pardon impeached officials suspected of criminal behavior, thus protecting them from federal criminal prosecution; such a move would not, however, shield those officials from removal from office via the impeachment process.

ArtI.S3.C7.2 Doctrine on Impeachment Judgments

Article I, Section 3, Clause 7:

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

While the Constitution authorizes the Senate,[1] following an individual's conviction in an impeachment trial, to bar an individual from holding office in the future, the text of the Constitution does not clearly indicate that a vote for disqualification from future office must be taken separately from the initial vote for conviction.[2] Instead, the potential for a separate vote for disqualification has arisen through the historical practice of the Senate.[3] The Senate did not choose to disqualify an impeached individual from holding future office until the Civil War era. Federal district judge West H. Humphreys took a position as a judge in the Confederate government but did not resign his seat in the United States government.[4] The House impeached Humphreys in 1862. The Senate then voted unanimously to convict Judge Humphreys and voted separately to disqualify the Humphreys from holding office in the future.[5] Senate practice since the Humphreys case has been to require a simple majority vote

[7] *See* discussion ArtII.S4.4.10 Judicial Impeachments.

[8] *See id.*

[9] U.S. Const. art. II, § 2, cl. 1.

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

[2] U.S. Const. art. I, § 3, cl. 7.

[3] *See* 6 Clarence Cannon, Cannon's Precedents of the House of Representatives of the United States § 512 (1936), https://www.govinfo.gov/content/pkg/GPO-HPREC-CANNONS-V6/pdf/GPO-HPREC-CANNONS-V6.pdf. *See, e.g.*, 49 Cong. Rec. 1447–48 (1913) (vote to disqualify Judge Robert W. Archbald, thirty-nine yeas, thirty-five nays).

[4] Emily F.V. Tassel & Paul Finkelman, Impeachable Offenses: A Documentary History from 1787 to the Present 87–88, 114–16 (1999).

[5] Eleanore Bushnell, Crimes, Follies, and Misfortunes: The Federal Impeachment Trials 123 (1992); *see* U.S. Const. art. I, § 3, cl. 7 ("Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust or profit under the United States.").

to disqualify an individual from holding future office, rather than the supermajority required by the Constitution's text for removal, but it is unclear what justifies this result beyond historical practice.[6]

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

The Senate's power to convict and remove individuals from office, as well as to bar them from holding office in the future, does not overlap with criminal remedies for misconduct. Indeed, the unique nature of impeachment as a political remedy distinct from criminal proceedings ensures that "the most powerful magistrates should be amenable to the law."[10] Rather than serving to police violations of strictly criminal activity, impeachment is a "method of national inquest into the conduct of public men" for "the abuse or violation of some public trust."[11] Impeachable offenses are those that "relate chiefly to injuries done immediately to the society itself."[12] Put another way, the purpose of impeachment is to protect the public interest, rather than impose a punitive measure on an individual.[13] This distinction was highlighted in the impeachment trial of federal district judge Alcee Hastings. Judge Hastings had been indicted for a criminal offense, but was acquitted.[14] In 1988, the House impeached Hastings for much of the same conduct for which he had been indicted. Judge Hastings argued that the impeachment proceedings constituted "double jeopardy" because of his previous acquittal in a criminal proceeding.[15] The Senate rejected his motion to dismiss the articles against him.[16]

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[6] U.S. Const. art. I, § 3, cl. 7.

[7] Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Part II, 117th Cong., S. Doc. No. 117-2, at 141 (2021).

[8] Proceedings of the United States Senate in the Impeachment Trial of Donald John Trump, Part III, 117th Cong., S. Doc. No. 117-2, at 200–01 (2021).

[9] 167 Cong. Rec. S609 (daily ed. Feb. 9, 2021).

[10] James Wilson, *Lectures on Law*, *reprinted in*, 1 The Works of James Wilson 425–26 (1791).

[11] *See* The Federalist No. 65 (Alexander Hamilton).

[12] *See Id.*

[13] 8 Annals of Cong. 2251 (1798).

[14] H.R. Res. 499 (Aug. 9, 1988); H. Comm. on the Judiciary, Impeachment of Judge Alcee L. Hastings, Report of the Comm. on the Judiciary to Accompany H. Res. 499, 100th Cong., 2d Sess., H.R. Rep. No. 100–810, at 1–5 (1988).

[15] Impeachment of Judge Alcee L. Hastings, Motions of Judge Alcee L. Hastings to Dismiss Articles I--XV and XVII of the Articles of Impeachment Against Him and Supporting and Opposing Memoranda, 101st Cong., 1st Sess., S. Doc. No. 101–4, at 48–65 (1989).

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

The Senate voted to convict and remove Judge Hastings on eight articles, but it did not disqualify him from holding office in the future.[17] Judge Hastings was subsequently elected to the House of Representatives.[18]

Section 4—Congress

Clause 1—Elections Clause

ArtI.S4.C1.1 Historical Background on Elections Clause

Article I, Section 4, Clause 1:

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

The Elections Clause gives state legislatures authority over Senate and House elections but allows Congress to regulate such elections and thereby override state election laws.[1] The only exception to Congress's authority over state elections—"the Places of chusing Senators"—became a nullity when the Seventeenth Amendment superseded Article I, Section 3, Clause 1, by providing for Senators to be elected by popular votes rather than selected by state legislatures.[2] How state and federal regulation of Senate and House elections interplay has been a topic of significant interest throughout the nation's history.

During the Constitution's ratification, the proposal to allow Congress to set aside state laws for electing Senators and Representatives was controversial.[3] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story summarized state concerns that were raised during the ratification process. He stated:

> Congress might prescribe the times of election so unreasonably, as to prevent the attendance of the electors; or the place at so inconvenient a distance from the body of the electors, as to prevent a due exercise of the right of choice. And congress might contrive the *manner* of holding elections, so as to exclude all but their own favourites from office. They might modify the right of election as they please; they might regulate the number of votes by the quantity of property, without involving any repugnancy to the constitution.[4]

In contrast to state concern over the ability of Congress to legislate how states would hold congressional elections, Alexander Hamilton, in the *Federalist No. 59*, reasoned that unless

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[17] 135 Cong. Rec. S13,783–87 (daily ed. Oct. 20, 1989).

[18] *See* Waggoner v. Hastings, 816 F. Supp. 716 (S.D. Fla. 1993).

[1] In 1842, Congress passed its first legislation to regulate House and Senate elections by establishing the district system for House elections. Act of June 25, 1842, ch. 47, § 2, 5 Stat. 491. Later legislation provided that Representatives "be elected by districts composed of a compact and contiguous territory and containing as nearly as practicable an equal number of inhabitants." *See, e.g.,* Act of Aug. 8, 1911, ch. 5, 37 Stat. 13.

[2] U.S. Const. amend. XVII. Congress's authority to regulate elections did not extend to where state legislatures would choose the Senators, because, at that time, the choice of senators belonged solely to the state legislatures. *See also* Joseph Story, Commentaries on the Constitution of the United States § 826 (1833) ("The choice is to be made by the state legislature; and it would not be either necessary, or becoming in congress to prescribe the place, where it should sit.").

[3] The Federalist No. 59 (Alexander Hamilton) ("This provision has not only been declaimed against by those who condemn the Constitution in the gross, but it has been censured by those who have objected with less latitude and greater moderation; and, in one instance it has been thought exceptionable by a gentleman who has declared himself the advocate of every other part of the system.").

[4] Joseph Story, Commentaries on the Constitution of the United States § 814 (1833).

Congress had authority to regulate Senate and House elections, state legislatures might "at any moment annihilate [the U.S. Government], by neglecting to provide for the choice of persons to administer its affairs."[5] Noting that the Elections Clause gave state legislatures primary power over Senate and House elections, Hamilton took the position that Congress would likely involve itself in congressional elections only if "extraordinary circumstances might render that interposition necessary to [the U.S. Government's] safety."[6] Echoing Hamilton's expectation that only "extraordinary circumstances" would involve Congress in regulating House and Senate elections, Justice Story reasoned that, as representatives of states and their people, Members of Congress would be reluctant to impose election laws on objecting states.[7]

ArtI.S4.C1.2 States and Elections Clause

Article I, Section 4, Clause 1:

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

By its terms, Article I, Section 4, Clause 1, referred to as the Elections Clause, contemplates that state legislatures will establish the times, places, and manner of holding elections for the House of Representatives and the Senate, subject to Congress making or altering such state regulations (except as to the place of choosing Senators).[1] The Supreme Court has interpreted the Elections Clause expansively, enabling states "to provide a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[2] The Court has further recognized the states' ability to establish sanctions for violating election laws[3] as well as authority over recounts[4] and primaries.[5] The Elections Clause, however, does not govern voter qualifications, which under Article I, Section 2, Clause 1, and the Seventeenth Amendment must be the same as the "Qualifications requisite for Electors of the most numerous Branch of the State Legislatures."[6] Similarly, the authority of states to establish the "Times, Places and Manner of holding Elections for Senators and Representatives" does not include authority to impose additional qualification requirements to be a Member of the House of Representatives or a Senator, which are governed by the

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[5] The Federalist No. 59 (Alexander Hamilton).

[6] *Id.*

[7] *See* Joseph Story, Commentaries on the Constitution of the United States § 818 (1833) ("Who are to pass the laws for regulating elections? The congress of the United States, composed of a senate chosen by the state legislatures, and of representatives chosen by the people of the states. Can it be imagined, that these persons will combine to defraud their constituents of their rights, or to overthrow the state authorities, or the state influence?").

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

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

[3] *Id.* at 369.

[4] Roudebush v. Hartke, 405 U.S. 15, 24, 25 (1972).

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

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

Constitution's Qualification Clauses at Article I, Section 2, Clause 2 for Members of the House and at Article I, Section 3, Clause 3 for the Senate.[7]

State authority to regulate the times, places, and manner of holding congressional elections has been described by the Court as the ability "to enact the numerous requirements as to procedure and safeguards which experience shows are necessary in order to enforce the fundamental rights involved."[8] The Court has upheld a variety of state laws designed to ensure that elections are fair and honest and orderly.[9] But the Court distinguished state laws that go beyond "protection of the integrity and regularity of the election process," and instead operate to disadvantage a particular class of candidates[10] or negate the need for a general election.[11] The Court noted that the Elections Clause does not allow states to set term limits, which the Court viewed as "disadvantaging a particular class of candidates and evading the dictates of the Qualifications Clause,"[12] or ballot labels identifying candidates who disregarded voters' instructions on term limits or declined to pledge support for them.[13] In its 1995 decision in *U.S. Term Limits v. Thornton*, the Court explained: "[T]he Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not as a source of power to dictate electoral outcomes, to favor or disfavor a class of candidates, or to evade important constitutional restraints."[14]

The Supreme Court has held that Article I, Section 4, Clause 1, provides for Congress, not the courts, to regulate how states exercise their authority over Senate and House elections,[15] although courts may hear cases concerning claims of one-person, one-vote violations and racial

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

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

[9] *See, e.g.*, Storer v. Brown, 415 U.S. 724 (1974) (restrictions on independent candidacies requiring early commitment prior to party primaries); Roudebush v. Hartke, 405 U.S. 15, 25 (1972) (recount for Senatorial election); Munro v. Socialist Workers Party, 479 U.S. 189 (1986) (requirement that minor party candidate demonstrate substantial support—1% of votes cast in the primary election—before being placed on ballot for general election). The Court, however, has held that courts should not modify election rules if the election is imminent and "'[n]o bright line separates permissible election-related regulation from unconstitutional infringements.'" Purcell v. Gonzalez, 549 U.S. 1, 5 (2006) (per curiam) (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359 (1997)). In *Purcell v. Gonzalez*, the Court observed that "the imminence of the election and the inadequate time to resolve the factual disputes" required the Court to "of necessity allow the election to proceed without an injunction suspending the voter identification rules." *Purcell*, 549 U.S. at 5–6. *See also* Republican Nat'l Comm. v. Democratic Nat'l Comm., No. 19A1016, slip op. (U.S. Apr. 2020) (per curiam) (noting that "lower federal courts should ordinarily not alter the election rules on the eve of the election") (citing Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam); Frank v. Walker, 574 U.S. 929 (2014); Veasey v. Perry, 574 U.S. 951 (2014)).

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

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

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

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

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

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

gerrymandering.[16] For example, in its 2019 *Rucho v. Common Cause* decision, the Court held that partisan gerrymandering claims—claims that one political party has gerrymandered congressional districts to the disadvantage of the other party—are not justiciable by courts because "the only provision in the Constitution [Article I, Section 4, Clause 1] that specifically addresses the matter assigns it to the political branches"[17] and such claims present political questions—"outside the courts' competence and therefore beyond the courts' jurisdiction"—that are not for courts to decide.[18] Although noting that the "districting plans at issue here are highly partisan, by any measure,"[19] the *Rucho* Court observed that partisan gerrymandering claims raise particular problems for courts to adjudicate. First, the Court noted that the Framers had expected partisan interests to inform how states drew district lines.[20] Consequently, the Court reasoned that the problem is not whether partisan gerrymandering has occurred but when it has "gone too far."[21] Second, the Court observed that there is no obvious standard by which to assess whether a partisan gerrymander has gone too far.[22] The Court stated: "The initial difficulty in settling on a 'clear manageable and politically neutral' test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of 'unfairness' in any winner-take-all system."[23] The Court in *Rucho* further emphasized that it did not condone partisan gerrymanders but that Congress is constitutionally authorized to address the issue.[24] Likewise, in *Husted v. A. Philip Randolph Institute*, the Court upheld a state law providing for removing voters from voting roles based on indicators that they had moved, noting, among other things, that the state law was consistent with federal law and that the Court had "no authority to dismiss the considered judgment of Congress and the Ohio Legislature regarding the probative value of a registrant's failure to send back a return card."[25]

The Court addressed what constitutes regulation by a state "Legislature" for purposes of the Elections Clause in its 2015 decision in *Arizona State Legislature v. Arizona Independent*

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

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

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

[19] *Id.* at 2.

[20] *Id.* at 12.

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

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

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

[24] *Rucho*, slip op. at 9 ("Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering.").

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

Redistricting Commission.[26] There, the Court rejected the Arizona legislature's challenge to the validity of the Arizona Independent Redistricting Commission (AIRC) and AIRC's 2012 map of congressional districts.[27] The Commission had been established by a 2000 ballot initiative, which removed redistricting authority from the legislature and vested it in the AIRC.[28] The legislature asserted that this arrangement violated the Elections Clause because the Clause contemplates regulation by a state "Legislature" and "Legislature" means the state's representative assembly.[29]

The Court disagreed and held that Arizona's use of an independent commission to establish congressional districts is permissible because the Elections Clause uses the word "Legislature" to describe "the power that makes laws," a term that is broad enough to encompass the power provided by the Arizona constitution for the people to make laws through ballot initiatives.[30] In so finding, the Court noted that the word "Legislature" has been construed in various ways depending upon the constitutional provision in which it is used, and its meaning depends upon the function that the entity denominated as the "Legislature" is called upon to exercise in a specific context.[31] Here, in the context of the Elections Clause, the Court found that the function of the "Legislature" was lawmaking and that this function could be performed by the people of Arizona via an initiative consistent with state law.[32] The Court also pointed to dictionary definitions from the time of the Framers;[33] the Framers' intent in adopting the Elections Clause;[34] the "harmony" between the initiative process and the Constitution's "conception of the people as the font of governmental power;"[35] and the practical consequences of invalidating the Arizona initiative.[36]

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[26] No. 13-1314 (2015).

[27] *Id.* at 2–3.

[28] *Id.*

[29] *Id.* at 2.

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

[31] *Id.* at 18.

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

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

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

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

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

ArtI.S4.C1.3 Congress and Elections Clause

Article I, Section 4, Clause 1:

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

Known as the Elections Clause, Article I, Section 4, Clause 1 provides for Congress and state legislatures to regulate the "Times, Places and Manner of holding elections for Senators and Representatives."[1] Under the Elections Clause, each state establishes how it will hold congressional elections, subject to Congress adopting or altering the state requirements (except as to the place of choosing Senators).[2] The Elections Clause's "Times, Places and Manner" encompasses "a complete code for congressional elections, not only as to times and places, but in relation to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns."[3] States and Congress may also establish sanctions for violating election laws[4] and procedures for recounts[5] and primaries.[6] The Elections Clause however, does not permit states or Congress to set voter qualifications for congressional elections, which, under the Constitution, must be the same qualifications necessary to vote for the most numerous branch of the state legislature.[7] Likewise, the Elections Clause does not allow states or Congress to change the qualifications to be a Member of the House of Representatives or the Senate, which are stipulated at Article I, Section 2, Clause 2 for the House and Article I, Section 3, Clause 3 for the Senate.[8]

By providing Congress power to preempt state election procedures, the Framers sought to prevent states from thwarting the Federal Government's operation by using state law to manipulate or preclude elections for the House of Representatives.[9] For example, during the Constitutional Convention Gouverneur Morris of Pennsylvania expressed concern that "the States might make false returns and then make no provision for new elections,"[10] while Alexander Hamilton observed in the *Federalist Papers* that "Nothing can be more evident than that an exclusive power of regulating elections for the national government, in the hands of the State legislatures, would leave the existence of the Union entirely at their mercy."[11] Despite the Elections Clause providing Congress power to preempt state law governing elections,

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[1] U.S. Const. art. I, § 4, cl. 1.

[2] *Id. See* Foster v. Love, 522 U.S. 67, 69 (1997) ("[I]t is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections binding on the States.'" (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 832–33 (1995))).

[3] Smiley v. Holm, 285 U.S. 355, 366 (1932).

[4] *Id.* at 369.

[5] Roudebush v. Hartke, 405 U.S. 15, 24–25 (1972).

[6] United States v. Classic, 313 U.S. 299, 320 (1941).

[7] U.S. Const. art. I, § 2, cl. 1; U.S. Const. amend. XVII. *See* Arizona v. Inter Tribal Council of Ariz., Inc., 570 U.S. 1, 17 (2013) ("Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the *times,* the *places,* and the *manner* of elections.'" (quoting The Federalist No. 60 (Alexander Hamilton))). See also Oregon v. Mitchell, 400 U.S. 112 (1970).

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

[9] United States Term Limits v. Thornton, 514 U.S. 779, 808 (1995).

[10] 2 The Records of the Federal Convention 241 (Max Farrand ed., 1901).

[11] The Federalist No. 59 (Alexander Hamilton). *See also* Rucho v. Common Cause, No. 18–422, slip op. at 9 (U.S. June 2019) (discussing Congress's authority under the Commerce Clause).

Congress did not exercise this power until 1842 when it passed a law requiring that Representatives be elected on a district basis.[12] Congress subsequently added contiguity, compactness, and substantial equality of population to districting requirements.[13]

In the Court's 1997 decision, *Foster v. Love*, the Supreme Court affirmed a lower court decision that, under the Elections Clause, federal law preempted a Louisiana statute governing congressional elections.[14] The *Foster* Court noted that while states can prescribe regulations governing the "Times, Places and Manner" of holding elections, "Congress may at any time by Law make or alter such Regulations."[15] The Court stated:

> The [Elections] Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections but only so far as Congress declines to pre-empt state legislative choices. Thus, it is well settled that the Elections Clause grants Congress 'the power to override state regulations' by establishing uniform rules for federal elections, binding on the States. 'The regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter so far as the conflict extends, ceases to be operative.'[16]

Under its Elections Clause authority, Congress has passed laws that govern how state election systems may operate.[17] For example, in *Arizona v. Inter Tribal Council of Arizona*, the Court held that the National Voter Registration Act of 1993, which required states to use a specific federal form to register voters for federal elections, preempted an Arizona law that imposed an additional evidence-of-citizenship requirement.[18] The *Arizona* Court further noted that state authority to regulate congressional elections is less than its general police powers because the Constitution provides expressly for state law governing elections to be preempted by federal law. The Court stated: "Unlike the States' 'historic police powers,' the States' role in regulating congressional elections—while weighty and worthy of respect—has always existed subject to the express qualification that 'it terminates according to federal law.'"[19]

The Court has also held that where a primary election is an integral part of choosing a Member of Congress, the right to vote in that primary election is subject to congressional protection[20] and includes the opportunity to cast a ballot and to have it counted honestly.[21] Congress may secure elections from personal violence and intimidation as well as from failures to count ballots lawfully cast[22] or the stuffing of ballot boxes with fraudulent ballots.[23] Congress may also enforce election laws by imposing sanctions[24] or punish state election

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[12] Act of June 25, 1842, ch. 47, 5 Stat. 491. In 1870, Congress passed the first comprehensive federal statute to enforce the Fifteenth Amendment's guarantee against racial discrimination in voting. The Enforcement Act of 1870, ch. 114, 16 Stat. 140.

[13] Under the 1872 Act (17 Stat. 28), Congress provided for congressional districts to contain "as nearly as practicable" equal numbers of inhabitants. In 1901 (31 Stat. 733), Congress required districts to comprise "compact territory."

[14] Foster v. Love, 522 U.S. 67 (1997).

[15] *Id.* at 69.

[16] *Id.*

[17] Rucho v. Common Clause, No. 18–422, slip op. at 30–34 (U.S. June 2019).

[18] 570 U.S. 1 (2013). Unlike the Arizona law, which required documentary evidence of citizenship, the federal form required only that an applicant wishing to vote in federal elections to swear under penalty of perjury that he or she was a citizen. *Id.* at 5.

[19] *Id.* (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Buckman Co. v. Plaintiffs' Legal Comm., 531 U.S. 341, 347 (2001)).

[20] United States v. Classic, 313 U.S. 299, 315–321 (1941). The authority of Newberry v. United States, 256 U.S. 232 (1921), to the contrary has been vitiated. *Cf.* United States v. Wurzbach, 280 U.S. 396 (1930).

[21] United States v. Mosley, 238 U.S. 383 (1915); United States v. Saylor, 322 U.S. 385, 387 (1944).

[22] *Ex parte* Yarbrough, 110 U.S. 651 (1884); United States v. Mosley, 238 U.S. 383 (1915)

officers for violating legal duties relating to congressional elections.[25] But the Court has held that bribing voters, although within Congress's power under other clauses of the Constitution, does not implicate the Elections Clause.[26] Finally, the Court has recognized that because the Elections Clause specifically vests Congress and the states with authority over the "Time, Places and Manner" of congressional elections, the Court's authority over such matters is limited.[27]

Clause 2—Assembly

ArtI.S4.C2.1 When Congress Shall Assemble

Article I, Section 4, Clause 2:

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

Ratified in 1933, Section 2 of the Twentieth Amendment superseded Article I, Section 4, Clause 2, by changing the date when Congress shall assemble from "the first Monday in December" to "noon on the 3d day of January . . . ."[1]

In requiring Congress to assemble at least once a year, the Framers ensured that Congress would meet regularly, thereby placing such sessions "equally beyond the power of faction, and of party of power, and of corruption."[2] During the Constitutional Convention, the Framers considered both May and December as possible periods for convening. In making this decision, they weighed the difficulties of traveling in December against the inconvenience to Members engaged in agricultural pursuits in May.[3] The interest in commercial pursuits proving greater than the interest in convenience, the Framers selected the first Monday in December to assemble.

The Framers' choice of December rather than May meant that more than a year would pass from the election of Congress in November until Congress convened in December of the following year. In its 1932 *Report on Fixing the Commencement of the Terms of the President and Vice President and Members of Congress*, the Senate Committee on the Judiciary explained the need for the lengthy delay, stating: "When our Constitution was adopted there was some reason for such a long intervention of time between the election and the actual

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[23] United States v. Saylor, 322 U.S. 385 (1944)

[24] *Ex parte* Siebold, 100 U.S. 371, 392 (1880) (holding that Congress's power under the Elections Clause "is paramount, and may be exercised at any time, and to any extent which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith."); *Ex parte* Clarke, 100 U.S. 399 (1880); United States v. Gale, 109 U.S. 65 (1883); *In re* Coy, 127 U.S. 731 (1888).

[25] *Ex parte* Siebold, 100 U.S. 371, 396–97 (1880).

[26] United States v. Bathgate, 246 U.S. 220, 225–26 (1918); United States v. Gradwell, 243 U.S. 476, 485 (1917) ("[T]he policy of Congress for [a] great . . . part of our constitutional life has been . . . to leave the conduct of the election of its members to state laws, administered by state officers, and that whenever it has assumed to regulate such elections it has done so by positive and clear statutes.").

[27] *See, e.g.,* Husted v. A. Philip Randolph Inst., No. 16-960, slip op. at 25–26 (U.S. June 2018) ("We have no authority to dismiss the considered judgment of Congress and the Ohio Legislature regarding the probative value of a registrant's failure to send back a [voter verification] return card.").

[1] U.S. Const. amend. XX.

[2] Joseph Story, Commentaries on the Constitution of the United States § 827 (1833). Justice Story further opined: "[I]t was obvious, that from the nature of their duties, and the distance of their abodes, the members of congress ought not to be brought together at shorter periods, unless upon the most pressing exigencies. A provision, so universally acceptable, requires no vindication or commentary." *Id.*

[3] Max Farrand, The Framing of the Constitution 136 (1913) (noting that James Madison advocated for Congress to convene in May because it was easier to travel then, but the Framers chose December for its convenience for Members involved in agriculture.)

commencement of work by the new Congress. We had neither railroads nor telegraphic communication connecting the various States and communities of the country."[4] The Senate Committee on the Judiciary also noted that, prior to the 1913 adoption of the Seventeenth Amendment, time was required between the election and convening of Congress so that state legislatures could convene and select Senators.[5] With popular election of Senators and improved communication and transportation technologies, the lengthy delay between the election and convening of Congress was no longer necessary.[6]

Section 5—Proceedings

Clause 1—Authority

ArtI.S5.C1.1 Congressional Authority over Elections, Returns, and Qualifications

Article I, Section 5, Clause 1:

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

Each House, in judging of elections under this clause, acts as a judicial tribunal, with like power to compel attendance of witnesses. In the exercise of its discretion, it may issue a warrant for the arrest of a witness to procure his testimony, without previous subpoena, if there is good reason to believe that otherwise such witness would not be forthcoming.[1] It may punish perjury committed in testifying before a notary public upon a contested election.[2] The power to judge elections extends to an investigation of expenditures made to influence nominations at a primary election.[3] Refusal to permit a person presenting credentials in due form to take the oath of office does not oust the jurisdiction of the Senate to inquire into the legality of the election.[4] Nor does such refusal unlawfully deprive the state that elected such person of its equal suffrage in the Senate.[5]

ArtI.S5.C1.2 Quorums in Congress

Article I, Section 5, Clause 1:

> *Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller*

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[4] Fixing the Commencement of the Terms of the President and Vice President and Members of Congress, S. Rep. No. 26, 72nd Cong., 1st Sess. (1932), *as reprinted in* 75 Cong. Rec. 1372, 1372 (Jan. 6, 1932).

[5] *Id.* ("Originally, Senators were elected by the legislatures, and as a rule the legislatures of the various States did not convene until after the beginning of the new year, and it was difficult and sometimes impossible for Senators to be elected until February or March.").

[6] *Id.* ("Under present conditions the result of elections is known all over the country within a few hours after the polls close, and the Capital City is within a few days' travel of the remotest portions of the country.").

[1] Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 616 (1929).

[2] *In re* Loney, 134 U.S. 372 (1890).

[3] 6 Cannon's Precedents of the House of Representatives §§ 72–74, 180 (1936). *Cf.* Newberry v. United States, 256 U.S. 232, 258 (1921).

[4] Barry v. United States *ex rel.* Cunningham, 279 U.S. 597, 614 (1929).

[5] 279 U.S. at 615. The existence of this power in both houses of Congress does not prevent a state from conducting a recount of ballots cast in such an election any more than it prevents the initial counting by a state. Roudebush v. Hartke, 405 U.S. 15 (1972).

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

The quorum principle—that a certain number of members of a governing body be present at a given meeting for the body to exercise its powers—was well established in parliamentary practice by the time of the Constitutional Convention.[1] The debate then was not over whether to have a quorum requirement, but instead where to set it.[2] Some felt a majority requirement was too high and would result in "great delay" and "great inconvenience" if either house consistently struggled to obtain a quorum.[3] But others, including George Mason, believed that setting the quorum requirement any lower would be "dangerous to the distant parts to allow a small number of members of the two Houses to make laws," as the "Central States could always take care to be on the Spot and by meeting earlier than the distant ones . . . ."[4] The Framers, apparently recognizing that too high a quorum requirement could debilitate Congress, but that too low a requirement would risk undue influence by the states in close proximity to the capital, set the quorum requirements at a majority of Members. In the *Federalist Papers*, James Madison explained the Framers' choice of a majority as balancing the risk of either requiring too many or too few Members of Congress to establish a quorum.[5] He noted:

> It has been said that more than a majority ought to have been required for a quorum; and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale.[6]

For many years the view prevailed in the House of Representatives that it was necessary for a majority of the members to vote on any proposition submitted to the House in order to satisfy the constitutional requirement for a quorum. It was a common practice for the opposition to break a quorum by refusing to vote. This was changed in 1890, by a ruling made by Speaker Thomas Brackett Reed of Maine and later embodied in Rule XV of the House, that Members present in the chamber but not voting would be counted in determining the presence of a quorum.[7]

After an 1890 law was adopted with a majority of Members present in the chamber, but not a majority voting, Speaker Reed's rule was challenged. The case, *United States v. Ballin*, provided the Supreme Court with an opportunity to construe not just the Constitution's quorum requirement, but also the breadth of the House's authority to determine how the presence of a quorum is determined.[8] After establishing that it had authority to consider the rule's "validity," the Court examined the quorum requirement, holding that "[a]ll that the Constitution requires is the presence of a majority, and when that majority are present the

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[1] 2 Joseph Story, Commentaries on the Constitution of the United States § 832 (1833)

[2] 2 Records of the Federal Convention of 1787, at 251–52 (Max Farrand ed., 1911).

[3] *Id.* at 251 (statement of Nathaniel Gorham of Massachusetts). *See also id.* at 251 (statement of John Mercer of Maryland).

[4] *Id.* at 251–52 (statement of George Mason). *See also id.* at 253 (statement of Oliver Ellsworth of Connecticut).

[5] The Federalist No. 58 (James Madison).

[6] *Id.*

[7] Hinds' Precedents of the House of Representatives §§ 2895–2905 (1907).

[8] 144 U.S. 1 (1892).

power of the house arises."[9] The Court then granted significant deference to the House in deciding how to determine the presence of a majority, concluding that because "[t]he Constitution has prescribed no method of making this determination," it is "within the competency of the house to prescribe any method which shall be reasonably certain to ascertain . . . the presence of a majority, and thus establishing the fact that the house is in a condition to transact business."[10] Thus, under *Ballin*, each chamber may determine a method for counting a quorum provided that method is "reasonably certain to ascertain" the "presence of a majority" such that the chamber is, constitutionally speaking, "in a condition to transact business."[11]

While *Ballin* established that the Court should generally defer to House and Senate rules on when a quorum exists, the Court's 1949 case *Christoffel v. United States*[12] suggest that such deference is not proper when the existence of a quorum is made an element of a cirminal offense.[13] In *Christoffel*, a witness who denied under oath before the House Committee on Education and Labor that he was a Communist was subsequently convicted of perjury in federal court. The Court reversed his conviction because the Committee did not have a quorum at the time the witness made the perjurious statements, and consequently, the witness's testimony had not been before a "competent tribunal," as required by the District of Columbia Code.[14] Although the Committee had a quorum when the hearing commenced, some of the Members had stepped away during the hearing so that the number of Members in attendance at the time the witness testified was below the number required to establish a quorum.[15] Under House practice, a quorum once established is presumed to continue until a Member raises "a point of no quorum and a count [reveals] the presence of less than a majority."[16] No such point of order had been raised during the hearing. Nevertheless, the Court held that in order "to convict, the jury had to be satisfied beyond a reasonable doubt that there were 'actually physically present' a majority of the committee."[17] To hold that the quorum requirement was satisfied "by a finding that there was a majority present two or three hours before the defendant offered his testimony, in the face of evidence indicating the contrary, is to rule as a matter of law that a quorum need not be present when the offense is committed."[18] "This," the Court concluded, "not only seems to us contrary to the rules and practice of the Congress, but denies petitioner a fundamental right. That right is that he be convicted of crime only on proof of all the elements of the crime charged against him."[19]

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[9] *Id.* at 6.

[10] *Id.* (emphasis added).

[11] *Id.*

[12] 338 U.S. 84 (1949).

[13] ArtI.S5.C2.1 Congressional Proceedings and the Rulemaking Clause.

[14] *Christoffel*, 338 U.S. at 87–90.

[15] *Id.* at 89–90 ("An element of the crime charged in the instant indictment is the presence of a competent tribunal . . . . [T]o charge, however, that such a requirement is satisfied by a finding that there was a majority present two or three hours before the defendant offered his testimony, in the face of evidence indicating the contrary, is to rule as a matter of law that a quorum need not be present when the offense is committed. . . . A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction.").

[16] *Id.* at 88.

[17] *Id.* at 89.

[18] *Id.* at 90.

[19] *Id.*

Clause 2—Rules

ArtI.S5.C2.1 Congressional Proceedings and the Rulemaking Clause

Article I, Section 5, Clause 2:

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

The Constitution's Rulemaking Clause authorizes the House of Representatives and Senate to establish rules by which each will conduct its own business. Describing the Senate's authority under the Rulemaking Clause "to determine how and when to conduct its business" as broad, the Court noted in *National Labor Relations Board v. Canning*:

> The Constitution explicitly empowers the Senate to 'determine the Rules of its Proceedings.' And we have held that 'all matters of method are open to the determination' of the Senate, as long as there is 'a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be attained' and the rule does not 'ignore constitutional restraints or violate fundamental rights.'[1]

The House and Senate's authority to establish rules is ongoing. As the Supreme Court observed in *United States v. Ballin*: "The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house, and within the limitations suggested, absolute and beyond the challenge of any other body or tribunal."[2]

Under *Ballin*, the House and Senate may exercise their rulemaking authorities at their discretion provided there is (1) "a reasonable relation" between the rule's method and the desired result, and (2) the rule does not "ignore constitutional restraints or violate fundamental rights."[3] Case law on when a House or Senate rule transgresses this standard is limited. In the 1932 case *United States v. Smith*,[4] the Court held that the Senate's rules did not allow the Senate to deprive an appointee of his title to federal office after he had been confirmed and taken the oath of office. In reaching this decision, the Court construed the Senate's rules and held against the Senate, stating: "In deciding the issue, the Court must give great weight to the Senate's present construction of its own rules; but so far, at least as that construction was arrived at subsequent to the events in controversy, we are not concluded by it."[5]

In the 1949 case *Christoffel v. United States*,[6] a sharply divided Court upset a perjury conviction in federal court of a witness who had denied under oath before a House committee that he was affiliated with Communist programs. Although the committee had a quoroum when the hearing commenced, at the time the witness allegedly perjured himself, some of the Members had stepped away from the hearing with the result that the number of Members in attendance was less than the number necessary to establish a quorum. Consequently, the

[1] NLRB v. Canning, 573 U.S. 513, 564–64 (2014) (quoting United States v. Ballin, 144 U.S. 1, 5 (1892).

[2] United States v. Ballin, 144 U.S. 1, 5 (1892). In *McGrain v. Daugherty*, the Court observed that the Senate is "a continuing body." McGrain v. Daugherty, 273 U.S. 135, 181–82 (1927). Hence its rules remain in force from Congress to Congress except as they are changed from time to time, whereas those of the House are readopted at the outset of each new Congress. *Id. See also* Marshall Field & Co. v. Clark, 143 U.S. 649, 672 (1892).

[3] *Ballin*, 144 U.S. at 5.

[4] 286 U.S. 6 (1932).

[5] *Id.* at 6.

[6] 338 U.S. 84 (1949).

Court reversed the lower court decision on the grounds that the witness's testimony had not been before a "competent tribunal" under the District of Columbia Code.[7] Writing for the Court, Justice Frank Murphy stated:

> An element of the crime charged in the instant indictment is the presence of a competent tribunal, and the trial court properly so instructed the jury. . . . [T]o charge, however, that such a requirement is satisfied by a finding that there was a majority present two or three hours before the defendant offered his testimony, in the face of evidence indicating the contrary, is to rule as a matter of law that a quorum need not be present when the offense is committed. . . . A tribunal that is not competent is no tribunal, and it is unthinkable that such a body can be the instrument of criminal conviction.[8]

In a dissent joined by three other Justices, Justice Robert H. Jackson argued that the Court's ruling had invalidated the House's rules and practices when it should have deferred to them and upheld the lower court decision. He stated: "The House has adopted the rule and practice that a quorum once established is presumed to continue unless and until a point of no quorum is raised. By this decision, the Court, in effect, invalidates that rule despite the limitations consistently imposed upon courts where such an issue is tendered."[9] By questioning the legitimacy of the House's rule and practice that "a quorum once established is presumed to continue" unless challenged, the Court, Justice Jackson suggested, risked undermining other actions taken by the House consistent with its rules.[10] Justice Jackson noted: "Since the constitutional provision governing the House itself also requires a quorum before that body can do business, this raises the question whether the decision now announced will also apply to itself. If it does, it could have the effect of invalidating any action taken or legislation passed without a record vote, which represents a large proportion of the business done by both House and Senate."[11]

ArtI.S5.C2.2 Punishments and Expulsions from Congress

ArtI.S5.C2.2.1 Overview of Expulsion Clause

Article I, Section 5, Clause 2:

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

Article I, Section 5, Clause 2, expressly grants each house of Congress the power to discipline its own Members for misconduct, including through expulsion. Expulsion is the process[1] by which a house of Congress may remove one of its Members, after the Member has

[7] *Id.* at 87–90.

[8] *Id.* at 89–90.

[9] 338 U.S. at 95. In her concurrence denying certiorari in *Schock v. United States,* No. 18-406, slip op. at 1 (U.S. Feb. 19, 2019), Justice Sonia Sotomayor noted that the Court has not resolved whether the separation of powers doctrine is violated by a federal court interpreting "internal rules adopted by the House of Representatives to govern its own Members." She stated: "Although this question does not arise frequently—presumably because criminal charges against Members of Congress are rare—the sensitive separation-of-powers questions that such prosecutions raise ought to be handled uniformly." *Id.*

[10] *Id.*

[11] *Id.* at 93.

[1] Expulsions generally begin with an investigation by the body's ethics committee, which may follow the introduction of a resolution proposing expulsion. *See* William Brown, House Practice: A Guide to the Rules, Precedents, and Procedures of the House, ch. 25, § 21 (2011). The ethics committees have jurisdiction to investigate the conduct of

been duly elected and seated.[2] Expulsion, which is expressly provided for in the Expulsion Clause, is often confused with exclusion, which is an implied power of Congress that stems from the Qualifications Clauses for the House and Senate.[3] Exclusion occurs when a body of Congress refuses to seat a Member-elect.[4] Unlike the two-thirds majority requirement of the expulsion power, a body of Congress may exclude a Member-elect with a simple majority.[5]

While exclusion and expulsion both bar an individual from holding a seat in Congress, the two actions exist for different purposes and occur at different times. For example, in *Powell v. McCormack*, the Court explored the constitutionality of Representative Adam Clayton Powell's exclusion from the House of Representatives.[6] The impetus for the case was an investigation of expenditures authorized by Powell during the 89th Congress, which concluded that, as chairman of a House committee, the Member had engaged in improper activities, including deceiving House authorities with regard to travel expenses and directing illegal payments to his wife.[7] The House took no formal action with regard to those findings during that Congress but refused to administer the oath of office to Powell at the start of the 90th Congress the following year.[8] Subsequently, a Select Committee, which was appointed at the outset of the 90th Congress to determine Powell's eligibility to be seated as a Member, recommended that Powell be sworn into office as a Member and subsequently disciplined.[9] However, the House rejected that recommendation and instead adopted a resolution that would exclude Powell, which it approved by a vote of 307 to 116.[10]

Powell sued to be reinstated, and on appeal the Supreme Court held that Powell's exclusion was unconstitutional, explaining that "exclusion and expulsion are not fungible proceedings."[11] While the Court recognized that the Constitution grants broad authority to

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Members who may be deemed to reflect upon the body of Congress in which they serve. *See* Senate Select Comm. on Ethics, 115th Cong., 1st Sess., Rules of Procedure 24 (Comm. Print 2015), https://www.ethics.senate.gov/public/index.cfm/files/serve?File_id=551b39fc-30ed-4b14-b0d3-1706608a6fcb.

[2] Expulsion, as a form of legislative discipline, exists separate from any individual criminal or civil liability of Members for particular actions. *See* United States v. Traficant, 368 F.3d 646, 649–652 (6th Cir. 2004) ("Because it would thwart the constitutional separation of powers if Congress could shield its members from criminal prosecution by the Executive Branch, we cannot read the Double Jeopardy Clause to include Congress's disciplining its own members." (emphasis omitted)), *cert. denied*, 543 U.S. 1055 (2005); United States v. Rose, 28 F.3d 181, 189–90 (D.C. Cir. 1994) (holding that separation of powers doctrine does not preclude a Member of Congress from being subject to investigation by both legislative and executive authorities). *See also* Punishment by the House of Representatives No Bar to an Indictment to the President of the United States, 2 Op. Att'y Gen. 655, 655–56 (1834). That is, Members of Congress are subject to both legislative discipline by their respective body as well as potential criminal or civil prosecution of any misconduct that constitutes a violation of federal, state, or local law.

[3] U.S. Const. art. I, § 2, cl. 2 ("No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* art. I, § 3, cl. 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

[4] Powell v. McCormack, 395 U.S. 486, 492–32 (1969).

[5] *Id.*

[6] *Id.* at 506. Prior to the Court's decision in *Powell*, there are some examples in which Members-elect were expelled, although commentators have observed that such classification may have been used because "no one [had] raised the point that he had not been sworn in." 3 Lewis Deschler, Deschler's Precedents of the United States House of Representatives ch. 12, § 13 (1979) (hereinafter Deschler's Precedents) (citing 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 1262 (1907) (hereinafter Hinds' Precedents) and 1 Hinds' Precedents § 476).

[7] *Powell*, 395 U.S. at 489–90.

[8] *Id.* at 490.

[9] *Id.* at 492.

[10] *Id.* at 492–93.

[11] *Id.* at 512.

each of the houses of Congress regarding expulsion and other discipline,[12] it explained that Congress's authority regarding *exclusion* was limited to the enumerated qualifications requirements.[13] Because of the distinct nature of each action, the Court emphasized that the vote to exclude Powell, despite exceeding a two-thirds majority, could not substitute for his expulsion.[14]

ArtI.S5.C2.2.2 Historical Background on Expulsion Clause

Article I, Section 5, Clause 2:

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

The Expulsion Clause states that "[e]ach House may [. . .] punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member."[1] Thus, the Constitution requires that expulsion of a Member of Congress may only be enforced "with the Concurrence of two-thirds."[2] While the Expulsion Clause does not specify the measure of the two-thirds majority, the standard is generally understood to be assessed relative to the number of Members of that body who are present and voting.[3] The two-thirds majority requirement mirrors the standard by which Congress may likewise remove officials in the Executive and Judicial Branches of government through the impeachment process.[4]

Like other constitutional provisions relating to the powers and privileges of the Congress,[5] the origins of the Expulsion Clause lay with the practices of the British Parliament.[6] The English House of Commons historically exercised an inherent authority to expel members by a simple majority vote.[7] That power was viewed as one to be wielded at the body's "absolute discretion" with few recognized limitations, and as a result, it was historically used more liberally in England than it has been in the United States.[8] Moreover, the House of Commons expulsion power was used in a relatively ad hoc manner with, for example, no established standards governing the type of conduct warranting expulsion.[9] As a result, hundreds of members were expelled from Parliament before the turn of the nineteenth century on grounds

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[12] *See* United States v. Brewster, 408 U.S. 501, 519 (1972).

[13] *Powell*, 395 U.S. at 522 ("[T]he Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution.").

[14] *Id.* at 510.

[1] U.S. Const. art. I, § 5, cl. 2.

[2] *Id.*

[3] 14 Lewis Deschler, Deschler's Precedents of the United States House of Representatives ch. 30, § 5.2; William Brown, House Practice: A Guide to the Rules, Precedents, and Procedures of the House, ch. 58, § 28 (2011).

[4] *See* Gerald T. McLaughlin, *Congressional Self-Discipline: The Power to Expel, To Exclude and To Punish*, 41 Fordham L. Rev. 43, 48 fn. 37 (1972) (citing Special Committee on Congressional Ethics, Association of the Bar of the City of New York, Congress and the Public Trust 204 (1970)).

[5] *See, e.g.,* U.S. Const. art. I, § 5, cl. 2 (authorizing each house to "determine the Rules of its Proceedings . . . "); *Id.* (authorizing each house to "punish its Members"); *Id.* art. I, § 6, cl.1 (providing that "for any speech or Debate" Members "shall not be questioned in any other Place").

[6] For a discussion of the exercise of the expulsion power by the House of Commons, see Dorian Bowman & Judith Farris Bowman, *Article 1, Section 5: Congress's Power to Expel-An Exercise in Self-Restraint*, 29 Syracuse L. Rev. 1071, 1073–83 (1978).

[7] *See* 1 Joseph Story, Commentaries on the Constitution of the United States § 837 (1833) (hereinafter Story); Benjamin Cassady, *"You've Got Your Crook, I've Got Mine": Why the Disqualification Clause Doesn't (Always) Disqualify*, 32 Quinnipiac L. Rev. 209, 243 (2014).

[8] Bowman & Bowman, *supra* note 6, at 1083.

[9] *Id.*

ranging from publishing slanderous writings to treason.[10] Early parliamentary expulsions were motivated not only by a desire to preserve the integrity of the legislative process, but also to expel unpopular or dissenting legislators for political or religious reasons.[11]

One contemporary English expulsion case that influenced the members of the Constitutional Convention was that of John Wilkes.[12] Wilkes was a Member of Parliament who in 1763 criticized the King's peace treaty with France.[13] Wilkes was arrested, expelled from the House of Commons, and fled into exile. He later returned to England and was reelected to Parliament in 1768, only to be convicted of seditious libel and again expelled from the House.[14] Wilkes was repeatedly reelected, but each time Parliament excluded him, prevented him from taking his seat, and ultimately declared him ineligible for reelection.[15] Wilkes was finally permitted to serve following his election in 1774, after which the House of Commons expunged his expulsions and exclusions, acknowledging that it had acted in a manner "subversive of the rights of the whole body of electors of this kingdom."[16]

English precedents and traditions concerning expulsion were incorporated into the proceedings of the colonial legislatures, where legislators were expelled for an equally wide array of reasons.[17] But the Wilkes case had a "significant impact in the American colonies," and after the Revolution, "few expulsions occurred in the new state legislatures."[18] The House of Commons's use of the expulsion power in the Wilkes case likely led to two constitutional restrictions on each house's authority to judge its membership and discipline its members: constitutionally fixed qualifications for service in the House and Senate and a two-thirds supermajority requirement to expel a Member.[19]

Early draft versions of the Expulsion Clause from the Convention's Committee of Detail[20] distinguished the power to expel from the power to punish members for "disorderly behavior"[21] and may have contributed to the lack of significant debate on the Expulsion Clause at the Constitutional Convention.[22] In early drafts, the "disorderly behavior" language appears to have been entirely separate from, and therefore inapplicable to, the power to expel.[23] It was not until late in the Convention's consideration of the provision that the body approved the two-thirds requirement for expulsion. James Madison recommended the addition, noting that "the right of expulsion was too important to be exercised by a bare majority . . . . "[24] No

[10] *Id.* at 1074.

[11] *Id.* at 1073–78.

[12] Cassady, *supra* note 7, at 222–49.

[13] *See* Powell v. McCormack, 395 U.S. 486, 527 (1969).

[14] *Id.*

[15] *Id.* at 528.

[16] *Id.* (citing 22 Parl. Hist. Eng. 1411 (1782)).

[17] Bowman & Bowman, *supra* note 6, at 1083–85.

[18] *See Powell*, 395 U.S. at 531 (characterizing Wilkes' struggles as a "*cause celebre*" for the colonists); Bowman & Bowman, *supra* note 6, at 1086.

[19] U.S. Const. art. I, § 5, cl. 1; *Id.* at art. I, § 5, cl. 2; Cassady, *supra* note 7, at 242–43.

[20] The Committee of Detail was appointed to draft the Constitution based on previously adopted resolutions.

[21] *See* Bowman & Bowman, *supra* note 6, at 1087–90.

[22] Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions 207 (2007).

[23] A draft presented to that committee distinguished between the power to punish and the power to expel: "Each House shall have authority . . . to punish its own Members for disorderly Behavior. Each House may expel a Member, but not a second time for the same Offence." 2 Records of the Federal Convention of 1787 156 (Max Farrand ed., 1911).

[24] *Id.* at 254 (remarks of James Madison). Madison's view won out over that of Gouverneur Morris, who was concerned that by imposing a supermajority requirement "a few men from factious motives may keep in a member who ought to be expelled." *Id.*

mention was made at the Convention in regards to the type of misconduct that would warrant expulsion.[25] Accordingly, it appears that the Founders viewed the chief barrier to the expulsion power's abuse as the procedural requirement of the approval of a supermajority of a house of Congress, as opposed to any substantive requirement that defines what sort of conduct warrants expulsion.[26]

ArtI.S5.C2.2.3 Judicial Interpretations of Expulsion Clause

Article I, Section 5, Clause 2:

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

The Supreme Court has not decided a case directly bearing on the expulsion of a Member of Congress, although judicial discussions of the expulsion power have developed in dicta.[1] The Court has stated, for example, that Congress's expulsion power "extends to all cases where the offence is such as in the judgment of the Senate is inconsistent with the trust and duty of a member."[2] The Court highlighted that a Member's conduct could be subject to legislative discipline even if "[i]t was not a statutable offence nor was it committed in his official character, nor was it committed during the session of Congress, nor at the seat of government."[3] The Court has also emphasized that the House and Senate may exercise the expulsion power exclusively, such that any prosecution by the Executive of related offenses by the Member does not interfere with Congress's power to expel.[4] These relatively few statements suggest the Court has a broad view of the expulsion power.

The lack of judicial precedent directly addressing the Expulsion Clause may be due to the political question doctrine, a principle stemming from the Constitution's separation of powers.[5] Under the doctrine, courts have declined to decide cases involving "political questions," which are controversies where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it."[6] In this vein, courts have been cognizant that the expulsion power,

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[25] *See* Bowman & Bowman, *supra* note 6, at 1072.

[26] *See* 1 Joseph Story, Commentaries on the Constitution of the United States § 835 (1833) (noting that the expulsion power "might be exerted for mere purposes of faction or party, to remove a patriot, or to aid a corrupt measure; and it has therefore been wisely guarded by the restriction, that there shall be a concurrence of two thirds of the members, to justify an expulsion"). The Expulsion Clause does not, for example, contain explicit substantive limiting language similar to that found in the Constitution's impeachment and removal provisions, which restrict the exercise of that authority to only that conduct which amounts to "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const. art. II, § 4.

[1] *See In re* Chapman, 166 U.S. 661, 669–671 (1897) (discussing expulsion authority of Congress in the context of a petitioner convicted of criminal contempt for refusing to answer questions during a congressional investigation); Powell v. McCormack, 395 U.S. 486, 506–11 (1969) (discussing the distinction between the exclusion of Members-elect based on qualifications for office and the expulsion of seated Members based on misconduct).

[2] *In re Chapman*, 166 U.S. at 669–70 (citations omitted). One scholar has examined the relationship between the removal authority conferred by the Constitution for purposes of impeachment to the removal authority conferred by the Expulsion Clause, discussing arguments for and against holding the separate branches of government accountable to similar standards of conduct. *See* Gerald T. McLaughlin, *Congressional Self-Discipline: The Power to Expel, To Exclude and To Punish*, 41 Fordham L. Rev. 43, 50 (1972).

[3] *In re Chapman*, 166 U.S. at 670.

[4] Burton v. United States, 202 U.S. 344, 368–70 (1906).

[5] *See* Baker v. Carr, 369 U.S. 186, 210 (1962) ("The nonjusticiability of a political question is primarily a function of the separation of powers.").

[6] *Id.* at 217.*See generally* CRS Report R43834, *The Political Question Doctrine: Justiciability and the Separation of Powers*, by Jared P. Cole.

as a form of legislative discipline, exists separately from civil or criminal liability and empowers the respective houses of Congress to maintain the integrity and dignity of the legislature and its proceedings.[7]

The Supreme Court has reflected this reasoning in some of its cases touching on the Expulsion Clause. For example, in 1897, the Court discussed the Expulsion Power in a case of a petitioner convicted of criminal contempt for refusing to answer questions during a congressional investigation of potential misconduct of Members of Congress.[8] Acknowledging that the houses of Congress had broad power to discipline Members and discretion in exercising that power, the Court declined to "encroach upon the province of that body."[9] In a criminal case against a Senator involving congressional privileges, the Court recognized that Congress has "almost unbridled discretion" over the standards for expulsion.[10] The Court observed that Members who are subject to legislative discipline are "judged by no specifically articulated standards," but by a body "from whose decision there is no established right of review."[11] The Court also discussed justiciability in *Powell v. McCormack* after determining that the House's attempt to bar a Member's service constituted an exclusion rather than expulsion.[12] In *Powell*, the Court generally recognized that the *exclusion* at issue was justiciable because "the Constitution leaves the House without authority to exclude any person, duly elected by his constituents, who meets all the requirements for membership expressly prescribed in the Constitution."[13] In a concurring opinion, however, Justice William O. Douglas noted that, "if this were an expulsion case I would think that no justiciable controversy would be presented."[14]

Members of Congress who were expelled do not appear to have challenged the expulsion decision itself in court. Some Members who have faced disciplinary proceedings under the Expulsion Clause have attempted to challenge the disciplinary measures through judicial review, but lower courts have consistently declined to consider the claims, citing separation of powers concerns.[15] For example, in *United States v. Traficant*, a Member of the House of Representatives was convicted by a jury of criminal charges related to his service in Congress and then found by the House Ethics Committee to have violated the House's internal rules of conduct, resulting in his eventual expulsion.[16] The U.S. Court of Appeals for the Sixth Circuit rejected the Member's claim that he could not be punished through both a criminal trial and

[7] *See In re Chapman*, 166 U.S. at 668 (noting that the power of houses of Congress to discipline their Members through expulsion or other means constitutes an exercise of their "inherent power of self-protection" that may be used to prevent Members' behavior from "destroy[ing] public confidence in the body").

[8] *Id.* at 664.

[9] *Id.* at 670.

[10] United States v. Brewster, 408 U.S. 501, 519 (1972).

[11] *Id.*

[12] *Powell*, 395 U.S. at 516.

[13] *Id.* at 522.

[14] *Id.* at 553 (Douglas, J., concurring) (noting the difference in justiciability of a case of exclusion of a Member-elect compared to a case of expulsion of a Member for misconduct).

[15] *See* United States v. Traficant, 368 F.3d 646, 652 (6th Cir. 2004); Rangel v. Boehner, 20 F. Supp. 3d 148, 167–68 (D.D.C. 2013), aff'd on other grounds by 785 F.3d 19 (2015) (noting that the district court dismissed the complaint on numerous jurisdictional grounds and recognizing that it needed only to affirm one of those grounds, relying upon the Speech and Debate Clause as "the simplest ground" upon which to affirm).

[16] *Traficant*, 368 F.3d at 648–49.

legislative discipline because of the Fifth Amendment's Double Jeopardy prohibition,[17] concluding that both branches have distinct authority to punish behavior of Members that can be exercised independent of the other.[18]

ArtI.S5.C2.2.4 Misconduct That Occurred in Office

Article I, Section 5, Clause 2:

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

Expulsion cases have been rare.[1] As of 2017, a total twenty Members of Congress have been expelled from their respective bodies—five in the House[2] and fifteen in the Senate.[3] While the grounds for expulsions may illustrate potential bases upon which the House or Senate may decide to expel a Member, they are not necessarily the exclusive grounds for expulsion as this is left to the discretion of the respective bodies of Congress.[4] Accordingly, expulsion is "'in its very nature discretionary, that is, it is impossible to specify beforehand all the causes for which a member ought to be expelled; and, therefore, in the exercise of this power, in each particular case, a legislative body should be governed by the strictest justice.'"[5] Expulsion does not appear to apply automatically to any particular conduct.[6]

Disloyalty to the United States appears to be the predominant basis upon which both the House and Senate have exercised their power to expel Members. Eighteen of the twenty expulsions in congressional history were based on the Members' disloyalty to the United States.[7] The earliest expulsion case in 1797 involved a Senator who "concocted a scheme for Indians and frontiersmen to attack Spanish Florida and Louisiana, in order to transfer those territories to Great Britain" for his own financial gain.[8] The Senate special committee that was appointed to investigate the matter recommended expulsion, describing the Senator's conduct as "entirely inconsistent with his public trust," and the full Senate subsequently voted to expel the Member by a vote of 25-1.[9]

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[17] *Id.* at 649 (The Member argued that "he was twice placed in jeopardy: first, when the House of Representatives initiated hearings that included the possibility of his imprisonment [. . .] and second, after Congress had already expelled him, when the district court ordered his imprisonment." (citation omitted)).

[18] *Id.* at 650–52 (noting Supreme Court precedent recognizing that the Expulsion Clause grants Congress exclusive authority to discipline its members) (citing Burton v. United States 202 U.S. 344, 369 (1906)).

[1] *See In re* Chapman, 166 U.S. 661, 670 (1897).

[2] U.S. House of Representatives, Historical Summary of Conduct Cases in the House of Representatives 1798–2004 (2004), https://ethics.house.gov/sites/ethics.house.gov/files/Historical_Chart_Final_Version%20in%20Word_0.pdf.

[3] Senate Historical Office, Expulsion and Censure https://www.cop.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm (last accessed Dec. 26, 2017).

[4] *See* 3 Lewis Deschler, Deschler's Precedents of the United States House of Representatives ch. 12, § 13 (hereinafter Deschler's Precedents).

[5] *Id.* (quoting Luther Cushing, Elements of the Law and Practice of Legislative Assemblies in the United States of America, § 625 (1866)).

[6] Legislative discipline for Members who have been convicted of a crime requires the House or Senate to affirmatively act in response to that Member's behavior. *See* 3 Deschler's Precedents, *supra* note 4, ch. 12, § 13 (noting that Congress normally will wait "to consider expulsion until the judicial processes have been exhausted"). *See also* Burton v. United States, 202 U.S. 344, 369–370 (1906).

[7] U.S. House of Representatives, Historical Summary of Conduct Cases in the House of Representatives 1798–2004 (2004), https://ethics.house.gov/sites/ethics.house.gov/files/Historical_Chart_Final_Version%20in%20Word_0.pdf; Senate Historical Office, Expulsion and Censure, https://www.cop.senate.gov/artandhistory/history/common/briefing/Expulsion_Censure.htm (last accessed Dec. 26, 2017).

[8] United States Senate: Election, Expulsion, and Censure Cases 1793–1990, S. Doc. No. 103-33, at 13 (1995).

[9] *Id.* at 13–14.

The majority of expulsion cases based on disloyalty to the United States—seventeen of the eighteen—arose in the context of the secession of the Confederate states at the beginning of the Civil War.[10] In early 1861, the Senate considered the status of Members representing states that were contemplating secession, ultimately expelling ten Members in a single vote after the war had begun.[11] In those cases, the Members represented Southern states that had seceded from the Union, and the Members had not formally resigned from the Senate. The expulsion resolution cited the Members' failure to appear in the Senate and alleged that the Members "are engaged in said conspiracy for the destruction of the Union and Government, or, with full knowledge of such conspiracy, have failed to advise the Government of its progress or aid in its suppression."[12] Other examples of Civil War expulsions involved Members who had supported secessionists despite representing states that had not seceded.[13]

After the Civil War expulsions, neither the House nor Senate expelled a Member for more than a century. In 1980, a Member was expelled following a criminal conviction on charges relating to receiving a payment in return for promising to use official influence on legislation in the so-called ABSCAM[14] investigation.[15] In 2002, the House expelled a Member who had been convicted of various criminal charges relating to his official actions in Congress, including bribery, illegal gratuities, obstruction of justice, defrauding the government, filing false tax returns, and racketeering.[16]

In some cases, Members' behavior has drawn public calls for expulsion or preliminary proceedings by the respective house toward potential expulsion, but the Member ultimately resigned prior to a formal decision to expel.[17] Members have resigned facing formal expulsion inquiries or even recommendations for expulsion for conduct during their time in office.[18] In the Senate, one such example occurred in 1995 when the Select Committee on Ethics recommended expelling a Member following its investigation of allegations of sexual misconduct, misuse of official staff, and attempts to interfere with the Committee's inquiry.[19] In the House, for example, the Committee on Standards of Official Conduct recommended expelling a Member for conduct violations related to activities that also resulted in the Member's criminal conviction for accepting illegal gratuities, illegal trafficking, and obstruction of justice.[20]

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[10] *See generally* Senate Historical Office, The Civil War Senate Reacts to Secession, https://www.cop.senate.gov/artandhistory/history/common/expulsion_cases/CivilWar_Expulsion.htm (last accessed Dec. 26, 2017).

[11] S. Doc. No. 103-33, at 95–98. Prior to the beginning of the Civil War in April 1861, the Senate considered expelling a number of Members representing Southern states, but instead only declared those seats to be vacant. *See id*. at 89–90.

[12] *Id.*

[13] *See, e.g.*, *Id.* at 102–107.

[14] *See* History: Famous Cases & Criminals, https://www.fbi.gov/history/famous-cases/abscam (last visited Dec. 13, 2017).

[15] *See* H.R. Rep. No. 96-1387, at 1–5 (1980); H.R. 794, 96th Cong. (1980).

[16] *See* H.R. Rep. No. 107-594, at 1–2 (2002); H.R. 495, 107th Cong. (2002); *see also* United States v. Traficant, 368 F.3d 646, 648 (6th Cir. 2004).

[17] The House Rules note an example in which the Speaker of the House advised a Member who was facing disciplinary proceedings that he should resign, but also note that "this is not usual." H.R. Doc. No. 114-192, at 28 (2017). The House did not identify which case it was relying upon in this example.

[18] *See, e.g.*, S. Rep. No. 104–137 (1995); H.R. Rep. No. 100-506 (1988); H.R. Rep. No. 97-110 (1981).

[19] S. Rep. No. 104-137, at 1–2 (1995).

[20] H.R. Rep. No. 100-506, at 1–2 (1988).

ArtI.S5.C2.2.5 Misconduct Occurring Prior to Election or Reelection

Article I, Section 5, Clause 2:

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

Whether the House and Senate may expel a Member for conduct that solely occurred prior to an intervening election appears unresolved. House and Senate practice (drawn primarily from committee reports relating to expulsion resolutions that were either not approved or not acted upon by the full body) concerning expulsions for prior misconduct are relatively inconsistent and do not appear to establish a clear and constant interpretation of whether prior conduct (i.e., conduct occurring before an intervening election)[1] may form the basis for an expulsion.[2] While the reasoning underlying the House and Senate approach to expulsions for prior misconduct does not appear to be uniform, and thus may have limited value in understanding the constitutional power,[3] some evidence suggests that both the House and the Senate have, on occasion, "distrusted their power" to expel for such conduct.[4] Manifestations of

[1] Both bodies have, at times, distinguished between (1) conduct occurring during a Member's previous term of office and (2) conduct (either private or public) that occurred prior to the Member's first election to Congress. *See e.g.,* S. Rep. No. 77-1010, at 6 (1942); H.R. Rep. No. 42-81, at 13 (1872). However, to the extent that the justification for nor expelling a Member for conduct that occurred prior to his last election rests on a reluctance to overturn the decision of the voters, this report treats the two groups of prior conduct similarly.

[2] *See* Memorandum to Hon. Louis Stokes, Chairman, Committee on Standards of Official Conduct *in* H.R. Rep. No. 97-110, at 156 (1981); 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 1283–89 (1907) (discussing precedents dealing with the question of expulsion for conduct "committed before election.").

[3] *See* United States v. Nixon, 418 U.S. 683, 703 (1974); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 11 (D.D.C. 2013) (interpreting Nixon as holding that "each branch of government is empowered to interpret the Constitution in the first instance when defining and performing its own constitutional duties, and that one branch's interpretation of its own powers is due deference from the others."). *See also* The Pocket Veto Case, 279 U.S. 655, 689 (1929); 1 Joseph Story, Commentaries on the Constitution of the United States § 838 (1833) (noting that questions regarding what conduct may be punished and what punishment may be applied "do not appear to have been settled by any authoritative adjudication of either house of [C]ongress"); Timothy Zick, *The Consent of the Governed: Recall of United States Senators*, 103 Dick. L. Rev. 567, 596 (1999) ("There continues to be much confusion concerning the proper boundaries of the power to expel."). *But see* NLRB v. Canning, 573 U.S. 513, 525 (2014) (noting that "this Court has treated practice as an important interpretive factor even when the nature or longevity of that practice is subject to dispute").

[4] *See* Rules of the House of Representatives, H.R. Doc. No. 96-398, at 27 (1981). The House Manual no longer contains this statement. *See* Rules of the House of Representatives, H.R. Doc. No. 114-192, at 28–9 (2017). *See also* H.R. Rep. No. 56–85, at 4 (1900) ("Both Houses have many times refused to expel where the guilt of the Member was apparent; where the refusal to expel was put upon the ground that the House or Senate, as the case might be, had no right to expel for an act unrelated to the Member as such, or because it was committed prior to his election.") Yet, it appears that neither the House or the Senate has previously expelled a Member for conduct that solely occurred prior to the Member's election to Congress. It can, however, be difficult to identify the specific date that misconduct giving rise to an expulsion occurred. For example, there is some ambiguity with regard to the timing of the conduct giving rise to the expulsion of Senator William Blount. However, a subsequent Senate report determined the offending conduct to have occurred after his first election, and also noted that "we have not been able to find a single case of expulsion where the crime or gross impropriety occurred outside of the time of membership." S. Rep. No. 77-1010, at 6 (1942). Similarly, the report recommending the expulsion of Senator Waldo Johnson, which was ultimately approved by the Senate, made reference to that fact that "[p]revious to his election to the Senate Mr. Johnson was known in Missouri, as entertaining secession proclivities," but it does not appear that that statement represented the sole grounds for the expulsion. S. Rep. No. 37-5 (1862). In the case of Senator Robert Packwood, a Senate Committee recommended expulsion on grounds that included prior misconduct, but the Senator resigned before the full Senate took action on those recommendations. *See* S. Rep. No. 104-137, at 9–11 (1995). Similarly, in the House, Raymond Lederer resigned after a committee recommended his expulsion for conduct that occurred prior to his last election. H.R. Rep. No. 97-110, at 17 (1981).

this "distrust" through more restrictive interpretations of the expulsion power appear to be driven more by considerations of policy than of constitutional authority.[5]

Reticience by the House or Senate to expel a Member for conduct that occurred prior to election may be justified by reluctance to supplant the judgment of the duly elected Member's constituency with that of a supermajority of the body. That justification is strongest when the Member's constituency is fully aware of the prior misconduct, but nevertheless elects the Member to represent them.[6] In short, the body must balance its interest in "assur[ing] the integrity of its legislative performance and its institutional acceptability to the people at large as a serious and responsible instrument of government,"[7] with respect for the voting public's electoral decisions and deference to the popular will and choice of the people.[8] This view is consistent with James Madison's statements in the *Federalist Papers* that "frequent elections" would be the chief means of ensuring "virtuous" legislators[9] and Justice Joseph Story's view that, although the expulsion power was both necessary and critical to the integrity of each house, exercise of the power was "at the same time so subversive of the rights of the people," as to require that it be used sparingly and to be "wisely guarded" by the required approval of a two-thirds majority.[10]

Congress's attempt to balance House and Senate integrity with deference to the people's will does not appear to be based on a clear constitutional prescription. As a 1914 House Judiciary Report noted:

> In the judgment of your committee, the power of the House to expel or punish by censure a Member for misconduct occurring before his election or in a preceding or former Congress is sustained by the practice of the House, sanctioned by reason and sound policy and in extreme cases is absolutely essential to enable the House to exclude from its deliberations and councils notoriously corrupt men, who have unexpectedly and suddenly dishonored themselves and betrayed the public by acts and conduct rendering them unworthy of the high position of honor and trust reposed in them . . . .
>
> But in considering this question and in arriving at the conclusions we have reached, we would not have you unmindful of the fact that we have been dealing with the question merely as one of *power*, and it should not be confused with the question of *policy* also involved. As a matter of sound policy, this extraordinary prerogative of the House, in

[5] *See, e.g.,* H.R. Rep. No. 63-570, at 4–5 (1914) (noting the distinction between questions of "power" and questions of "policy" and concluding that "[a]s a matter of sound policy, this extraordinary prerogative of the House, in our judgment, should be exercised only in extreme cases . . . ."); H.R. Rep No. 96-351, at 4–5 (1981) (noting that "power is not to be confused with policy or discretion"); S. Rep. No. 104-137, at 7–8 (1995) (noting that "[t]here have been indications that the Senate, in an expulsion case, might not exercise its disciplinary discretion with regard to conduct in which an individual had engaged before the time he or she had been a member.").

[6] *See* Memorandum to Hon. Louis Stokes, Chairman, Committee on Standards of Official Conduct *in* H.R. Rep. No. 97-110, at 156–57 (1981) (noting that with regard to expulsion for prior conduct "the issue ultimately is one of Congressional policy, and not Constitutional power"). "Indeed, the House precedents against punishment for prior misconduct have sometimes been characterized as constituting a doctrine of 'forgiveness,' resting on the assumption that the electorate, knowing full well of the Member's misconduct, has consciously chosen to forgive those acts and return him to the House." *Id.* at 157.

[7] Powell v. McCormack, 395 F.2d 577, 607 (D.C. Cir. 1968) (McGowan, J., concurring).

[8] *See* 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 257 (statement of Alexander Hamilton) ("After all, sir, we must submit to this idea, that the true principle of a republic is, that the people should choose whom they please to govern them. Representation is imperfect proportion as the current of popular favor is checked. This great source of free government, popular election, should be perfectly pure, and the most unbounded liberty allowed.").

[9] The Federalist No. 57 (James Madison).

[10] 1 Joseph Story, Commentaries on the Constitution of the United States § 837 (1833).

> our judgment, should be exercised only in extreme cases and always with great caution and after due circumspection, and should be invoked with greatest caution where the acts of misconduct complained of had become public previous to and were generally known at the time of the Member's election.[11]

To exercise the power of expulsion in a case in which the misconduct was generally known at the time of the Member's election, the report further noted, the House "might abuse its high prerogative, and in our opinion might *exceed the just limitations of its constitutional authority* by seeking to substitute its standards and ideals for the standards and ideals of the constituency of the Member who had deliberately chosen him to be their Representative."[12]

ArtI.S5.C2.2.6 House of Representatives Treatment of Prior Misconduct

Article I, Section 5, Clause 2:

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

Whether the Expulsion Clause extends to misconduct that occurred prior to a Member's election (or reelection) has been explored more thoroughly in the House than in the Senate.[1] As early as 1884, Speaker John G. Carlisle responded to a proposed House investigation of alleged misconduct that occurred prior to a Member's election by stating that "this House has no right to punish a Member for any offense alleged to have been committed previous to the time when he was elected as a member of the House. That has been so frequently decided in the House that it is no longer a matter of dispute."[2] Nevertheless, disagreement exists on whether a Member can be expelled for prior misconduct.[3]

In 1872, two House committees investigating Members Oakes Ames and James Brooks for their role in the Credit Mobilier scandal reached different conclusions.[4] The alleged misconduct had occurred "four or five years" prior to being brought to the attention of the House and before the Members had been elected to Congress.[5] A special committee found that the House had authority to expel a Member for conduct occurring in a prior Congress, and before an intervening election, and recommended that the House exercise that power with respect to Ames and Brooks.[6] The report concluded that the Constitution placed "no qualification [on] the [expulsion] power" and assigned no restriction as to when an offense that

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[11] H.R. Rep. No. 63-570, at 4–5 (1914) (emphasis added).

[12] *Id.* at 5 (emphasis added).

[1] In addition to the examples discussed below, *Hinds* lists a number of precedents relating to the House's power to expel a Member for prior conduct. 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States § 1283–89 (1907). For example, in 1799, the House declined to expel Matthew Lyon for an offense which had been committed while he was a Member of the House but before his last election. *Id.* § 1284. In 1858, the House laid on the table a committee report concluding that it was "inexpedient" for the House to take action against O.B. Matteson for known misconduct prior to an election. *Id.* § 1285. In 1876, the House declined to take action against Members William S. King and John G. Schumaker for violations of law committed in a preceding Congress. *Id.* § 1283.

[2] H.R. Rep. No. 69–30, at 1–2 (1925).

[3] The House and Senate power to discipline their members generally includes the authority to censure, reprimand, fine, or expel. *See* Josh Chafetz, Democracy's Privileged Few: Legislative Privilege and Democratic Norms in the British and American Constitutions 2010 (2007).

[4] *Compare* H.R. Rep. No. 42–77 (1872), *with* H.R. Rep. No. 42–81 (1872). The Credit Mobilier scandal involved the sale of shares of stock to Members at below market rates. *See* Chafetz, *supra* note 3, at 221.

[5] H.R. Rep. No. 63–570, at 3 (1914).

[6] H.R. Rep. No. 42–77, at XIX (1872).

warranted expulsion had to occur.[7] The committee interpreted the expulsion power to have no apparent limit, reasoning that although inappropriate, "[i]f two-thirds of the House shall see fit to expel a man . . . without any reason at all . . . they have the power, and there is no remedy except by appeal to the people."[8] The committee also addressed whether the expulsion power authorized the House to override the will of a Member's constituency, who, with full knowledge of the questionable conduct, chose to elect him as their representative:

> The committee have no occasion in this report to discuss the question as to the power or duty of the House in a case where a constituency, with a full knowledge of the objectionable character of a man, have selected him to be to their representative. It is hardly a case to be supposed that any constituency, with a full knowledge that a man had been guilty of an offense involving moral turpitude, would elect him. The majority of the committee are not prepared to concede such a man could be forced upon the House, and would not consider the expulsion of such a man any violation of the rights of the electors, for while the electors have rights that should be respected, the House as a body has rights also that should be protected and preserved.[9]

The House Judiciary Committee reached a different conclusion with respect to Ames and Oakes, however, adopting a much narrower view of the expulsion power.[10] According to the Committee, so long as a Member "does nothing which is disorderly or renders him unfit to be in the House while a member thereof . . . the House has no right or legal constitutional jurisdiction or power to expel the member."[11] In support of this conclusion, the Committee also addressed the right of the Member's constituency, noting: "This is a Government of the people, which assumes that they are the best judges of the social, intellectual, and moral qualifications of their Representatives whom they are to choose, not anybody else to choose for them . . . ."[12] Ultimately, the House chose to censure, rather than expel, Ames and Brooks.[13] However, in adopting the censure resolution, the House specifically *refused* to agree to a preamble that asserted that "grave doubts exist as to the rightful exercise by this House of its power to expel a Member for offenses committed by such Member long before his election thereto and not connected with such election."[14]

Other House examples, however, suggest that the House has viewed itself, at times, as lacking the power to expel a Member for misconduct occurring prior to the individual's last election.[15] The House Rules Manual, for example, reflects different interpretations: while previously providing that "both Houses have distrusted their power to punish in such cases," it no longer makes such a statement.[16] Similarly, a House select committee investigating the possible expulsion of John W. Langley stated in 1925 that "with practical uniformity the

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[7] *Id.* at XIV.

[8] *Id.* at XVII.

[9] *Id.* at XVI–XVII.

[10] H.R. Rep. No. 42-81, at 7–13 (1873).

[11] *Id.* at 13.

[12] *Id.* at 8.

[13] H.R. Rep. No. 63-570, at 4–5 (1914).

[14] *Id.* at 4 ("The House ignored the recommendations of the Judiciary Committee and punished two of its Members by censure and declined to express doubt as to its power and jurisdiction by refusing to adopt the preamble.").

[15] *See, e.g.,* H.R. Rep. No. 56-85, at 4 (1900) ("Both houses have many times refused to expel where . . . [the misconduct] was committed prior to his election."); H.R. Rep. No. 94–1477, at 2 (1976) (recommending that a Member not be expelled because a prior conviction did "not relate to his official conduct while a Member of Congress.").

[16] *Compare* Rules of the House of Representatives, H.R. Doc. No. 96-398, at 27 (1981), *with* Rules of the House of Representatives, H.R. Doc. No. 114-192, at 28–9 (2017).

precedents in such cases are to the effect that the House will not expel a Member for reprehensible action prior to his election as a Member . . . . "[17] A 1972 House report similarly noted that "[p]recedents, without known exception, hold that the House will not act in any way against a Member for any actions of which his electorate had full knowledge at the time of his election. The committee feels that these precedents are proper and should in no way be altered."[18]

The Supreme Court relied upon these and other House precedents in *Powell v. McCormack*.[19] Although urged by the House to view Powell's exclusion as an expulsion, the Court would not assume that the House would have voted to exclude Powell given that Members had "expressed a belief that such strictures [on expelling a Member for prior conduct] apply to its own power."[20] The Court specifically stated, however, it was not ruling on the House's authority to expel for past misconduct.[21]

Two additional examples provide additional insight into the ambiguity of the House's various positions on the reach of the expulsion power. In 1979, a House committee recommended censure of Charles C. Diggs, Jr., when he was reelected to the House after being convicted of a criminal kickback scheme involving his congressional employees.[22] In discussing the House's authority to punish a Member for known conduct that occurred prior to an election, the Committee noted that "the House has jurisdiction under Article I, Section 5 to inquire into the misconduct of a Member occurring prior to his last election, and under appropriate circumstances, to impose *at least* those disciplinary sanctions that *fall short of expulsion*."[23] Although perhaps questioning whether expulsion can reach prior misconduct, the committee did not conclude that it lacked the power to expel in such a case, instead deeming it "unwise" to "express an opinion on the Constitutional issue of whether the House has the power to expel" for prior misconduct.[24] The report added that "the House cannot overlook entirely the reelection of Rep. Diggs following his conviction and due respect for that decision by his constituents is a proper element in the consideration of this case."[25]

In 1981, a House committee recommended expulsion of Raymond F. Lederer for misconduct occurring while he was a Member, but prior to his reelection to Congress.[26] A grand jury indicted Lederer in connection with the ABSCAM inquiry before his reelection, but he was not convicted until after the voters of his district had returned him to Congress.[27] As a result of this timing, the Special Counsel to the House Committee on Standards of Official Conduct concluded that "the voters did not have full knowledge of the offenses he committed at the time they reelected him, and there appears to be no constitutional impediment to the Congressional expulsion power under such circumstances."[28]

[17] H.R. Rep. No. 69-30, at 1–2 (1925).
[18] H.R. Rep. No. 92-1039, at 4 (1972).
[19] *Powell*, 395 U.S. at 508–10.
[20] *Id.* at 510.
[21] *Id.* at 507, n. 27.
[22] H.R. Rep. No. 96–351, at 3–5 (1979).
[23] *Id.* at 3.
[24] *Id.* at 5.
[25] *Id.*
[26] H.R. Rep. No. 97–110, at 16 (1981).
[27] *Id.* at 157.
[28] *Id.* at 145. Lederer resigned before the House took action on the expulsion recommendation.

ArtI.S5.C2.2.7 Senate Treatment of Prior Misconduct

Article I, Section 5, Clause 2:

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

The Senate's use of expulsion for prior misconduct[1] suggests that the Senate does not have a clearly established view on whether a Member may be expelled for conduct that occurred prior to the Member's election to the Senate.[2] In 1807, John Quincy Adams provided an early, broad conception of the Senate's expulsion power, writing in a committee report that "[b]y the letter of the Constitution the power of expelling a Member is given to each of the two Houses of congress, without any limitation other than that which requires a concurrence of two-thirds."[3] The two-thirds requirement was, in the opinion of the committee, "a wise and sufficient guard against the possible abuse of this legislative discretion."[4] Yet, the report also suggested that whether the public was aware of the misconduct was significant in asserting that expulsion was the appropriate remedy when misconduct was "suddenly and unexpectedly revealed to the world."[5]

Other Senate precedents suggest that when misconduct occurred is a factor in determining whether expulsion is appropriate. For example, as Senator-elect Arthur R. Gould prepared to take the oath of office after being elected in 1926, allegations were made that he engaged in bribery in connection with a Canadian railroad contract that occurred in 1911.[6] A Senate committee investigated and recommended that the Senate disregard all charges.[7] In the committee report, a question was raised as to whether, under the circumstances, the Senate had the authority to expel.[8] Although the committee expressed no opinion on the "important constitutional questions touching the power of the Senate," the report nevertheless stated that "expulsion of a Member of the Senate for an offense alleged to have been committed prior to his election must depend upon the peculiar facts and circumstances of the particular case."[9] The full Senate later adopted the committee's recommendation to disregard all charges.

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[1] This lack of precedent may be due to the fact that Senators face elections less frequently (thereby reducing the possibility of misconduct occurring prior to an intervening election) and, prior to adoption of the Seventeenth Amendment, were not directly elected by the people. U.S. Const. amend. XVII. *But see* 41 Cong. Rec. 936 (Jan. 11, 1907) (statement of Sen. Hopkins) (asserting that the William N. Roach case "settled forever the question that the Senate will not undertake to revise the judgment of a State in determining the character of a man whom the State shall select as a United States Senator. The Senate will content itself with what occurs while such Senator is a member of this body.").

[2] One commentator has described the Senate's power in this area as existing in a "twilight zone of the Senate's jurisdiction." George H. Haynes, The Senate of the United States: Its History and Practice 1892 (2d ed. 1960). For a Senate floor debate on the topic, see Cong. Globe, 37th Cong., 2d Sess. 968 (1862). In addition to the examples discussed below, *Hinds* lists two precedents relating to the Senate's power to expel a Member for prior conduct. 2 Asher C. Hinds, Hinds' Precedents of the House of Representatives of the United States §§ 1288–89 (1907) (hereinafter Hinds' Precedents). In 1796, the Senate declined to pursue action against Humphrey Marshall for alleged criminal conduct that occurred prior to his election. 2 Hinds' Precedents § 1288. In 1893, the Senate "discussed" its power to take action against William N. Roach who was "charged with a crime alleged to have been committed before his election," but ultimately concluded to take no action. 2 Hinds' Precedents § 1289.

[3] *See* 2 Hinds' Precedents § 1264.

[4] *Id.*

[5] *Id.*

[6] United States Senate: Election, Expulsion, and Censure Cases 1793–1990, S. Doc. No. 103-33, at 334–35 (1995).

[7] S. Rep. No. 69-1715, at 12 (1927).

[8] *Id.*

[9] *Id.*

ArtI.S5.C2.2.7
Senate Treatment of Prior Misconduct

A Senate committee took a highly restrictive view of the Senate's expulsion power in the exclusion case of Senator William Langer.[10] Shortly after his election to the Senate in 1941, the Senate received allegations of the Senator's participation in a wide variety of misconduct, including a bribery and kickback scheme during his time as a state official.[11] A Senate committee investigated the matter and in its report recommended that Langer be excluded on the grounds that he lacked the required "moral fitness" to be a Senator.[12] The report also discussed the absence of any authority to expel Langer from the Senate. "This committee finds," the report concluded, "that expulsion cannot occur unless the offender is a member, at the time when the injury to the Senate insides."[13] The Committee did qualify that blanket conclusion, however, by reserving the Senate's right to expel a Member for *unknown* prior misconduct, ultimately concluding that the Constitution "does not contemplate expulsion for any crime or violation of rules, or Infraction of law, except such as occurred either during membership or was first disclosed during membership to the impairment of the honor of the Senate."[14]

The recommended expulsion of Senator Robert Packwood in 1995 supports the conclusion that the Senate has authority to expel a Member for conduct prior to election, at least when the conduct was not previously known and occurred during the Member's previous term in office. In that case, the Senate Ethics Committee voted unanimously to recommend that the Senate expel Senator Packwood for various allegations, including acts of sexual misconduct stretching back to 1969.[15] Much of the Senator's conduct, however, was not uncovered until after his 1992 reelection.[16]

The Committee report began by articulating a broad expulsion power, acknowledging that the Supreme Court had "implied an unqualified authority of each House of Congress to discipline a Member for misconduct, regardless of the specific timing of the offense."[17] The report also made a distinction between the power of censure and the power to expel, similar to that which was made by the House in the 1979 case of Charles C. Diggs, Jr., noting that "[h]istorically, neither House of congress has abdicated its ability to punish a Member in the form of censure" for prior misconduct.[18] With regard to expulsion, the report noted only that "[t]here have been indications that the Senate, in an expulsion case, might not exercise its disciplinary discretion with regard to conduct in which an individual had engaged before the time he or she had been a member."[19] For this proposition, the Senate report cited a single past expulsion case in which the Senate did not act on a specific charge "since it was to have been taken previously to the election" of the Senator.[20]

House and Senate examples appear to support the conclusion that both bodies have been "less than consistent" in their views on the expulsion power's application to conduct occurring

[10] S. Rep. No. 77-1010, at 9–13 (1942).

[11] United States Senate: Election, Expulsion, and Censure Cases 1793–1990, S. Doc. No. 103-33, at 368–70 (1995).

[12] *Id.* at 369.

[13] S. Rep. No. 77-1010, at 6 (1942).

[14] *Id.* at 13, n.4. (emphasis added). Senate votes to both exclude and expel Langer each failed. S. Doc. No. 103-33, at 370 (1995).

[15] S. Rep. No. 104-137, at 7–8 (1995).

[16] *Id.* at 1–2.

[17] *Id.* at 39–40.

[18] *Id.* at 40.

[19] *Id.*

[20] *Id.* at n. 65.

prior to a Member's last election.[21] However, in either house, the key factors for consideration include whether the Member's constituency had knowledge of the misconduct and whether the misconduct, though taking place before an intervening election, nonetheless occurred during one of the Member's previous terms in office.[22] However, exercising restraint in expelling a Member generally does not appear to be due to a constitutional restriction; rather, it is a policy choice based on respect for the democratic system.[23]

Clause 3—Records

ArtI.S5.C3.1 Requirement that Congress Keep a Journal

Article I, Section 5, Clause 3:

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

Justice Joseph Story explained that the object of the requirement in Article I, Section 5, Clause 3, that the House of Representatives and Senate each keep of "a Journal of its Proceedings" is "to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents."[1] In his *Commentaries on the Constitution of the United States*, Justice Story noted that the Journal requirement prevents secrecy and the "intrigue and cabal" that secrecy facilitates.[2] Justice Story also noted that the Journal requirement aids civic understanding and confidence in the government.[3] Finally, he noted that public interest in and knowledge of Congress's proceedings serves as a bellwether of the Republic's health. He stated:

> So long as known and open responsibility is valuable as a check, or an incentive among the representatives of a free people, so long a journal of their proceedings, and their votes, published in the face of the world, will continue to enjoy public favour, and be demanded by public opinion. When the people become indifferent to the acts of their representatives, they will have ceased to take much interest in the preservation of their liberties. When the journals shall excite no public interest, it will not be a matter of surprise, if the constitution itself is silently forgotten, or deliberately violated.[4]

When the Journal of either House is put in evidence for the purpose of determining whether the yeas and nays were ordered, and what the vote was on any particular question, the Journal must be presumed to show the truth, and a statement therein that a quorum was

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[21] *See* Memorandum to Hon. Louis Stokes, Chairman, Committee on Standards of Official Conduct *in* H.R. Rep. No. 97-110, at 156 (1981).

[22] *See, e.g.,* H.R. Rep. No. 42-81, at 7–13 (1872); S. Rep. No. 77-1010, at 6–13 (1942).

[23] *Id.*

[1] 2 Joseph Story, Commentaries on the Constitution of the United States § 838 (1833). *See also* Field v. Clark, 143 U.S. 649, 670 (1892).

[2] 2 Joseph Story, Commentaries on the Constitution of the United States § 839 (1833) ("Intrigue and combination are more commonly found connected with secret sessions than with public debates, with the workings of the ballot box, than with the manliness of viva voce voting.").

[3] *Id.* § 838 ("The public mind is enlightened by an attentive examination of the public measures; patriotism, and integrity, and wisdom obtain their due reward; and votes are ascertained, not by vague conjecture, but by positive facts.").

[4] *Id.* § 839.

present, though not disclosed by the yeas and nays, is final.[5] But when an enrolled bill, which has been signed by the Speaker of the House and by the President of the Senate, in open session receives the approval of the President and is deposited in the Department of State, its authentication as a bill that has passed Congress is complete and unimpeachable, and it is not competent to show from the Journals of either House that an act so authenticated, approved, and deposited, in fact omitted one section actually passed by both Houses of Congress.[6]

Clause 4—Sessions

ArtI.S5.C4.1 Adjournment of Congress

Article I, Section 5, Clause 4:

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

In Article I, Section 4, Clause 2, the Framers stipulated when Congress would assemble and begin conducting its official business.[1] In Article I, Section 5, Clause 4, the Framers gave the two chambers of Congress—the House of Representatives and the Senate—authority to adjourn.[2] The House and Senate can use this power independent of each other subject to the requirement that if one Chamber wants to adjourn for more than three days, it requires the other's consent.[3] If the two houses cannot agree to adjourn, the Constitution gives the President power to adjourn them.[4] Article II, Section 3, provides in part "in Case of

[5] United States v. Ballin, 144 U.S. 1, 4 (1892). *See also* NLRB v. Canning, 573 U.S. 513, 551–52 (2014) ("[W]hen the Journal of the Senate indicates that a quorum was present, under a valid Senate rule, at the time the Senate passed a bill, we will not consider an argument that a quorum was not, in fact, present. The Constitution requires the Senate to keep its Journal . . . and 'if reference may be had to' it, 'it must be assumed to speak the truth.'") (quoting *Ballin*, 144 U.S. at 4).

[6] Field v. Clark, 143 U.S. 649 (1892); Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911). *See* the dispute in the Court with regard to the application of *Field* in an origination clause dispute. United States v. Munoz-Flores, 495 U.S. 385, 391 n.4 (1990), and *id.* at 408 (Scalia, J., concurring). A parallel rule holds in the case of a duly authenticated official notice to the Secretary of State that a state legislature has ratified a proposed amendment to the Constitution. Leser v. Garnett, 258 U.S. 130, 137 (1922); *see also* Coleman v. Miller, 307 U.S. 433 (1939).

[1] U.S. Const. art. I, § 4, cl. 2 ("The Congress shall assemble at least once in every Year, and such Meeting shall be on the first Monday in December, unless they shall by Law appoint a different Day."). Article I, Section 4, Clause 2 was superseded by ratification of the Twentieth Amendment in 1933. U.S. Const. amend. XX ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall by law appoint a different day.").

[2] U.S. Const. art. I, § 5, cl. 4. For additional information on adjournments, see Richard S. Beth & Valerie Heitshusen, Cong. Rsch. Serv., R42977, Sessions, Adjournments, and Recesses of Congress (2016), https://crsreports.congress.gov/product/pdf/R/R42977. Beth and Heitshusen state: "In either a daily or an annual context, generally speaking, a *session* is a period when a chamber is formally assembled as a body and can, in principle, engage in business. *A session* begins when a chamber *convenes*, or assembles, and ends when it *adjourns*. In the period between convening and adjournment, the chamber is said to be 'in session.' Once a chamber adjourns, it may be said to 'stand adjourned,' and until it reconvenes, it may be said to be 'out of session,' or 'in adjournment.' The period from a chamber's adjournment until its next convening is also often called an adjournment. The term *recess*, by contrast, is generally used to refer to a temporary suspension of a session, or a break within a session. For a break within the daily session, this term is a formal designation; for a break within an annual session, the term is only colloquial, but is in general use. In either context, a recess begins when the chamber recesses, or 'goes into recess.' For most purposes, it can be said that a recess, like an adjournment, ends when the chamber reconvenes. During the period between recessing and reconvening, the chamber is said to be 'in recess' or to 'stand in recess.' When a chamber reconvenes from a recess, the suspended session resumes." *Id.*

[3] U.S. Const. art. I, § 5, cl. 4.

[4] U.S. Const. art. II, § 3. See Joseph Story, Commentaries on the Constitution of the United States § 1557 (1833) ("The power to adjourn congress in cases of disagreement is equally indispensable; since it is the only peaceable way of

Disagreement between [the House of Representatives and the Senate], with Respect to the Time of Adjournment, [the President] may adjourn them, to such Time as he shall think proper."[5]

In his *Commentaries on the Constitution of the United States*, Justice Joseph Story reasoned that by empowering Congress to determine when to adjourn, the Framers prevented the President from using the royal governor tactic of squelching dissent by adjourning colonial legislatures.[6] Consequently, Article I, Section 5, Clause 4 checked the President's power over Congress.[7] Likewise, by requiring the two chambers of Congress to agree to any adjournment longer than three days, Clause 4 prevented either house from frustrating the legislative process by adjourning. In addition, by authorizing the President to resolve disagreements between the two chambers on when they would adjourn, the Framers created an incentive for the chambers to cooperate.

Section 6—Rights and Disabilities

Clause 1—Pay, Privileges, and Immunities

ArtI.S6.C1.1 Compensation of Members of Congress

Article I, Section 6, Clause 1:

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

The Compensation Clause of Article I, Section 6, Clause 1 provides for the national government to compensate Members of Congress for their services in amounts set by congressional legislation. With the ratification of the Twenty-Seventh Amendment on May 7, 1992,[1] congressional legislation "varying"—decreasing or increasing—the level of Members' compensation may not take effect until an intervening election has occurred.

The Framers' decision that Members of Congress should be paid from the Treasury of the United States reflected their view that Members of Congress worked for the nation as a whole and should be compensated accordingly. In his *Commentaries on the Constitution of the United States*, Justice Joseph Story reasoned, "If it be proper to allow a compensation for services to the members of congress, there seems the utmost propriety in its being paid out of the public

terminating a controversy, which can lead to nothing but distraction in the public councils."). For discussion on the President's ability to conduct business when the Senate is in recess, see ArtII.S2.C3.1 Overview of Recess Appointments Clause.

[5] U.S. Const. art. II, § 3.

[6] Joseph Story, Commentaries on the Constitution of the United States § 842 (1833).

[7] *Id.* at § 841. Justice Story further noted that "[v]ery different is the situation of parliament under the British constitution; for the king may, at any time, put an end to a session by a prorogation of parliament, or terminate the existence of parliament by a dissolution, and a call of a new parliament." *Id.*

[1] U.S. Const. amend. XXVII ("No law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened."). *See* Twenty-Seventh Amendment discussion at Amdt27.1 Overview of Twenty-Seventh Amendment, Congressional Compensation. On September 25, 1789, James Madison proposed text that would become the Twenty-Seventh Amendment to Congress as one of twelve amendments, ten of which the states quickly ratified and comprise the Bill of Rights. The states would ultimately ratify the Twenty-Seventh Amendment on May 7, 1992. *See* 2 Mark Grossman, Constitutional Amendments 1029, 1031 (2012).

treasury of the United States. The labor is for the benefit of the nation, and it should properly be remunerated by the nation."[2] Conversely, if states or constituents compensated their specific Members of Congress, the Members might be more loyal to those interests than to the good of the nation as a whole. Justice Story observed: "[I]f the compensation were to be allowed by the states, or by the constituents of the members, if left to their discretion, it might keep the latter in a state of slavish dependence, and might introduce great inequalities in the allowance."[3] Concern that state frugality in compensating Members of Congress would reduce the pool of candidates to serve in Congress also drove the Framers' decision to have the Federal Government compensate Members of Congress. As George Mason of Virginia commented during the Constitutional Convention: "[T]he parsimony of the States might reduce the provision so low that . . . the question would be not who were most fit to be chosen, but who were most willing to serve."[4]

From the Founding to 1967, Congress passed legislation setting its rates of pay. In 1967, Congress passed a law that created a quadrennial commission to propose to the President salary levels for top officials of the Government, including Members of Congress.[5] In 1975, Congress legislated to bring Members of Congress within a separate commission system authorizing the President to recommend annual increases for civil servants to maintain pay comparability with private-sector employees.[6] Dissenting Members of Congress attacked the use of commissions to set congressional compensation as violating the Compensation Clause mandate that compensation be "ascertained by Law." Courts, however, rejected these challenges.[7] In the Ethics Reform Act of 1989,[8] Congress provided for a formula to make adjustments to its compensation on an annual basis. Congress, however, has declined to accept the annual adjustment more often than it has accepted the adjustment.[9] Following ratification of the Twenty-Seventh Amendment in 1992, which made pay increases effective only after an intervening election, a federal court of appeals panel ruled that Congress's cost-of-living mechanism did not violate the Twenty-Seventh Amendment, and that a challenge to the quadrennial pay raise provision was not ripe.[10]

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[2] 2 Joseph Story, Commentaries on the Constitution of the United States § 854 (1833).

[3] *Id.*

[4] 1 The Records of the Federal Constitution 216 (Max Farrand ed., 1911) (statement of George Mason). *See also id.* at 372 (with respect to states compensating Members of Congress, Nathanial Gorham stated that he "wished not to refer the matter to the State Legislatures who were always paring down salaries in such a manner as to keep out of offices men most capable of executing the functions of them."); *id.* at 373 ("those who pay are the masters of those who are paid") (statement of Alexander Hamilton).

[5] Pub. L. No. 90-206, § 225, 81 Stat. 642 (1967), *as amended*, Pub. L. No. 95-19, § 401, 91 Stat. 45 (1977), *as amended*, Pub. L. No. 99-190, § 135(e), 99 Stat. 1322 (1985).

[6] Pub. L. No. 94-82, § 204(a), 89 Stat. 421.

[7] Pressler v. Simon, 428 F. Supp. 302 (D.D.C. 1976) (three-judge court), *aff'd summarily*, 434 U.S. 1028 (1978); Humphrey v. Baker, 848 F.2d 211 (D.C. Cir.), *cert. denied*, 488 U.S. 966 (1988).

[8] Pub. L. No. 101-194, § 704(a)(1), 103 Stat. 1769, 2 U.S.C. § 4501.

[9] Ida A. Brudnick, Cong. Rsch. Serv., No. 97-615, Salaries of Members of Congress: Congressional Votes, 1990–2022 (2022), https://crsreports.congress.gov/product/pdf/RS/97-1011/86.

[10] Boehner v. Anderson, 30 F.3d 156, 163 (D.C. Cir. 1994). For additional information on how Members of Congress are compensated, see Ida A. Brudnick, Cong. Rsch. Serv., No. 97-1011, Salaries of Members of Congress: Recent Actions and Historical Tables (2022), https://crsreports.congress.gov/product/pdf/RS/97-1011/86; Ida A. Brudnick, Cong. Rsch. Serv., No. 97-615, Salaries of Members of Congress: Congressional Votes, 1990–2022 (2022), https://crsreports.congress.gov/product/pdf/RL/97-615.

ArtI.S6.C1.2 Privilege from Arrest

Article I, Section 6, Clause 1:

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

In Article I, Section 6, Clause 1, the Framers provided for Members of Congress to be free from arrest when attending or traveling to and from Congress except in cases of treason, felony, or breaches of the peace.[1] In interpreting this provision, the Supreme Court has held that the phrase "treason, felony, and breach of the peace" encompasses all criminal offenses.[2] Consequently, Members are only privileged from arrests arising from civil suits, which were common in America at the time the Constitution was ratified.[3]

In providing for Members to "be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same,"[4] the Framers followed English parliamentary and colonial practices as well as precedent established by the Articles of Confederation. The Articles provided that "the members of Congress shall be protected in their persons from arrests and imprisonments, during the time of their going to and from, and attendance on, Congress, except for treason, felony or breach of the peace."[5] In his *Commentaries on the Constitution of the United States*, Justice Joseph Story discussed the practice of privileging members of Parliament and colonial legislatures from arrest,[6] reasoning that privilege from arrest reflected the "superior duties" of members of legislative bodies to the legislative process and the representation of their constituents.[7] Justice Story stated:

> When a representative is withdrawn from his seat by a summons, the people whom he represents, lose their voice in debate and vote, as they do in his voluntary absence. When a senator is withdrawn by summons, his state loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of the evil admits of

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[1] U.S. Const. art. I, § 6, cl. 1.

[2] Williamson v. United States, 207 U.S. 425, 446 (1908).

[3] Long v. Ansell, 293 U.S. 76, 82 (1934) (citing *Williamson*, 207 U.S. 425).

[4] U.S. Const. art. I, § 6, cl. 1.

[5] Articles of Confederation of 1781, art. V. *See Williamson*, 207 U.S. 425. *See also* Bolton v. Martin, 1 U.S. (1 Dall.) 296, 316 (1788) (recognizing the privilege as covering members of the Pennsylvania Convention on ratifying the Constitution and noting that members "ought not to be diverted from the public business by law-suits, brought against them during the sitting of the House; which, though not attended with the arrest of their persons, might yet oblige them to attend to those law-suits, and to bring witnesses from a distant county, to a place whither they came, perhaps solely, on account of that public business."); Geyer's Lessee v. Irwin, 4 U.S. (4 Dall.) 92, 92 (1790) ("A member of the general assembly is, undoubtedly, privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him. And we think, that upon principle, his suits cannot be forced to a trial and decision, while session of the legislature continues."); Joseph Story, Commentaries on the Constitution of the United States § 856 (1833); 1 William Blackstone, Commentaries on the Laws of England 160–61 (1765) ("Neither can any member of either house be arrested and taken into custody, nor served with any process of the courts of law . . . . These privileges however, which derogate from the common law, being only indulged to prevent the member's being diverted from the public business, endure no longer than the session of parliament, save only as to the freedom of his person: which in a peer is for ever sacred and inviolable, and in a commoner for forty days after every prorogation, and forty days before the next appointed meeting . . . . But this privilege of person does not hold in crimes of such public malignity as treason, felony, or breach of the peace; or rather perhaps in such crimes for which surety of the peace may be required.").

[6] Joseph Story, Commentaries on the Constitution of the United States § 856 (1833).

[7] *Id.* at § 857.

> no comparison. The privilege, indeed, is deemed not merely the privilege of the member, or his constituents, but the privilege of the house also.[8]

Whether the provision in Article I, Section 6, excluding "Treason, Felony, and Breach of the Peace" offenses from the privilege from arrest applied to all criminal offenses or only criminal offenses involving violence and public disturbance has been subject to debate. After examining the historical meaning of the provision, the Supreme Court in *Williamson v. United States*, concluded that the qualifying language encompassed all criminal offenses. The *Williamson* Court adopted the government's position, which was summarized by the Court as follows:

> [T]he words "breach of the peace" should not be narrowly construed, but should be held to embrace substantially all crimes, and therefore as in effect confining the parliamentary privilege exclusively to arrests in civil cases. And this is based not merely upon the ordinary acceptation of the meaning of the words, but upon the contention that the words "treason, felony, and breach of the peace," as applied to parliamentary privilege, were commonly used in England prior to the Revolution, and were there well understood as excluding from the parliamentary privilege all arrests and prosecutions for criminal offenses; in other words, as confining the privilege alone to arrests in civil cases, the deduction being that when the framers of the Constitution adopted the phrase in question they necessarily must be held to have intended that it should receive its well-understood and accepted meaning.[9]

Consequently, under Supreme Court precedent, the privilege from arrest applies only to civil cases.[10] As one commentator has noted: "In practice, since the abolition of imprisonment for debt, this particular clause has lost most of its importance."[11]

While the privilege prevents Members from being arrested in civil suits, it does not prevent them from being served with subpoenas. In *United States v. Cooper*, Thomas Cooper, a newspaper publisher, was indicted under the Sedition Act of 1798 for libeling President John Adams. Cooper sought to compel several members of Congress to testify as witnesses at his trial. In allowing Cooper to subpoena Members of Congress, Justice Samuel Chase, in a Circuit Court decision, stated: "I do not know of any privilege to exempt members of congress from the service, or the obligations of a *subpoena* . . . ."[12] Over a hundred years later, Justice Louis Brandeis reached a similar conclusion in *Long v. Ansell*, holding that the privilege from arrest was limited to arrests in civil cases and did not encompass service of process. Writing for the Court, Justice Brandeis stated: "History confirms the conclusion that the immunity is limited to arrest."[13]

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[8] *Id.*

[9] Williamson v. United States, 207 U.S. 425, 436 (1908). *See also* Coxe v. M'Clenachan & Houston, Special Bail, 3 U.S. (3 Dall.) 478, 478 (1798) (noting the privilege applies when Congress is in session).

[10] *Williamson*, 207 U.S 425. *See also* Gravel v. United States, 408 U.S. 606, 614–15 (1972) (noting that the privilege only applies to arrests in civil cases).

[11] Edward S. Corwin, The Constitution and What It Means Today 23 (Harold W. Chase & Craig R. Ducat eds., 1973) (1958).

[12] United States v. Cooper, 4 U.S. (4 Dall.) 341, 341 (Chase, Cir. J., Dist. Pa. 1800),

[13] Long v. Ansell, 293 U.S. 76, 80 (1934) (holding that Senator Huey P. Long was not exempt from service of civil process). Justice Brandeis further clarified that: "The constitutional privilege here asserted must not be confused with the common-law rule that witnesses, suitors, and their attorneys while in attendance in connection with the conduct of one suit, are immune from service in another. That rule of practice is founded upon the needs of the court, not upon the convenience or preference of the individuals concerned. And the immunity conferred by the court is extended or withheld as judicial necessities require." *Id.* (citing Lamb v. Schmitt, 285 U.S. 222 (1932)).

ArtI.S6.C1.3 Speech or Debate

ArtI.S6.C1.3.1 Overview of Speech or Debate Clause

Article I, Section 6, Clause 1:

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

The Supreme Court has described the Speech or Debate Clause as a provision that cannot be interpreted literally,[1] but instead must be construed "broadly" in order to effectuate the Clause's vital role in the constitutional separation of powers.[2] "Deceptively simple"[3] phrases—such as "shall not be questioned," "Speech or Debate," and even "Senators and Representatives"—have therefore been accorded meanings that extend well beyond their literal constructions.[4] Arguably, this purpose-driven interpretive approach has given rise to some ambiguity in the precise scope of the protections afforded by the Clause. Despite uncertainty at the margins, it is well established that the Clause serves to secure the independence of the federal legislature by providing Members of Congress and their aides with immunity from criminal prosecutions or civil suits that stem from acts taken within the legislative sphere.[5] As succinctly described by the Court, the Clause's immunity from liability applies "even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes."[6] This general immunity principle forms the core of the protections afforded by the Clause.

Once it is determined that the Clause applies to a given action, the resulting protections from liability are "absolute,"[7] and the action "may not be made the basis for a civil or criminal judgment against a Member."[8] In such a situation, the Clause acts as a jurisdictional bar to the legal claim.[9] But this immunity is also complemented by two component privileges (an evidentiary privilege and a testimonial privilege) that emanate from the Clause and can be

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[1] Hutchinson v. Proxmire, 443 U.S. 111, 124 (1979) (noting that the "Court has given the Clause a practical, rather than a strictly literal, reading . . .").

[2] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 501 (1975) ("Without exception, our cases have read the Speech or Debate Clause broadly to effectuate its purposes.").

[3] Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 415 (D.C. Cir. 1995).

[4] Kilbourn v. Thompson, 103 U.S. 168, 204 (1881).

[5] *Eastland*, 421 U.S. at 510–11 (noting that the Clause should be "construed to provide the independence which is its central purpose"); United States v. Johnson, 383 U.S. 169, 182 (1966) ("There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause.").

[6] Doe v. McMillan, 412 U.S. 306, 312–13 (1973).

[7] *Eastland*, 421 U.S. at 503 ("[O]nce it is determined that Members are acting within the 'legitimate legislative sphere' the Speech or Debate Clause is an absolute bar to interference."); *McMillan*, 412 U.S. at 324 ("The business of Congress is to legislate; Congressmen and aides are absolutely immune when they are legislating.").The Court has gone so far as to say that legislative acts may not even be the subject of "inquiry" by either the executive or Judicial Branches. United States v. Brewster, 408 U.S. 501, 509 (1972) ("The privilege protect[s] Members from inquiry into legislative acts or the motivation for actual performance of legislative acts.").

[8] *McMillan*, 412 U.S. at 312.

[9] *See McMillan*, 412 U.S. at 318; *see also* Fields v. Off. of Johnson, 459 F.3d 1, 13 (D.C. Cir. 2006) (quoting *McMillan* and explaining that "[t]he Speech or Debate Clause operates as a jurisdictional bar when 'the actions upon which [a party seeks] to predicate liability [are] 'legislative acts.'").

asserted to prevent certain compelled disclosures. Even if absolute immunity is inappropriate, the evidentiary component of the Clause prohibits the introduction of evidence of legislative acts for use against a Member,[10] while the testimonial privilege protects Members from compelled testimony on protected acts.[11] The Supreme Court has not explicitly framed the protections of the Clause by reference to these two independent component privileges, but has instead implicitly recognized their existence.[12] As a result, these privileges are neither clearly established nor described, and may further contribute to the unsettled aspects of the Clause.

ArtI.S6.C1.3.2 Historical Background on Speech or Debate Clause

Article I, Section 6, Clause 1:

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

The text and purpose of the Speech or Debate Clause can be traced to Parliament's historic struggles for supremacy with the English monarch.[1] Prior to 1689, the English Crown had repeatedly used both the power of prosecution, and its control over the courts, to punish, suppress, or intimidate Members of Parliament who had made statements critical of the Crown during parliamentary debates.[2] The common law of seditious libel "was interpreted with the utmost harshness against those whose political or religious tenets were distasteful to the government," and used to imprison "disfavored" Members of the House of Commons.[3] Following the Glorious Revolution and the new ascension of parliamentary power, the English Bill of Rights of 1689 sought to combat these past abuses by ensuring parliamentary independence through the establishment of a legislative privilege. That seminal document provided that "the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or Place out of Parliament."[4]

Although English history and practice is essential to a complete understanding of the Clause, the Court has noted that the Clause must nevertheless be "interpreted in light of the American experience, and in the context of the American constitutional scheme of government

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[10] United States v. Helstoski, 442 U.S. 477, 487 (1979) (noting that the Court's previous holdings "leave no doubt that evidence of a legislative act of a Member may not be introduced by the Government"); *Brewster*, 408 U.S. at 527 (holding that "evidence of acts protected by the Clause is inadmissible").

[11] Gravel v. United States, 408 U.S. 606, 616 (1972) ("We have no doubt that Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting.").

[12] Indeed, the Supreme Court has never used the phrase "testimonial privilege" or "evidentiary privilege" in discussing the Speech or Debate Clause. In *United States v. Gillock*, the Court referenced an evidentiary privilege for state legislators "similar in scope" to the Clause. 445 U.S. 360, 366 (1980).

[1] United States v. Johnson, 383 U.S. 169, 178–79 (1966) (describing the Clause as "the culmination of a long struggle for parliamentary supremacy" in which "successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators."). For a thorough discussion of the historical evolution of the legislative privilege associated with the Clause *see* Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers 201–10 (2017).

[2] *Johnson*, 383 U.S. at 177–79.

[3] VI Holdsworth, A History of English Law 214 (1927).

[4] 1 W. & M., Sess. 2, c.2.

. . . ."[5] The early American "experience" began with colonial charters and early state constitutions, many of which included some form of legislative privilege that generally tracked the language of the English Bill of Rights.[6] Following the American Revolution, the Articles of Confederation adopted language explicitly enshrining legislative privilege into the Federal Government structure, providing that "[f]reedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress. . . ."[7]

The current text, which draws its key terms "[s]peech," "[d]ebate," and "questioned" directly from the English Bill of Rights, was adopted at the Constitutional Convention without significant discussion or debate.[8] In light of the absence of any contrary intent, and despite the fact that early American history did not "reflect" the same "catalogue of abuses at the hands of the Executive that gave rise to the privilege in England,"[9] it may nonetheless be "reasonably inferred that the framers of the Constitution meant" to incorporate the principles underlying the legislative privilege established in England through the English Bill of Rights "by the use of language borrowed from that source."[10] James Wilson, one of the few Members of the Constitutional Convention to comment on the Clause, called the provision "indispensably necessary" to the "discharge" of the "publick [sic] trust."[11] His view was that Members of Congress must be clothed with the "fullest liberty of speech" so as to "be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."[12] The Clause, therefore, appears to have been adopted for the same basic purpose that undergirded its English and early American ancestors: to preserve the independence and integrity of individual Members of the legislative body by "prevent[ing] intimidation by the executive and accountability before a possibly hostile judiciary."[13] As such, it represents a key pillar of the American separation of powers.

Preventing such intimidation is not "the sole function of the Clause."[14] The Clause also serves a good governance role, effectively barring judicial or executive processes that may "disrupt" or "distract[ ]" from a Member's representative or legislative obligations.[15] Consistent with this anti-distraction rationale, the Clause's broad proscription that Members

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[5] United States v. Brewster, 408 U.S. 501, 508 (1972).

[6] Kilbourn v. Thompson, 103 U.S. 168, 201–02 (1881); Tenney v. Brandhove, 341 U.S. 367, 372–73 (1951).

[7] Articles of Confederation of 1781, art. V; *Johnson*, 383 U.S. at 177.

[8] *Johnson*, 383 U.S. at 177 (citing V Elliot's Debates 406 (1836 ed.)).

[9] *Brewster*, 408 U.S. at 508.

[10] *Kilbourn*, 103 U.S. at 202.

[11] 1 The Works of James Wilson 421 (R. McCloskey ed., 1967); *see also* 1 Joseph Story, Commentaries on the Constitution of the United States § 866 (1833) ("The next great and vital privilege is the freedom of speech and debate, without which all other privileges would be comparatively unimportant or ineffectual.").

[12] 1 The Works of James Wilson 421 (R. McCloskey ed., 1967).

[13] *See Johnson*, 383 U.S. at 180–81 (noting that "it is apparent from the history of the clause that the privilege was [ ] born primarily of a desire . . . to prevent intimidation by the executive and accountability before a possibly hostile judiciary.").

[14] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 502 (1975).

[15] *Id.* at 503 ("Just as a criminal prosecution infringes upon the independence which the Clause is designed to preserve, a private civil action, whether for an injunction or damages, creates a distraction and forces Members to divert their time, energy, and attention from their legislative tasks to defend the litigation. Private civil actions also may be used to delay and disrupt the legislative function."); *Brewster*, 408 U.S. at 507 (noting that the Clause exists to "protect the integrity of the legislative process by insuring the independence of individual legislators"); Powell v. McCormack, 395 U.S. 486, 505 (1969) (stating that "[t]he purpose of the protection afforded legislators is . . . to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions"); Tenney v. Brandhove, 341 U.S. 367, 377 (1951) ("Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good . . . The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial. . . .").

not be "questioned in *any* other place" has been interpreted as limiting not only actions initiated by the Executive Branch—which clearly implicate the separation of powers—but also private civil suits initiated by members of the public—which generally implicate the separation of powers only to a lesser degree.[16]

ArtI.S6.C1.3.3 Activities to Which Speech or Debate Clause Applies

Article I, Section 6, Clause 1:

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

A series of decisions from the Supreme Court address the general scope of the Speech or Debate Clause. These cases elucidate the distinction between legislative acts, such as voting or debating, which are accorded protection under the Clause and are not subject to "inquiry,"[1] and political or other nonlegislative acts, which are not protected by the Clause and therefore may serve as the basis for a legal action.[2] The cases suggest at least three noteworthy themes. First, despite the text, the protections afforded by the Clause extend well beyond "speeches" or "debates" undertaken by "Senators and Representatives."[3] Second, otherwise legitimate political interactions external to the legislative sphere—for example, disseminating information outside of Congress—are generally not considered protected legislative acts.[4] Third, the Clause does not immunize criminal conduct that is clearly not part of the "due functioning" of the legislative process.[5]

The Supreme Court adopted a broad interpretation of "Speech or Debate" from its first assessment of the Clause in the 1881 case *Kilbourn v. Thompson*.[6] In *Kilbourn*, the Court considered whether a civil action could be maintained against Members who were responsible for initiating and approving a contempt resolution ordering an arrest.[7] The Members defended themselves on the ground that their acts were protected by the Clause. The Court agreed, determining that the Members were not subject to suit for their actions.[8]

The Court adopted a constitutional construction of the Clause that extended its protections beyond mere legislative deliberation and argument, holding that "it would be a

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[16] *Eastland*, 421 U.S. at 503 (emphasis added). Even civil suits implicate the separation of powers principles that underlie the Clause as any court order directed at a Member could be viewed as a clash between the judicial and legislative powers. *See id.* ("[W]hether a criminal action is instituted by the Executive Branch, or a civil action is brought by private parties, judicial power is still brought to bear on Members of Congress and legislative independence is imperiled.").

[1] Gravel v. United States, 408 U.S. 606, 616 (1972).

[2] *See, e.g., id.* at 613–29; United States v. Brewster, 408 U.S. 501, 507–29 (1972); United States v. Johnson, 383 U.S. 169, 174–85 (1966); Kilbourn v. Thompson, 103 U.S. 168, 201–05 (1881).

[3] *Kilbourn*, 103 U.S. at 204 (extending the protections of the Clause beyond speeches and debates); *Gravel*, 408 U.S at 616–17 (extending the protections of the Clause to acts of aides).

[4] *See Gravel*, 408 U.S. at 625–26.

[5] *See Johnson*, 383 U.S. at 172.

[6] *Kilbourn*, 103 U.S. at 200–05.

[7] *Id.* at 200.

[8] *Id.* at 201. In reaching its holding, the Court noted that if the Members had ordered the unlawful arrest "in any ordinary tribunal" they would have been liable for the act. *Id.* The Court concluded, however, that the Constitution and the Clause make clear that Congress "is not an ordinary tribunal." *Id.*

narrow view of the constitutional provision to limit it to words spoken in debate."[9] Instead, the Court determined that the Clause applied to "things generally done in a session of the House by one of its members in relation to the business before it," including the presentation of reports, the offering of resolutions, and the act of voting.[10] Accordingly, the Court concluded that although the arrest itself may have been unlawful, the Members were immune from suit and could not be "brought in question" for their role in approving the resolution "in a court of justice or in any other place," as that act was protected by the Clause.[11]

The Court only rarely addressed the Clause after *Kilbourn*.[12] It was not until the 1966 case *United States v. Johnson* that the Court embarked on an attempt to define the protections afforded by the Clause in the context of a criminal prosecution of a Member.[13] In *Johnson*, a former Member challenged his conviction for conspiracy to defraud the United States that arose from allegations he had agreed to give a speech defending certain banking interests in exchange for payment.[14] In prosecuting the case, the government relied heavily on the former Member's motive for giving the speech, introducing evidence that the speech had been made solely to serve private, rather than public, interests.[15] Focusing on the admission of this protected evidence, the Court overturned the conviction. "However reprehensible such conduct may be," the Court concluded that a criminal prosecution, the "essence" of which requires proof that "the Congressman's conduct was improperly motivated," was "precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry."[16] The opinion noted that the Clause must be "read broadly to effectuate its purposes," ultimately concluding that it prohibits a prosecution that is "dependent" upon the introduction of evidence of "the legislative acts" of a Member *or* "his motives for performing them."[17] Although it overturned the conviction, the Court remanded the case to the district court for further proceedings, holding that the government should not be precluded from bringing a prosecution "purged of elements offensive to the Speech or Debate clause" through the elimination of all references to the making of the speech.[18]

The *Johnson* case stands for at least two important propositions. First, the opinion demonstrated that the government is not prohibited from prosecuting conduct that merely relates to legislative duties, but is not itself a legislative act.[19] When a legislative act is not an element of the offense, the government may proceed with its case by effectively "purg[ing]" the introduction of evidence offensive to the Clause.[20] Second, though not explicitly articulating

[9] *Id.* at 204.

[10] *Id.*

[11] *Id.* at 201.

[12] *See* Philip Mayer, *An Uncertain Privilege: Reexamining the Scope and Protections of the Speech or Debate Clause*, 50 Colum. J.L. & Soc. Probs. 229, 233 (2017) ("After *Kilbourn*, the Supreme Court did not substantively address the Clause until almost a century later.").

[13] *Johnson*, 383 U.S. at 170–85.

[14] *Id.* at 170–73. The Member also allegedly agreed to "exert influence" over Department of Justice enforcement decisions. *Id.* at 171. With regard to that aspect of the claim, the Court suggested that an "attempt to influence the Department of Justice" was not legislative. *Id.* at 172.

[15] *Id.* at 177.

[16] *Id.* at 180.

[17] *Id.* at 185.

[18] *Johnson*, 383 U.S. at 185.

[19] *Id.* at 185.

[20] *Id.*

such a privilege, the opinion impliedly introduced the evidentiary component of the Clause by holding that even though a case may go forward, a Member may invoke the Clause to bar admission of specific protected evidence.[21]

The evidentiary privilege component of the Clause was reaffirmed in *United States v. Helstoski*.[22] There, the Court expressly held that any "references to past legislative acts of a Member cannot be admitted [into evidence] without undermining the values protected by the Clause."[23] The Court acknowledged that "without doubt the exclusion of such evidence will make prosecutions more difficult," but reasoned that such a limitation was consistent with a constitutional provision that was "designed to preclude prosecution of Members" entirely when legislative acts form the basis of the claim.[24]

In the 1972 decision of *United States v. Brewster*, which involved a Member's challenge to his indictment on a bribery charge, the Court reaffirmed *Johnson* and clarified that "a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts."[25] The Court made clear that the Clause does not prohibit inquiry into illegal conduct simply because it is "related" to the legislative process or has a "nexus to legislative functions," but rather, the Clause protects only the legislative acts themselves.[26] By adhering to such a limitation, the Court reasoned that the result would be a Clause that was "broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members."[27]

Brewster also drew an important distinction between legislative and political acts. The opinion labeled a wide array of constituent services,[28] though "entirely legitimate," as "political

[21] *Id.* at 173 ("The language of the Speech or Debate Clause clearly proscribes at least some of the evidence taken during trial.").

[22] 442 U.S. 477, 487 (1979).

[23] *Id.* at 489. The *Helstoski* opinion interpreted Johnson as "leav[ing] no doubt that evidence of a legislative act of a Member may not be introduced by the Government in a prosecution . . ." *Id.* at 487.

[24] *Id.* The *Helstoski* opinion also evidenced the Court's unwillingness to address the important question of the proper means by which the protections of the Clause may be waived. *Id.* at 490–94. The waiver question hinges on whether the protections of the Clause inhere to Members as individuals, or to the House and Senate as institutions. If the Clause creates an individual privilege, waiver would need to be made by the individual Member and arguably could not be made by the institution without the Member's consent. If, however, the privilege is institutional, waiver would need to be made by the institution, and arguably could not be made by the individual member without the institution's consent. With regard to individual waiver, the Court saw no need to determine whether an individual Member can waive the Clause's protections, but "assuming that is possible, we hold that waiver can be found only after explicit and unequivocal renunciation of the protection." *Id.* at 490–91. With regard to institutional waiver, the opinion noted that "[t]his Court has twice declined to decide" whether Congress could waive a Member's privilege through a "narrowly drawn statute." *Id.* at 492. The Court again, however, saw "no occasion to resolve" the question. *Id.* The opinion nonetheless "recognize[d] that an argument can be made from precedent and history that Congress, as a body, should not be free to strip individual Members of the protection guaranteed by the Clause from being 'questioned' by the Executive in the courts," but ultimately reiterated that "[w]e perceive no reason to undertake, in this case, consideration of the Clause in terms of separating the Members' rights from the rights of the body." *Id.* at 492–93.

[25] United States v. Brewster, 408 U.S. at 512.

[26] *Id.* at 513, 528.

[27] *Id.* at 525.

[28] These unprotected activities include "a wide range of legitimate 'errands' performed for constituents, the making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside the Congress." *Id.* at 512. Similarly, in *Hutchinson v. Proxmire*, the Court held that informing the public of legislative activities is not protected by the Clause. 443 U.S. 111, 133 (1979) ("Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process. As a result, transmittal of such information by press releases and newsletters is not protected by the Speech or Debate Clause.").

in nature" rather than legislative.[29] As a result, the Court suggested that "it has never been seriously contended that these political matters . . . have the protection afforded by the Speech or Debate Clause."[30]

Turning to the terms of the bribery indictment, the Court framed the fundamental threshold question for any prosecution of a Member of Congress as "whether it is necessary to inquire into how [the Member] spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute."[31] With regard to bribery, the Court reasoned that because acceptance of the bribe is enough to prove a violation of the statute, there was no need for the government to present evidence that the Member had later *voted* in accordance with the illegal promise, "[f]or it is *taking* the bribe, not performance of the illicit compact, that is a criminal act."[32] Because "taking the bribe is, obviously, no part of the legislative function" and was therefore "not a legislative act," the government would not be required to present any protected legislative evidence in order to "make out a prima facie case."[33] In that sense, the Court distinguished the case before it from *Johnson*. Whereas the prosecution in *Johnson* relied heavily on showing the motive for Johnson's floor speech, the prosecution in *Brewster* need not prove any legislative act, but only that money was accepted in return for a promise.

ArtI.S6.C1.3.4 Distraction Rationale and Speech or Debate Clause

Article I, Section 6, Clause 1:

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

Two cases from the late 1960s reveal the Court's view that the Clause embodies a desire to prevent the "distractions" associated with compelling a Member to participate in a legal proceeding. In *Dombrowski v. Eastland*, the Court affirmed the dismissal of a civil action against a Senator for allegedly conspiring with Louisiana state officials to violate the petitioner's Fourth Amendment rights.[1] In doing so, the Court noted broadly, and without additional discussion, that a Member "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves."[2]

Similarly, in *Powell v. McCormack*, the Court suggested that "the purposes of the Speech or Debate Clause are fully protected if legislators are relieved of the burden of defending themselves."[3] The Court further described its underlying reasoning, noting that "[t]he purpose of the protection afforded legislators is not to forestall judicial review of legislative action but

[29] *Brewster*, 408 U.S. at 512.

[30] *Id.*

[31] *Id.* at 526.

[32] *Id.*

[33] *Id.* at 525.

[1] Dombrowski v. Eastland, 387 U.S. 82, 83 (1967). The petitioners were civil rights lawyers alleging that the Chairman and counsel of the Internal Security Subcommittee of the Senate Judiciary Committee conspired with Louisiana State officials to "seize property and records of petitioners by unlawful means." *Id.*

[2] *Id.* at 85.

[3] Powell v. McCormack, 395 U.S. 486, 505 (1969).

to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions."[4] The Court's brief and indefinite articulation of the anti-distraction rationale in these and subsequent cases has given rise to a significant debate among the lower courts regarding whether the principle justifies prohibitions on the disclosure of protected documents, even when not for evidentiary use.[5]

ArtI.S6.C1.3.5 Communications Outside the Legislative Process

Article I, Section 6, Clause 1:

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

The Supreme Court's opinion in *Gravel v. United States* establishes that communications outside of the legislative process are generally not protected by the Clause.[1] *Gravel* involved a Speech or Debate challenge to a grand jury investigation into the disclosure of classified documents by a Senator and his aides.[2] After coming into possession of the "Pentagon Papers"—a classified Defense Department study addressing U.S. involvement in the Vietnam War—Senator Mike Gravel disclosed portions of the document at a subcommittee hearing and submitted the entire study into the record.[3] The Senator and his staff had also allegedly arranged for the study to be published by a private publisher.[4] A grand jury subsequently issued a subpoena for testimony from one of Senator Gravel's aides and the private publisher.[5] Senator Gravel intervened to quash the subpoenas.[6]

The Supreme Court rejected Senator Gravel's effort to shield his aide and the publisher from testifying. The *Gravel* opinion began by reasoning that "[b]ecause the claim is that a Member's aide shares the Member's constitutional privilege, we consider first whether and to what extent Senator Gravel himself is exempt from process or inquiry by a grand jury investigating the commission of a crime."[7] In addressing the scope of the Senator's protections, the Court implied the existence of the testimonial component of the Clause, noting that the

[4] *Id.*

[5] Disagreement among the lower federal courts over whether the Clause prohibits any compelled disclosure of legislative act documents, regardless of purpose, or instead prevents only the evidentiary use of such documents, represents perhaps the chief ongoing dispute over the scope of the Clause's protections. *Compare* United States v. Rayburn House Off. Bldg., 497 F.3d 654, 655 (D.C. Cir. 2007) (holding that the testimonial component of the Clause includes a documentary nondisclosure privilege) *with* United States v. Renzi, 651 F.3d 1012, 1034 (9th Cir. 2011) (holding that the testimonial component of the Clause does not create the documentary nondisclosure privilege outlined in *Rayburn*) and *In re* Fattah, 802 F.3d 516, 529 (3rd Cir. 2015) ("The Speech or Debate Clause does not prohibit the disclosure of privileged documents. Rather, it forbids the evidentiary use of such documents.").

[1] Gravel v. United States, 408 U.S. 606, 622–27 (1972). *Gravel* also exemplifies that the Speech or Debate protections can extend to a Member's personal aides. *Id.* at 616–22.

[2] *Id.* at 608–10.

[3] *Id.* at 608.

[4] *Id.* at 610.

[5] *Id.* at 608.

[6] *Id.* at 609.

[7] *Gravel*, 408 U.S. at 613.

protections of the Clause protect a Member from compelled questioning.[8] The Court did so by stating, without further discussion, that it had "no doubt" that "Senator Gravel may not be made to answer—either in terms of questions or in terms of defending himself from prosecution—for the events that occurred at the subcommittee meeting."[9]

The *Gravel* opinion also drew a clear line of demarcation between protected legislative acts and other unprotected acts not "essential to the deliberations" of Congress.[10] Although the Senator was protected for his actions at the hearing, the Senator's alleged arrangement for private publication of the Pentagon Papers was not "part and parcel of the legislative process" and was therefore not protected by the Clause.[11] In reaching this determination, the Court established a working definition of "legislative act" that remains applicable today, holding that a legislative act is an

> integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.[12]

Private publication, as opposed to publication in the record, was "in no way essential to the deliberations of the Senate."[13] Thus, the Clause provided no immunity from testifying before the grand jury relating to that arrangement.[14]

The Court reaffirmed its views on internal and external distribution of legislative materials in its subsequent decisions in *Doe v. McMillan* and *Hutchinson v. Proxmire*.[15] *McMillan* involved a civil suit brought by parents and students in which it was alleged that the disclosure and publication of "somewhat derogatory" personal information in a congressional committee report on the District of Columbia public school system violated the petitioner's right to privacy.[16] The report was distributed within Congress and ordered printed and distributed by the Government Publishing Office (GPO).[17] The complaint named a variety of defendants, including committee Members, congressional staff, the head of the GPO, and a number of non-congressional parties.[18] The Court began by holding that the claims against the committee Members and their staffs for their activities, such as preparing and approving the report, were "plain[ly] . . . barred" by the Clause.[19] However, the Court found that the public printer enjoyed no Speech or Debate Clause protections for the republication of the report to the public, even though that action was directed by Congress.[20] Public republication of an otherwise protected legislative report, the Court reasoned, was not "an essential part" of the

[8] *Id.* at 626; Brown & Williamson Tobacco Corp. v. Williams, 62 F.3d 408, 418 (D.C. Cir. 1995) (holding that "the Supreme Court recognized the testimonial privilege in *Gravel v. United States*"). *Gravel* involved questioning before a grand jury. 408 U.S. at 613. The D.C. Circuit has suggested, however, that the prohibition extends to questions asked "in a deposition, on the witness stand, and so forth . . ." Fields v. Off. of Johnson, 459 F.3d 1, 14 (D.C. Cir. 2006).

[9] *Gravel*, 408 U.S. at 616.

[10] *Id.* at 625.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 626.

[15] 412 U.S. 306, 308–17 (1973); 443 U.S. 111, 114–133 (1979).

[16] *McMillan*, 412 U.S. at 308 n.1.

[17] *Id.* at 308–09.

[18] *Id.* at 309.

[19] *Id.* at 312.

[20] *Id.* at 313–18.

legislative or deliberative process.[21] In reaching that conclusion, the Court rejected claims that Congress's public "informing function" should fall within the Clause's protections.[22]

Similarly, in *Hutchinson*, the Court held that the Clause did not provide a Senator and his aide with immunity in a defamation suit arising from the Senator's public dissemination of his "Golden Fleece Award," a prize intended to draw attention to wasteful government spending.[23] The suit alleged damages arising from the Senator publicizing the award nationwide through press releases and newsletters.[24] In holding that the Clause did not provide the Member and his aide with immunity, the Court saw no reason "for departing from the long-established rule" that a Member may face liability for republication of legislative statements or reports.[25] Whereas the Senator would be "wholly immune" for his efforts to publicize the award through a speech in the Senate, "neither the newsletters nor the press release was 'essential to the deliberations of the Senate'" and therefore they were not protected.[26] The Court rejected arguments put forward by the Senator that public dissemination of the award came within the protections of the Clause either by advancing the "the duty of Members to tell the public about their activities," an argument previously rejected in *McMillan*, or as a means to influence other Senators.[27] Neither activity, the Court concluded, was "part of the legislative function or the deliberations that make up the legislative process."[28]

ArtI.S6.C1.3.6 Subpoena Power and Congress

Article I, Section 6, Clause 1:

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

In *Eastland v. U.S. Servicemen's Fund*, the Supreme Court concluded that the Clause acts as a significant barrier to judicial interference in Congress's exercise of its subpoena power.[1] The case involved a suit filed by a private non-profit organization against the Chairman of a Senate subcommittee seeking the Court to enjoin a congressional subpoena issued to a bank for the non-profit's account information.[2] The subpoena was issued as part of an investigation into alleged "subversive" activities harmful to the U.S. military conducted by the organization.[3] The Court held that because the "power to investigate and to do so through compulsory process plainly" constitutes an "indispensable ingredient of lawmaking," the Clause made the

[21] *Id.* at 314–15

[22] *Id.* at 317.

[23] Hutchinson v. Proxmire, 443 U.S. 111, 114 (1979). Senator Proxmire had given the award to federal agencies that funded the petitioner's research. *Id.*

[24] *Id.* at 115–16.

[25] *Id.* at 128.

[26] *Id.* at 130 (quoting Gravel v. United States, 408 U.S. 606, 625 (1972)).

[27] *Id.* at 131–33. The opinion drew a clear distinction between the legislative act of a Member informing himself, and the generally non-legislative act of informing the public. *Id.* at 132.

[28] *Id.* at 133.

[1] 421 U.S. 491, 501 (1975).

[2] *Id.* at 494–96.

[3] *Id.* at 493.

subpoena "immune from judicial interference."[4] *Eastland* is generally cited for the proposition that the Clause prohibits courts from entertaining pre-enforcement challenges to congressional subpoenas.[5] As a result, the lawfulness of a subpoena usually may not be challenged until Congress seeks to enforce the subpoena through either a civil action or contempt of Congress.[6]

ArtI.S6.C1.3.7 Persons Who Can Claim the Speech or Debate Privilege

Article I, Section 6, Clause 1:

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

Although the text of the Speech or Debate Clause refers only to "Senators and Representatives," and therefore clearly applies to actions by any Member of Congress,[1] it is now well established that protections of the Clause apply equally to certain congressional staff.[2] Initially, however, the Court seemed apprehensive about such an extension. For example, in early cases the Court held that while Members enjoyed immunity for their actions, the congressional staffers who were also named as defendants, and who were responsible for implementing the Member's directives, did not.[3] Indeed, in *Dombrowski v. Eastland*, the Court relied on language in *Tenney v. Brandhove* in reasoning that the protection of the Clause "'deserves greater respect'" when a legislator is sued "'than where an official acting on behalf of the legislature is sued.'"[4]

However, the Court later shifted course. In *Gravel*, the Court held that the Clause protects an aide's action when the Clause would have protected the same action if it were done by a

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[4] *Id.* at 501.

[5] *See In re* Grand Jury, 821 F.2d 946, 957 (3d Cir. 1987) ("The Supreme Court has held analogously that the Speech or Debate Clause shields Congressmen from suit to block a Congressional subpoena because making the legislators defendants 'creates a distraction and forces Members [of Congress] to divert their time, energy, and attention from their legislative tasks to defend the litigation.'") (citing *Eastland*, 421 U.S. at 503).

[6] United States v. Ryan, 402 U.S. 530, 532 (1971) (noting that in the judicial context that "one who seeks to resist the production of desired information [has a] choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal"); *Eastland*, 421 U.S. at 515–16 (Marshall, J., concurring). While it is generally true that courts will not interfere in valid congressional attempts to obtain information, especially through the exercise of the subpoena power, Justice Thurgood Marshall's concurrence in *Eastland* suggests that the restraint exercised by the courts in deference to the separation of powers is not absolute. *Id.* at 513–18 (Marshall, J., concurring) (clarifying that the Clause "does not entirely immunize a congressional subpoena from challenge," but instead requires only that a Member "may not be called upon to defend a subpoena against constitutional objection"). Justice Marshall thus implied that a challenge to the legitimacy of a subpoena may proceed if it is not directed at Congress or its Members. *Id.* at 517. He did not speculate as to what such a case may look like or "who might be the proper parties defendant." *Id.*

[1] The Clause may be asserted not only by a current Member but also by a former Member in an action implicating his conduct while in Congress. *See* United States v. Brewster, 408 U.S. 501, 502 (1972).

[2] Gravel v. United States, 408 U.S. 606, 616–17 (1972).

[3] *See* Kilbourn v. Thompson, 103 U.S. 168, 200 (1881) (distinguishing between a claim against the Sergeant-at-Arms and a claim against a Member); Dombrowski v. Eastland, 387 U.S. 82, 84–85 (1967) (permitting a claim against an aide, but not the Member); Powell v. McCormack, 395 U.S. 486, 504 (1969) (noting that "although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts").

[4] *Dombrowski*, 387 U.S. at 85 (quoting Tenney v. Brandhove, 341 U.S. at 367, 378 (1951).

Member.[5] An aide, the Court reasoned, should be viewed as the "alter ego" of the Member he or she serves.[6] The *Gravel* Court recognized that the Member and his or her aide must be "treated as one,"[7] noting:

> [I]t is literally impossible, in view of the complexities of the modern legislative process, with Congress almost constantly in session and matters of legislative concern constantly proliferating, for Members of Congress to perform their legislative tasks without the help of aides and assistants; that the day-to-day work of such aides is so critical to the Members' performance that they must be treated as the latter's alter egos; and that if they are not so recognized, the central role of the Speech or Debate Clause—to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary—will inevitably be diminished and frustrated.[8]

The opinion distinguished its earlier decisions on the ground that in those cases, the aides did not themselves engage in legislative acts.[9] Whereas, in *Gravel*, and a number of subsequent cases, the Court was willing to extend the protections of the Clause so long as the act of the aide was itself a legislative act, and therefore would have been protected had it been performed by the Member.[10]

At issue in *Gravel* were the actions of a Member's personal staff, but the Clause applies to others as well. Decisions of the Court have extended the protections of the Clause to committee staff, including those in the position of chief counsel, clerk, consultant, staff director, and investigator.[11]

However, it should be noted that any protections under the Clause that are enjoyed by congressional or legislative staff flow from the Member.[12] They do not inhere personally to the individual. As a result, an "aide's claim of privilege can be repudiated and thus waived by the [Member]."[13] Moreover, the fact that a legislative aide is carrying out a directive from the Member, or even has specific authorization from the House or Senate to take the act in question, "is not sufficient to insulate the act from judicial scrutiny."[14] This principle was underscored in *Kilbourn*, in which the Court denied Speech or Debate Clause immunity for the Sergeant at Arms for carrying out an arrest pursuant to a House resolution,[15] and *Powell v. McCormack*, in which the Court similarly held that a suit could be maintained against the House Sergeant at Arms, Doorkeeper, and Clerk for implementing the House's exclusion of Representative Adam Clayton Powell.[16]

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[5] *Gravel*, 408 U.S. at 628 (holding that an aide's "immunity, testimonial or otherwise, extends only to legislative acts as to which the Senator himself would be immune").

[6] *Id.* at 617.

[7] *Id.* at 616 (quoting United States v. Doe, 455 F.2d 753, 761 (1972)).

[8] *Id.* at 616–17 (internal citations omitted).

[9] *Id.* at 618–21.

[10] *Id.* at 620 (noting that in *Kilbourn*, *Dombrowski*, and *Powell* "immunity was unavailable because [the aide] engaged in illegal conduct that was not entitled to Speech or Debate Clause protection").

[11] *See* Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 507 (1975); Doe v. McMillan, 412 U.S. 306, 309 (1973).

[12] *Gravel*, 408 U.S. at 621–22 (noting that the "privilege applicable to the aide is viewed, as it must be, as the privilege of the Senator, and invocable only by the Senator or by the aide on the Senator's behalf . . . .").

[13] *Id.* at 622 n.13.

[14] *McMillan*, 412 U.S. at 315 n.10.

[15] Kilbourn v. Thompson, 103 U.S. at 199–200.

[16] Powell v. McCormack, 395 U.S. at 504.

Clause 2—Bar on Holding Federal Office

ArtI.S6.C2.1 Overview of Federal Office Prohibition

Article 1, Section 6, Clause 2

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

The second clause of Article I, Section 6 contains two provisions disqualifying Members of Congress from holding other federal offices, such as those in the Executive or Judicial Branches of government. The first provision is generally known as the Ineligibility Clause,[1] and precludes Members from being appointed to federal civil offices that were created (or had their compensation increased) during their congressional term for the length of their elected term. The second provision, often called the Incompatibility Clause,[2] forbids a Member from simultaneously holding "any Office under the United States."

The essential distinction between the Ineligibility and Incompatibility Clauses is one of timing.[3] The Incompatibility Clause forbids only concurrent officeholding, so incompatibility violations can generally be prevented by resigning either the other federal office or one's seat in Congress.[4] In contrast, the Ineligibility Clause forbids appointment to a federal office that was created or had its compensation increased during a Member's elected term for the length of that term; it thus may apply even if the Member is willing to resign his or her seat in Congress to take the other office.[5]

Both Clauses seek to prevent corruption and ensure the separation of powers between the federal executive and Legislative Branches of government.[6] As Justice Antonin Scalia explained:

> The Framers' experience with post revolutionary self-government had taught them that combining the power to create offices with the power to appoint officers was a recipe for legislative corruption. The foremost danger was that legislators would create offices with the expectancy of occupying them themselves. This was guarded against by the Incompatibility and Ineligibility Clauses.[7]

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[1] *See, e.g.*, Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 210 (1974) (using "Ineligibility Clause" to refer to the first half of U.S. Const. art. I, § 6, cl. 2). Other names for this provision include the Emoluments Clause and the Sinecure Clause. *See* Seth Barrett Tillman, *Originalism and the Scope of the Constitution's Disqualification Clause*, 33 Quinnipiac L. Rev. 59, 64 n.12 (2014).

[2] *See, e.g.*, *Schlesinger*, 418 U.S. at 210 (using "Incompatibility Clause" to refer to the second half of U.S. Const. art. I, § 6, cl. 2).

[3] *See* Buckley v. Valeo, 424 U.S. 1, 272–73 (1976) (White, J., dissenting) (explaining the distinction between the Clauses), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107–155, 116 Stat. 81.

[4] *See* ArtI.S6.C2.3 Incompatibility Clause and Congress.

[5] *See* ArtI.S6.C2.2 Ineligibility Clause (Emoluments or Sinecure Clause) and Congress.

[6] *See* The Federalist No. 76 (Alexander Hamilton) (describing the Ineligibility and Incompatibility Clauses as "important guards against the danger of executive influence upon the legislative body"); *Buckley*, 424 U.S. at 124 ("The further concern of the Framers of the Constitution with maintenance of the separation of powers is found in the so-called 'Ineligibility' and 'Incompatibility' Clauses contained in Art. I, § 6. . . ."); U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 869 n.11 (1995) (Thomas, J., dissenting) ("The Ineligibility Clause was intended to guard against corruption.").

[7] Freytag v. Comm'r, 501 U.S. 868, 904 (1991) (Scalia, J., dissenting) (citations omitted).

ArtI.S6.C2.1
Overview of Federal Office Prohibition

Edmond Randolph introduced what became the Ineligibility and Incompatibility Clauses at the Constitutional Convention as part of the resolutions of the Virginia Plan.[8] The original proposed language would have prohibited Members of Congress from holding any state or federal office during their elected term and for a period of time thereafter,[9] later set at one year.[10] The scope of Members' eligibility for other offices was debated during the Convention.[11] Some delegates favored stricter ineligibility rules to prevent corruption,[12] while others wished to limit the provision to forbid only concurrent officeholding (i.e., incompatibility) so as not to render worthy Members ineligible for Executive office.[13]

Early in the Convention, Nathaniel Gorham moved to strike the Ineligibility Clause, which—after a debate that revealed the Framers' divergent views on this issue—failed by an equally divided vote.[14] James Madison then proposed a "middle ground" provision, which would limit ineligibility of Members only to federal offices that were created, or had their emoluments increased, during the Members' term.[15] Madison's compromise failed to be approved by the Convention when first proposed.[16] Charles Pinckney, who had earlier successfully moved to limit the Ineligibility and Incompatibility Clauses to only federal (and not state) offices,[17] moved to limit the provision to forbid only concurrent officeholding, but failed in that effort.[18]

Late in the Convention, after another failed motion by Pinckney to remove the ineligibility provision,[19] the substance of Madison's compromise was re-introduced and was narrowly passed by the Convention.[20] With some stylistic changes, the Ineligibility and Incompatibility Clauses were incorporated into the Constitution.[21]

ArtI.S6.C2.2 Ineligibility Clause (Emoluments or Sinecure Clause) and Congress

Article 1, Section 6, Clause 2

> *No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States, which shall have been created, or*

[8] 1 The Records of the Federal Convention of 1787, at 20–21 (Max Farrand ed., 1911) [hereinafter Farrand's Records].

[9] *Id.*

[10] *Id.* at 217, 235.

[11] For historical perspectives on the framing of the Ineligibility and Incompatibility Clauses, see, for example, John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intruder in A Federalist Constitution*, 24 Hofstra L. Rev. 89, 91 (1995); Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 Cornell L. Rev. 1045 (1994); Daniel H. Pollitt, *Senator/Attorney-General Saxbe and the "Ineligibility Clause" of the Constitution: An Encroachment upon Separation of Powers*, 53 N.C. L. Rev. 111 (1974).

[12] *See, e.g.,* 1 Farrand's Records, *supra* note 8, at 387 (comments of George Mason), 387–88 (comments of Roger Sherman).

[13] *See, e.g.*, 1 Farrand's Records, *supra* note 8, at 381–82 (comments of Alexander Hamilton); 2 Farrand's Records, *supra* note 8, at 490 (comments of Charles Pinckney).

[14] 1 Farrand's Records, *supra* note 8, at 379–82.

[15] *See* 1 Farrand's Records, *supra* note 8, at 386–88.

[16] 1 Farrand's Records, *supra* note 8, at 390.

[17] *Id.* at 386.

[18] 2 Farrand's Records, *supra* note 8, at 283–84, 289. Pinckney's proposal, which lost by an evenly divided vote, would have made Members incapable of holding any federal office for which they "receive any salary, fees or emoluments of any kind—and the acceptance of such office shall vacate their seats respectively." 2 Farrand's Records, *supra* note 8, at 284.

[19] 2 Farrand's Records, *supra* note 8, at 489–90.

[20] 2 Farrand's Records, *supra* note 8, at 491–92.

[21] 2 Farrand's Records, *supra* note 8, at 568 (Committee of Style draft), 654 (final language).

the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

The Ineligibility Clause prohibits a Member of Congress from being appointed to a federal civil office that was created, or had its compensation increased, during the Member's elected term. The main intent of this provision is to prevent "legislative corruption" whereby Members vote to create or increase the remuneration of an office that they expect to occupy themselves.[1] Appointments to such offices are restricted only "during the Time for which [the Member] was elected."[2] A former Member may, for example, be appointed to a federal judgeship created during his term, so long as appointment is not made until after the expiration of that term.[3] For this reason, as Justice Joseph Story observed, the Clause "does not go to the extent of [its anti-corruption] principle" because a Member may still be influenced by the possibility of holding another office "if the period of his election is short, or the duration of it is approaching its natural termination."[4]

Because of standing and other justiciability requirements, courts have only rarely addressed the Ineligibility Clause.[5] In *Ex parte Levitt*, the Supreme Court ruled on a motion challenging the appointment of Justice Hugo Black, who was a U.S. Senator immediately prior to his appointment and confirmation to the Court in 1937.[6] Justice Black was alleged to be constitutionally ineligible for that office because Congress had, during Black's current Senate term, created a new option that allowed Supreme Court Justices to retire and receive a pension.[7] Finding that the movant lacked any direct injury from Justice Black's appointment beyond "a general interest common to all members of the public," the Court summarily dismissed the case on standing grounds.[8] In another notable decision, the U.S. District Court for the District of Columbia dismissed, for lack of standing, an Ineligibility Clause challenge to then-Senator Hillary Clinton's appointment as Secretary of State because the salary of that office was increased (but then subsequently decreased) during her Senate term.[9]

As the courts have largely declined to rule on Ineligibility Clause disputes, Presidents have sought legal opinions from the Department of Justice—through the Attorney General or the Office of Legal Counsel (OLC)—to determine whether particular appointments would accord with the Ineligibility Clause. For example, OLC has opined that when a statute provides for the "possibility of a future salary increase" (such as an annual adjustment) during a Member's

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[1] Freytag v. Comm'r, 501 U.S. 868, 904 (1991) (Scalia, J., dissenting) (citations omitted).

[2] U.S. Const. art. I, § 6, cl. 2. As the Clause forbids appointment during the time for which the Member was elected—even if that person is no longer a Member—resignation of one's congressional seat to take the other office does not cure the Ineligibility Clause violation. *See* Appointment to Civil Office, 17 Op. Att'ys Gen. 365, 366 (1882).

[3] Judges—Members of Cong.—Const. Restriction on Appointment (Article I, § 6, cl. 2) Omnibus Judgeship Bill, 2 Op. O.L.C. 431 (1978).

[4] Joseph Story, Commentaries on the Constitution of the United States § 864 (1833).

[5] Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 219 (1974) (noting that *Ex parte Levitt* was "the only other occasion" where the Supreme Court faced a question under the Ineligibility and Incompatibility Clauses).

[6] *Ex parte* Levitt, 302 U.S. 633 (1937) (per curiam).

[7] Act of Mar. 1, 1937, ch. 21, 50 Stat. 24. The constitutionality of Justice Black's appointment was defended on a number of grounds, including that providing for retirement did not actually increase the emoluments of the office because Justices were already allowed to resign and continue receiving their full salary. For a discussion of these arguments, see William Baude, *The Unconstitutionality of Justice Black*, 98 Tex. L. Rev. 327, 333–38 (2019) and Daniel H. Pollitt, *Senator/Attorney General Saxbe and the "Ineligibility Clause" of the Constitution: An Encroachment upon Separation of Powers*, 53 N.C. L. Rev. 111, 123–24 (1974).

[8] *Ex parte Levitt*, 302 U.S. at 633; *see also* McClure v. Carter, 513 F. Supp. 265, 270 (D. Idaho 1981) (holding that Senator lacked standing to challenge the appointment of Judge Abner Mikva based on the Ineligibility Clause), *aff'd sub nom.* McClure v. Reagan, 454 U.S. 1025 (1981).

[9] Rodearmel v. Clinton, 666 F. Supp. 2d 123, 128–29 (D.D.C. 2009), *appeal dismissed*, 560 U.S. 950 (2010).

term—but no increase has yet occurred—the Ineligibility Clause does not bar the Member's appointment to that office.[10] Other OLC opinions have found no Ineligibility Clause violation when the President is free to set a salary after the appointment is made[11] or when an office is created by the President after the expiration of a Member's term (even if the nomination occurred prior to the end of that term).[12]

One area of conflicting opinions on the scope of the Ineligibility Clause concerns the so-called "Saxbe fix."[13] Under this procedure, Congress reduces (or "rolls back") the salary of a particular office to the level it was at the beginning of a Member of Congress's term, seeking to avoid an Ineligibility Clause violation and enable the appointment of the Member to that office.[14] For example, in 1973, President Richard Nixon wished to appoint Senator William Saxbe to be his Attorney General.[15] However, during Saxbe's current Senate term, Congress voted to increase the Attorney General's salary from $35,000 to $60,000.[16] Seeking to comply with the Ineligibility Clause, Congress voted to roll back the Attorney General's salary to $35,000 before the Senate confirmed Saxbe as Attorney General.[17] Although there have been conflicting views within the Executive Branch as to whether such rollbacks actually cure the constitutional problem, recent OLC opinions have concluded that the Saxbe fix complies with the Ineligibility Clause.[18]

ArtI.S6.C2.3 Incompatibility Clause and Congress

Article 1, Section 6, Clause 2.

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

The Incompatibility Clause forbids Members of Congress from simultaneously holding another federal office.[1] The Clause is thus broader than the Ineligibility Clause in some ways, but narrower in others. It is broader in that its prohibition applies to "*any* Office under the United States," and not just civil offices that were created or had their compensation increased

[10] Const. Law—Article I, Section 6, Clause 2—Appointment of Member of Cong. to a Civ. Office, 3 Op. O.L.C. 298, 298 (1979); *see also* Const. Law—Article I, Section 6, Clause 2—Appointment of Member of Cong. to a Civil Office, 3 Op. O.L.C. 286 (1979).

[11] Applicability of Ineligibility Clause to Appointment of Congressman Tony P. Hall, 26 Op. O.L.C. 40, 41 (2002).

[12] Nomination of Sitting Member of Cong. to be Ambassador to Vietnam, 20 Op. O.L.C. 284, 284 (1996).

[13] Statutory Rollback of Salary to Permit Appointment of Member of Cong. to Exec. Office, 33 Op. O.L.C. 201, 202 (2009) (noting that Executive Branch "has not yet come to rest on a conclusion" as to whether the Saxbe fix complies with the Ineligibility Clause). Although the "fix" is named for its use in 1973 when President Nixon appointed Senator William Saxbe as his Attorney General, the first prominent usage was in 1903, when Congress reduced the compensation of the Secretary of State to allow President Taft to appoint Senator Philander Knox to that office. *See generally* John F. O'Connor, *The Emoluments Clause: An Anti-Federalist Intrude in a Federalist Constitution*, 24 Hofstra L. Rev. 89, 122–35 (1995) (reviewing the history of the Saxbe fix).

[14] *See* Statutory Rollback, 33 Op. O.L.C. at 201 (explaining this procedure); O'Connor, *supra* note 13, at 93 (same).

[15] *See* Pollitt, *supra* note 7, at 111–12.

[16] Pollitt, *supra* note 7, at 112.

[17] Pollitt, *supra* note 7, at 112

[18] Statutory Rollback, 33 Op. O.L.C. at 220. For contrary views, see Michael Stokes Paulsen, *Is Lloyd Bentsen Unconstitutional?*, 46 Stan. L. Rev. 907, 907–11 (1994); O'Connor, *supra* note 13, at 135–46; and Memorandum for the Counselor to the Attorney General, from Charles J. Cooper, Assistant Attorney General, Office of Legal Counsel, *Re: Ineligibility of Sitting Congressman to Assume a Vacancy on the Supreme Court* (Aug. 24, 1987).

[1] *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 210 (1974).

during the Member's term.[2] But the Clause is narrower in that it only prohibits *concurrent* office-holding: a Member may generally avoid an Incompatibility Clause violation by resigning his or her seat in Congress to accept appointment to the other federal office (or vice versa).[3] As Justice Byron White explained:

> [U]nder the [Ineligibility and Incompatibility Clauses], Congressmen were disqualified from being appointed only to those offices which were created, or for which the emoluments were increased, during their term of office. Offices not in this category could be filled by Representatives or Senators, but only upon resignation.[4]

Like the Ineligibility Clause, courts have largely declined to adjudicate Ineligibility Clause suits based on standing and other justiciability issues. In *Schlesinger v. Reservists Committee to Stop the War*, the Supreme Court rejected, on standing grounds, an Incompatibility Clause challenge to certain Members of Congress's holding of commissions in reserve components of the U.S. Armed Forces.[5] The Court, relying on *Ex parte Levitt*, held that the plaintiffs lacked a concrete injury as either citizens or taxpayers to sue for the alleged Incompatibility Clause violation.[6] The Supreme Court therefore did not reach the merits of dispute, which included arguments over whether a commission in the Reserves was an "office" within the meaning of the Clause and whether such Incompatibility Clause determinations rest exclusively with Congress.[7]

Although *Schlesinger* held that citizens do not generally have standing to enforce the Incompatibility Clause, lower courts have occasionally heard Incompatibility Clause disputes in particular circumstances. In *United States v. Lane*, a service member convicted of wrongful use of cocaine had his conviction affirmed by a panel of the Air Force Court of Criminal Appeals that included Senator Lindsay Graham (who was also an officer in the United States Air Force Standby Reserve).[8] The lower court denied the service member's motion to disqualify the Senator from the panel based on the Incompatibility Clause.[9] On subsequent appeal, the U.S. Court of Appeals for the Armed Forces held this to be in error, finding that the service member had standing and that the Incompatibility Clause prevented a Senator from serving as an appellate judge on a military court of criminal appeal.[10]

Relying on its constitutional power to determine the qualifications of its own Members,[11] Congress—rather than the courts—has been the primary enforcer of the Incompatibility Clause. Thus, Congress has voted to deny seats to putative Members, or declared Members'

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[2] U.S. Const. art. I, § 6, cl. 2 (emphasis added).

[3] *See, e.g.*, 2 Deschler's Precedents § 13 (1976) (Member-elect may hold incompatible office if that office is resigned prior to the convening of Congress); *accord* 1 Hinds' Precedents §§ 497–98 (1907).

[4] Buckley v. Valeo, 424 U.S. 1, 272–73 (1976) (White, J. dissenting), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81.

[5] 418 U.S. at 209.

[6] *Id.* at 217–28.

[7] *Id.* at 212–14. The President's Office of Legal Counsel has adopted the latter view, opining that "exclusive responsibility for interpreting and enforcing the Incompatibility Clause rests with Congress." Members of Cong. Holding Rsrv. Comm'ns, 1 Op. O.L.C. 242, 242 (1977). The Supreme Court has noted this as an open question but has not resolved it. Powell v. McCormack, 395 U.S. 486, 521 n.41 (1969) ("It has been argued that [the Incompatibility Clause and other provisions] is no less a 'qualification' within the meaning of Art. I, § 5, than those set forth in Art. I, § 2. We need not reach this question, however . . . .") (citations omitted).

[8] 64 M.J. 1, 2 (C.A.A.F. 2006).

[9] *Id.*

[10] *See id.* at 3–4, 6–7.

[11] *See supra* ArtI.S5.C1.1 Congressional Authority over Elections, Returns, and Qualifications.

seats to be vacant, based on their holding or acceptance of incompatible offices.[12] An early example of this practice occurred in the Seventh Congress, which relied on the Incompatibility Clause to declare the seat of then-Representative John P. Van Ness vacant based on his acceptance of the office of major in the District of Columbia militia.[13]

A recurring and unsettled issue relates to whether Members of Congress may simultaneously serve in the U.S. Armed Forces reserve despite the Incompatibility Clause.[14] Early congressional practice held that accepting a commission as an officer in the Army forfeited a Member's seat in Congress.[15] In 1916, during the First World War, the House Judiciary Committee issued a report finding that acceptance of a commission in the National Guard would vacate that Member's seat.[16] However, Congress did not act on the report.[17] During World War II, an opinion of the Attorney General concluded that Members would forfeit their seat if they entered the armed forces by enlistment or commission, should Congress "choose to act."[18] The opinion therefore urged the President to refrain from commissioning Members.[19] In recent decades, Congress has declined to take any action against Members holding Reserve or National Guard commissions, which may suggest acceptance of the practice.[20]

Section 7—Legislation

Clause 1—Revenue

ArtI.S7.C1.1 Origination Clause and Revenue Bills

Article I, Section 7, Clause 1:

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

Until ratification of the Seventeenth Amendment in 1913,[1] only members of the House of Representatives were elected by the people directly.[2] To ensure that persons elected directly by the people would have initial responsibility over tax decisions,[3] the Constitution's Origination Clause directs that all "Bills for raising Revenue shall originate in the House of

[12] *See, e.g.*, 6 Cannon's Precedents §§ 60, 65 (1935); 1 Hinds' Precedents §§ 486, 487, 488, 492, 501, 504 (1907).

[13] *See* 1 Hinds' Precedents § 486 (1907).

[14] 2 Deschler's Precedents § 14 (1976) ("An unresolved issue relating to incompatible offices and military service is the status of Members of Congress who hold reserve commissions in branches of the armed forces. Congress has declined on several occasions to finally determine whether active service with the reserves is an incompatible office under the United States.").

[15] *See, e.g.*, 1 Hinds' Precedents §§ 487–92, 494 (1907).

[16] *See* 6 Cannon's Precedents § 60 (1935).

[17] Although the Members kept their seats, the Speaker of House initially declined to pay the salaries of Members who had accepted commissions. *See* David J. Shaw, *An Officer and a Congressman: The Unconstitutionality of Congressmen in the Armed Forces Reserve*, 97 Geo. L.J. 1739, 1750 (2009). A few years later, Congress voted to pay salaries to such Members, less the compensation received from the Army. *Id.*; 6 Cannon's Precedents § 61 (1935).

[18] Members of Cong. Serving in the Armed Forces, 40 Op. Att'ys Gen. 301, 303 (1949).

[19] *Id.*

[20] 2 Deschler's Precedents §§ 14, 14.1, 14.4 (1976). For a review of arguments as to whether the Incompatibility Clause permits or forbids dual service in Congress and the armed forces reserve, see Shaw, *supra* note 17, at 1755–66.

[1] *See* William Jennings Bryan, Certification of Adoption of Seventeenth Amendment as Part of Constitution, *reprinted in* 38 Stat. 2049–50 (1915).

[2] *See* Amdt17.2 Historical Background on Popular Election of Senators.

[3] Skinner v. Mid-Am. Pipeline Co., 490 U.S. 212, 221 (1989).

Representatives."[4] The Clause permits Senate amendments to such bills.[5] By implication, though, the Senate may not originate bills for raising revenue.[6]

The Origination Clause is part of the procedures that Congress and the President must follow to enact a law.[7] The Clause is a prerogative of the House—it alone is allowed to originate such bills. However, in all Origination Clause challenges, the House has passed a bill containing matter alleged to have improperly originated in the Senate. House passage has not prevented the Court from addressing an Origination Clause challenge.[8]

The typical Origination Clause challenge involves a federal law that requires a person to pay a particular sum. These sums have gone by various names in statute,[9] including a "tax."[10] The person challenging the payment requirement focuses on Congress's consideration of the bill that became law with the payment requirement. The challenger alleges that this bill was one for raising revenue within the meaning of the Origination Clause and that action of the Senate is what first gave the bill its revenue-raising character.[11]

Origination Clause cases potentially pose a factual question and a legal question. The potential factual question is whether the bill that became law containing the challenged payment requirement first took on a revenue-raising character as a result of action by the Senate. The Court has never resolved competing factual claims about origination by, for example, considering evidence of a bill's content at different stages in its congressional consideration. In a related context, the Court has limited its factual inquiry into the process by which a bill became law, citing the "respect due to" Congress.[12] Similar concerns have impacted the Court's approach to Origination Clause cases, which has been to resolve only the primary legal question posed by such cases and not competing factual claims about where bill matter actually originated.[13]

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[4] U.S. Const. art. I, § 7, cl. 1.

[5] *Id.*

[6] *See id.*

[7] United States v. Munoz-Flores, 495 U.S. 385, 396–97 (1990) (rejecting the contention of a dissenting justice that improperly originated bills for raising revenue may nonetheless become law if passed according to the other legislative process requirements of Article I, Section 7).

[8] *Id.* at 395 (rejecting the argument that an Origination Clause claim poses a nonjusticiable political question to be decided solely by the House when it decides whether to pass legislation).

[9] *Id.* at 388 (special assessment).

[10] Millard v. Roberts, 202 U.S. 429, 435 (1906); Twin City Nat'l Bank of New Brighton v. Nebecker, 167 U.S. 196, 197 (1897).

[11] Most commonly, one of two types of Senate action has been alleged: either the bill that became law with revenue-raising features was originally introduced in the Senate, *see Millard*, 202 U.S. at 435 (apparently describing relevant bills as having been introduced in the Senate), or the bill first passed the House without any revenue-raising features, which the Senate then added through amendment, *see Nebecker*, 167 U.S. at 197 (challenge to a "tax on the circulating notes of national banks" that was alleged to have "originated in the Senate, by way of amendment to the House bill," which bill originally passed the House with no provisions for raising revenue). *But see infra* note 16.

[12] *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 672–73, 679 (1892) (declining to examine the journals of the houses, committee reports, or "other documents printed by authority of Congress" to determine whether, as required by Article I, Section 7, Clause 2, a bill passed both chambers in identical form and was presented to the President in the same form); *see also* ArtI.S5.C3.1 Requirement that Congress Keep a Journal.

[13] *See Nebecker*, 167 U.S. at 203 (stating that because the Court held that the bill in question was not a "Bill[ ] for raising Revenue," the Court did not need to "consider whether, for the decision of the question before us, the journals of the two houses of congress can be referred to for the purpose of determining" whether an act "originated in the one body or the other"); *see also* Rainey v. United States, 232 U.S. 310, 317 (1914) (similar); Flint v. Stone Tracy Co., 220 U.S. 107, 143 (1911) (similar).

This legal question is whether the bill that became law was a "Bill[ ] for raising Revenue." The House-origination requirement applies only to bills that levy taxes "in the strict sense."[14] A statute that raises revenue to support the general functions of the Government fits this category.[15] If a bill with a revenue-raising provision originates in the House, the Origination Clause does not prevent the Senate from removing that revenue-raising provision and substituting another in its place.[16] A statute does not levy taxes in the strict sense—and thus is not subject to House origination—if it establishes a program and raises money for the support of that program in particular.[17] The fact that such a statute might refer to a monetary exaction as a "tax" does not make the bill subject to the Origination Clause.[18]

Clause 2—Role of President

ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills

Article I, Section 7, Clause 2:

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

Article I, Section 7, Clause 2 provides that once a bill passes both houses of Congress it must be presented to the President for approval or veto.[1] This provision, together with Article I, Section 7, Clause 3, is sometimes called the "Presentment Clause."[2]

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[14] United States v. Norton, 91 U.S. 566, 569 (1875) (internal quotation marks omitted) (interpreting provisions of criminal law by reference to the Origination Clause's use of the term "revenue").

[15] United States v. Munoz-Flores, 495 U.S. 385, 397–98 (1990).

[16] In *Flint v. Stone Tracy Co.*, a bill allegedly originated in the House containing an inheritance tax, but after House passage of the measure the Senate amended the bill to substitute a corporate tax for the inheritance tax. The Court found no constitutional impediment to this process, because the bill had "properly originated in the House" and the Senate amendment was germane to the bill's subject matter and not beyond the Senate's power to propose. 220 U.S. at 143.

[17] *Munoz-Flores*, 495 U.S. at 397–98 (concluding that a "special assessment provision was passed as part of a particular program" to compensate and assist crime victims "to provide money for that program"). Earlier cases employed an equivalent framing, asking whether the money-raising aspects of a bill were a means of achieving the central, non-revenue-raising object of the bill. *See* Millard v. Roberts, 202 U.S. 429, 435–36 (1906) (ruling that taxes imposed on property in the District of Columbia merely financed a bill's central object of infrastructure improvements); *Nebecker*, 167 U.S. at 202–03 (holding that a tax on certain notes was a means of accomplishing a bill's main purpose of providing a national currency and further explaining that the act did not "raise revenue to be applied in meeting the expenses or obligations of the government" more generally).

[18] *See Munoz-Flores*, 495 U.S. at 398.

[1] The following essays discuss the veto power, including Supreme Court cases limiting the availability of line item vetoes and legislative vetoes. *See* ArtI.S7.C2.2 Veto Power; ArtI.S7.C2.3 Line Item Veto; ArtI.S7.C2.4 Legislative Veto.

[2] Because the presentment requirement is contained in two separate constitutional provisions, some sources refer to them collectively as the "Presentment Clauses," *e.g.*, INS v. Chadha, 462 U.S. 919, 946 (1983). Article I, Section 7,

The Supreme Court has held that if the President wishes to approve a bill, the Presentment Clause only requires him to sign it. He need not write on the bill the word "approved" nor the date of approval.[3] The text of Article I requires that the President sign a bill, if at all, "within ten Days (Sundays excepted)" after presentment. Failure to sign has different consequences depending on whether the legislature is in session, since the President cannot return a vetoed bill to Congress when the legislature is adjourned.[4] If the President does not sign a bill within ten days of presentment while Congress is in session, the bill automatically becomes law. If Congress adjourns while the bill is awaiting signature and the President does not sign the bill within ten days of presentment, the bill does not become law. This is sometimes called a "pocket veto." However, a President wishing to approve a bill is not required to sign it on a day when Congress is in session.[5] He may sign within ten days (other than Sundays) after the bill is presented to him, even if that period extends beyond the date of Congress's adjournment.[6]

The Court has held that a bill becomes a law on the date of its approval by the President.[7] When an act does not specify an effective date, it also takes effect on the date of its approval.[8] The Court has further held that a new law generally takes effect from the first moment of the day, fractions of a day being disregarded.[9] If no date appears on the face of the roll, the Court may ascertain the fact by resort to any source of information capable of furnishing a satisfactory answer.[10]

ArtI.S7.C2.2 Veto Power

Article I, Section 7, Clause 2:

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

Clause 3 requires presentment to the President of orders, resolutions, and votes approved by both houses of Congress. *See* ArtI.S7.C3.1 Presentation of Senate or House Resolutions.

[3] Gardner v. The Collector, 73 U.S. (6 Wall.) 499, 503 (1868).

[4] For discussion of cases concerning the return of vetoed legislation to Congress, see ArtI.S7.C2.2 Veto Power.

[5] La Abra Silver Mining Co. v. United States, 175 U.S. 423, 453 (1899).

[6] Edwards v. United States, 286 U.S. 482 (1932). On one occasion in 1936, delay in presentation of a bill enabled the President to sign it twenty-three days after the adjournment of Congress. L. F. Schmeckebier, *Approval of Bills After Adjournment of Congress*, 33 Am. Pol. Sci. Rev. 52–53 (1939).

[7] *Gardner*, 73 U.S. at 504. *See also* Burgess v. Salmon, 97 U.S. 381, 383 (1878).

[8] Matthews v. Zane, 20 U.S. (7 Wheat.) 164, 211 (1822). Subject to applicable constitutional limitations, Congress may specify that a bill takes effect before or after the date of enactment. *See* "Effective Dates" section of CRS Report R46484, *Understanding Federal Legislation: A Section-by-Section Guide to Key Legal Considerations*, by Victoria L. Killion.

[9] Lapeyre v. United States, 84 U.S. (17 Wall.) 191, 198 (1873).

[10] *Gardner*, 73 U.S. at 511.

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

The Presentment Clause allows the President to veto legislation, preventing it from taking effect unless two thirds of both the House and Senate vote to override the veto. The Supreme Court has held that the two-thirds vote of each Chamber required to pass a bill over a veto refers to two-thirds of a quorum.[1] While the President may exercise the veto power to prevent a bill from becoming law, the Court has held that, once a bill becomes law, the President has no authority to repeal it.[2] The Court has also issued decisions limiting vetoes in certain contexts, including the line item veto and the legislative veto.[3]

When Congress is in session, a President who wishes to veto a bill must return the bill to the Chamber in which it originated within ten days (excepting Sundays) of when the bill is presented to him.[4] If Congress approves a bill and sends it to the President, then adjourns before the ten days elapse, the President cannot return the bill to the originating Chamber after adjournment. In those circumstances, the President can prevent the bill from becoming law simply by declining to sign it, sometimes called a "pocket veto." If the President blocks legislation by pocket veto, Congress cannot later override the veto—instead, the legislature must reintroduce the bill and enact it again.

The Supreme Court has explained that the Constitution's veto provisions serve two functions. On the one hand, they ensure that "the President shall have suitable opportunity to consider the bills presented to him. . . . It is to safeguard the President's opportunity that Paragraph 2 of § 7 of Article I provides that bills which he does not approve shall not become law if the adjournment of the Congress prevents their return."[5] At the same time, the sections ensure "that the Congress shall have suitable opportunity to consider his objections to bills and on such consideration to pass them over his veto provided there are the requisite votes."[6] The Court asserted that it "should not adopt a construction which would frustrate either of these purposes."[7]

The Supreme Court has considered two cases concerning the return of vetoed legislation to Congress. In 1929, in *The Pocket Veto Case*, the Court held that the President could not return a bill to the Senate, where it originated, when Congress adjourned its first session *sine die* fewer than ten days after presenting the bill to the President.[8] The Court declined to limit the word "adjournment" to final adjournments, instead reading it as referring to any occasion on which a house of Congress is not in session. The Court held that "the determinative question in reference to an 'adjournment' is not whether it is a final adjournment of Congress or an interim adjournment, such as an adjournment of the first session, but whether it is one that 'prevents' the President from returning the bill to the House in which it originated within the time allowed."[9] Because neither House was in session to receive the bill, the President was prevented from returning it. One of the parties had argued that the President could return the

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[1] Missouri Pacific Ry. v. Kansas, 248 U.S. 276 (1919).

[2] The Confiscation Cases, 87 U.S. (20 Wall.) 92 (1874).

[3] *See* ArtI.S7.C2.3 Line Item Veto; ArtI.S7.C2.4 Legislative Veto.

[4] If the President fails to sign a bill within ten days of enactment (excepting Sundays) while Congress is in session, the bill becomes law automatically.

[5] Wright v. United States, 302 U.S. 583 (1938).

[6] *Id.* at 596.

[7] *Id.*

[8] 279 U.S. 655 (1929).

[9] *Id.* at 680.

bill to a proper agent of the House of origin for consideration when that body convened. After noting that Congress had never authorized an agent to receive bills during adjournment, the Court further opined that "delivery of the bill to such officer or agent, even if authorized by Congress itself, would not comply with the constitutional mandate."[10]

By contrast, in the 1938 case *Wright v. United States*, the Court held that the President's return of a bill to the Secretary of the Senate on the tenth day after presentment, during a three-day adjournment by the originating Chamber only, was an effective return.[11] In the first place, the Court reasoned, the pocket veto clause referred to an adjournment of "the Congress," and here only the Senate, the originating body, had adjourned. The President could return the bill to the originating Chamber while it was in an intrasession adjournment because there was no "practical difficulty" in making the return. The Court observed: "The organization of the Senate continued and was intact. The Secretary of the Senate was functioning and was able to receive, and did receive the bill."[12] The Court held that such a procedure complied with the constitutional provisions because "[t]he Constitution does not define what shall constitute a return of a bill or deny the use of appropriate agencies in effecting the return."[13] The Court determined that the concerns that motivated the decision in *The Pocket Veto Case* were not present. There was no indefinite period in which a bill was in a state of suspended animation with public uncertainty over the outcome. Thus, the Court concluded, "When there is nothing but such a temporary recess the organization of the House and its appropriate officers continue to function without interruption, the bill is properly safeguarded for a very limited time and is promptly reported and may be reconsidered immediately after the short recess is over."[14]

ArtI.S7.C2.3 Line Item Veto

Article I, Section 7, Clause 2:

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

The veto power grants the President a significant role in the legislative process; but, as with many aspects of the Constitution's three-branch system of government, the Presentment Clause sometimes requires the President to compromise. At times, often in the appropriations context, Congress enacts far-reaching bills containing provisions the President believes to be beneficial or even necessary along with other provisions that he would not approve standing

[10] *Id.* at 684.

[11] 302 U.S. 583 (1938).

[12] *Id.* at 589–90.

[13] *Id.* at 589.

[14] *Id.* at 595.

alone. Under the Presentment Clause, the President must sign or veto an entire bill. For more than a century, Presidents sought authority to veto certain line items in an appropriations bill while otherwise approving the legislation. Numerous Presidents from Ulysses Grant on unsuccessfully sought a constitutional amendment that would allow a line-item veto by which individual items in an appropriations bill or a substantive bill could be extracted and vetoed. Beginning in the Franklin Delano Roosevelt Administration, Congress debated whether it could enact a statute authorizing a line-item veto.[1]

In 1996, Congress approved and the President Bill Clinton signed the Line Item Veto Act.[2] The law empowered the President, within five days of signing a bill, to cancel certain spending items and targeted, defined tax benefits. In exercising this authority, the President was to determine that the cancellation of each item would (1) reduce the Federal budget deficit; (2) not impair any essential Government functions; and (3) not harm the national interest.[3]

In *Clinton v. City of New York*, the Supreme Court held the Act unconstitutional because it did not comply with the Presentment Clause.[4] Although Congress in passing the Act considered itself to have been delegating power to the President,[5] the Court instead analyzed the statute under the Presentment Clause. In the Court's view, two bills from which the President subsequently struck items became law the moment the President signed them. His cancellations thus amended and, in part, repealed the two federal laws. The Court explained, however, that statutory repeals must conform to the Presentment Clause's "single, finely wrought and exhaustively considered, procedure" for enacting or repealing a law.[6] The Court held that the procedures in the Act did not, and could not, comply with that clause. The Act purported to allow the President to act in a legislative capacity, altering a law. But nothing in the Constitution authorized the President to amend or repeal a statute unilaterally, and the Court construed both constitutional silence and the historical practice over 200 years as "an express prohibition" of the President's action.[7]

ArtI.S7.C2.4 Legislative Veto

Article I, Section 7, Clause 2:

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

[1] *See* Line Item Veto: Hearing Before the Senate Committee on Rules and Administration, 99th Cong., 1st Sess. (1985), esp. 10–20 (CRS memoranda detailing the issues).

[2] Pub. L. No. 104-130, 110 Stat. 1200 (codified in part at 2 U.S.C. §§ 691–692).

[3] *Id.* § 691(a)(A).

[4] 524 U.S. 417 (1998).

[5] *E.g.*, H.R. Conf. Rep. No. 104-491, 104th Cong., 2d Sess. 15 (1996) (stating that the proposed law delegates limited authority to the President).

[6] 524 U.S. at 438–39 (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)).

[7] *Id.* at 439.

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

Beginning in the 1930s, Congress embraced a new use for concurrent resolutions (resolutions by both Houses of Congress) and simple resolutions (resolutions by a single Chamber), invoking them to terminate powers delegated to the President or to disapprove particular exercises of power by the President or the President's agents. The "legislative veto" or "congressional veto" first developed in the context of the delegation to the Executive of power to reorganize governmental agencies,[1] and expanded in response to national security and foreign affairs considerations immediately prior to and during World War II.[2] At first, Congress applied veto provisions to certain actions taken by the President or another Executive officer—such as the reorganization of an agency, changes to tariff rates, or the disposal of federal property. However, Congress later expanded the device to give itself power to negate regulations issued by Executive Branch agencies, and proposals were made to allow Congress to negate all regulations of Executive Branch independent agencies.[3] The proliferation of congressional veto provisions raised a series of interrelated constitutional questions.[4]

In the 1983 case *INS v. Chadha*, the Court held a one-House congressional veto to be unconstitutional as violating both the bicameralism principles reflected in Article I, Sections 1 and 7, and the presentment provisions of Section 7, Clauses 2 and 3.[5] The veto provision in question, Section 244(c)(2) of the Immigration and Nationality Act, authorized either house of Congress by resolution to veto the decision of the Attorney General to allow a particular deportable alien to remain in the country.

In determining that veto of the Attorney General's decision on suspension of deportation was a legislative action requiring presentment to the President for approval or veto, the Court set forth the general standard. The Court explained that whether actions taken by either House are "an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'"[6] The Court concluded that the action before it "was essentially legislative" because "it had the

[1] Act of June 30, 1932, § 407, 47 Stat. 414.

[2] *See, e.g.*, Lend Lease Act of March 11, 1941, 55 Stat. 31; First War Powers Act of December 18, 1941, 55 Stat. 838; Emergency Price Control Act of January 30, 1942, 56 Stat. 23; Stabilization Act of October 2, 1942, 56 Stat. 765; War Labor Disputes Act of June 25, 1943, 57 Stat. 163, all providing that the powers granted to the President should come to an end upon adoption of concurrent resolutions to that effect.

[3] A bill providing for this failed to receive the two-thirds vote required to pass under suspension of the rules by only three votes in the 94th Congress. H.R. 12048, 94th Congress, 2d Sess. *See* H. Rep. No. 94-1014, 94th Congress, 2d Sess. (1976), and 122 Cong. Rec. 31615–641, 31668. Considered extensively in the 95th and 96th Congresses, similar bills were not adopted. See Regulatory Reform and Congressional Review of Agency Rules: Hearings Before the Subcommittee on Rules of the House of the House Rules Committee, 96th Congress, 1st Sess. (1979); Regulatory Reform Legislation: Hearings Before the Senate Committee on Governmental Affairs, 96th Congress, 1st Sess. (1979).

[4] From 1932 to 1983, by one count, nearly 300 separate provisions giving Congress power to halt or overturn Executive action had been passed in nearly 200 acts; substantially more than half of these had been enacted since 1970. A partial listing was included in The Constitution, Jefferson's Manual and Rules of the House of Representatives, H. Doc. No. 96-398, 96th Congress, 2d Sess. (1981), 731–922. A subsequent listing, in light of the Supreme Court's ruling, is contained in H. Doc. No. 101-256, 101st Cong., 2d sess. (1991), 907–1054. Justice Byron White's dissent in INS v. Chadha, 462 U.S. 919, 968–974, 1003–1013 (1983), describes and lists many kinds of such vetoes. The types of provisions varied widely. Many required congressional approval before an executive action took effect, but more commonly they provided for a negative upon Executive action, by concurrent resolution of both Houses, by resolution of only one House, or even by a committee of one House.

[5] 462 U.S. 919 (1983).

[6] *Id.* at 952.

purpose and effect of altering the legal rights, duties and relations of persons, including the Attorney General, Executive Branch officials and Chadha, all outside the Legislative Branch."[7]

The other major component of the Court's reasoning in *Chadha* stemmed from its reading of the Constitution as making only "explicit and unambiguous" exceptions to the bicameralism and presentment requirements. Thus the House alone was given power of impeachment, and the Senate alone was given power to convict upon impeachment and to provide advice and consent to Executive appointments and treaties; similarly, the Congress may propose a constitutional amendment without the President's approval, and each House is given autonomy over certain "internal matters" such as judging the qualifications of its members. By implication then, exercises of legislative power not falling within any of these "narrow, explicit, and separately justified" exceptions must conform to the prescribed procedures: "passage by a majority of both Houses and presentment to the President."[8]

While *Chadha* involved a single-House veto, the Court's analysis of the presentment issue made clear that two-House veto provisions and committee veto provisions suffer the same constitutional infirmity as the law at issue in that case.[9] Justice Byron White, dissenting in *Chadha*, asserted that the Court had "sound[ed] the death knell for nearly 200 other statutory provisions in which Congress has reserved a 'legislative veto.'"[10] The breadth of the Court's ruling in *Chadha* was evidenced in its 1986 decision in *Bowsher v. Synar*.[11] Among that case's rationales for holding the Deficit Control Act unconstitutional was that Congress had, in effect, retained control over Executive action in a manner resembling a congressional veto. The Court explained that "*Chadha* makes clear" that "once Congress makes its choice in enacting legislation, its participation ends. Congress can thereafter control the execution of its enactment only indirectly—by passing new legislation."[12]

Since 1983, Congress has employed various devices other than the legislative veto, such as "report and wait" provisions and requirements for certain consultative steps before action may be undertaken.[13] *Chada* has, however, restricted efforts in Congress to confine the discretion it delegates to the Executive Branch.

Clause 3—Process

ArtI.S7.C3.1 Presentation of Senate or House Resolutions

Article I, Section 7, Clause 3:

> *Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented*

[7] *Id.*

[8] *Id.* at 955–56.

[9] Shortly after deciding *Chadha*, the Court removed any doubts on this score with summary affirmance of an appeals court's invalidation of a two-House veto in Consumers Union v. FTC, 691 F.2d 575 (D.C. Cir. 1982), *aff'd sub nom.* Process Gas Consumers Group v. Consumer Energy Council, 463 U.S. 1216 (1983).

[10] *Chadha*, 462 U.S. at 967 (White, J., dissenting).

[11] 478 U.S. 714 (1986). *See also* Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).

[12] *Id.* at 733. This position was developed at greater length in the concurring opinion of Justice John Paul Stevens. *Id.* at 736.

[13] A "report and wait" provision requires that new rule-making be reported to Congress before it takes effect. It does not allow Congress to veto a rule unilaterally, but instead gives Congress the opportunity to enact new legislation through the ordinary legislative process to block or alter the rule. The Court has upheld a "report and wait" provision that allowed for congressional rule of new court procedural rules. Sibbach v. Wilson, 312 U.S. 1 (1941); *see also Chadha*, 462 U.S. at 935 n.9 (citing *Sibbach*).

to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Article I, Section 7, Clause 3 requires presentation to the President of all orders, resolutions, or votes in which both Houses of Congress must concur. This provision is sometimes called the Orders, Resolutions, and Votes Clause (ORV Clause) and, together with Article I, Section 7, Clause 2, forms part of the Presentment Clause.[1] Some sources from the Founding and the early years of the Republic suggest that the Framers included the ORV Clause to prevent Congress from evading the veto clause by designating as something other than a bill measures intended to take effect as laws.[2]

If construed literally, the ORV Clause could have significantly slowed the legislative process by requiring presentment to the President of various intermediate matters. However, Congress has interpreted the Clause to limit its practical burden. At the request of the Senate, the Judiciary Committee in 1897 published a comprehensive report detailing how the Clause had been interpreted over the years. The report showed that the word "necessary" in the Clause had come to refer to necessity for law-making—that is, an order, resolution, or vote must be approved by both Chambers and presented to the President if it is to have the force of law. By contrast, "votes" taken in either House preliminary to the final passage of legislation need not be submitted to the other House or to the President, nor must concurrent resolutions merely expressing the views or "sense" of the Congress.[3]

The ORV Clause expressly excepts only adjournment resolutions and makes no explicit reference to resolutions proposing constitutional amendments. However, beginning with the Bill of Rights, congressional practice has been that resolutions proposing constitutional amendments need not be presented to the President for veto or approval. In *Hollingsworth v. Virginia*, the Court rejected a challenge to the validity of the Eleventh Amendment based on the assertion that it had not been presented to the President.[4] Subsequent cases cite *Hollingsworth* for the proposition that presentation of constitutional amendment resolutions is not required.[5]

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[1] Article I, Section 7, Clause 2 requires presentment to the President of bills approved by both houses of Congress. *See* ArtI.S7.C2.1 Overview of Presidential Approval or Veto of Bills. One Supreme Court case discusses both provisions of the Presentment Clause together. INS v. Chadha, 462 U.S. 919 (1983). For additional discussion of *Chadha*, see ArtI.S7.C2.4 Legislative Veto.

[2] *See* 2 Records of the Federal Convention of 1787, at 301–02, 304–05 (Max Farrand ed., 1937); 2 Joseph Story, Commentaries on the Constitution of the United States § 889, at 335 (1833). Recent scholarship presents a different possible explanation for the ORV Clause—that it was designed to authorize delegation of lawmaking power to a single House, subject to presentment, veto, and possible two-House veto override. Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 Tex. L. Rev. 1265 (2005).

[3] S. Rep. No. 1335, 54th Congress, 2d Sess.; 4 Hinds' Precedents of the House of Representatives § 3483 (1907).

[4] 3 U.S. (3 Dall.) 378 (1798).

[5] Although *Hollingsworth* did not necessarily so hold, *see* Seth Barrett Tillman, *A Textualist Defense of Art. I, Section 7, Clause 3: Why Hollingsworth v. Virginia was Rightly Decided, and Why INS v. Chadha was Wrongly Reasoned*, 83 Tex. L. Rev. 1265 (2005), the Court has reaffirmed this interpretation. *See* Hawke v. Smith, 253 U.S. 221, 229 (1920) (In *Hollingsworth* "this court settled that the submission of a constitutional amendment did not require the action of the President."); INS v. Chadha, 462 U.S. 919, 955 n.21 (1983) (In *Hollingsworth* the Court "held Presidential approval was unnecessary for a proposed constitutional amendment.").

Section 8—Enumerated Powers

ArtI.S8.1 Overview of Congress's Enumerated Powers

As discussed in more detail in earlier essays, the Framers sought to limit the legislative power only to those powers granted by the Constitution.[1] Section 8 of Article 1 sets out the bulk of Congress's enumerated legislative authorities. Congress's most significant powers, in terms of the breadth of authority, may be its "power of the purse,"[2] referring to its authority to tax and spend[3] and its power to regulate interstate and foreign commerce.[4] Section 8 also defines a number of more specific powers. For example, it gives Congress authority to establish uniform laws on naturalization and bankruptcy,[5] establish post offices[6] and courts,[7] regulate intellectual property,[8] and punish maritime crimes.[9] Further, although the President is the Commander in Chief,[10] Section 8 also grants Congress certain war powers, including the power to declare war,[11] to raise and maintain armies and a navy,[12] and to call forth the militia for certain purposes.[13] Apart from these specific powers, Section 8 also provides that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" and other express constitutional powers.[14] This Necessary and Proper Clause gives Congress discretion over the means it chooses to execute its enumerated powers, so long as the goal is "legitimate" and the means "appropriate."[15]

Clause 1—General Welfare

ArtI.S8.C1.1 Taxing Power

ArtI.S8.C1.1.1 Overview of Taxing Clause

Article I, Section 8, Clause 1:

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

Article I, Section 8, Clause 1 of the Constitution provides Congress with broad authority to lay and collect taxes for federal debts, the common defense, and the general welfare.[1] By the Constitution's terms, the power of Congress to levy taxes is subject to but "one exception and

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[1] ArtI.S1.2.1 Origin of Limits on Federal Power; ArtI.S1.3.3 Enumerated, Implied, Resulting, and Inherent Powers.

[2] *See, e.g.*, United States v. Richardson, 418 U.S. 166, 178 n.11 (1974) (discussing Congress's power of the purse).

[3] U.S. Const. art. I, § 8, cl. 1.

[4] *Id.* cl. 3.

[5] *Id.* cl. 4.

[6] *Id.* cl. 7.

[7] *Id.* cl. 9.

[8] *Id.* cl. 8.

[9] *Id.* cl. 10.

[10] U.S. Const. art. II, § 2, cl. 1.

[11] U.S. Const. art. I, § 8, cl. 11.

[12] *Id.* cls. 12–13.

[13] *Id.* cl. 15.

[14] *Id.* cl. 18.

[15] United States v. Kebodeaux, 570 U.S. 387, 394 (2013); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819).

[1] *See* Nicol v. Ames, 173 U.S. 509, 514–16 (1899); 3 Joseph Story, Commentaries on the Constitution of the United States 368–69 (1833); The Federalist No. 41 (James Madison).

only two qualifications."[2] Articles exported from any state may not be taxed at all,[3] direct taxes must be levied by the rule of apportionment,[4] and indirect taxes by the rule of uniformity.[5] The Supreme Court has emphasized the sweeping character of this power by saying from time to time that it "reaches every subject,"[6] that it is "exhaustive"[7] or that it "embraces every conceivable power of taxation."[8] Despite few express limitations on the taxing power, the scope of Congress's taxing power has been at times substantially curtailed by judicial decisions with respect to the manner in which taxes are imposed,[9] the objects for which they may be levied,[10] and the subject matter of taxation.[11]

ArtI.S8.C1.1.2 Historical Background on Taxing Power

Article I, Section 8, Clause 1:

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

The Framers' principal motivation for granting Congress the power to tax in the Constitution was to provide the National Government with a mechanism to raise a "regular and adequate supply"[1] of revenue and pay its debts.[2] Under the predecessor Articles of Confederation, the National Government had no power to tax and could not compel states to raise revenue for national expenditures.[3] The National Government could requisition funds from states to place in the common treasury, but, under the Articles of Confederation, state requisitions were "mandatory in theory" only.[4] State governments resisted these calls for

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[2] License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1866).

[3] U.S. Const. art. I, § 9, cl. 5.

[4] *Id.* art. I, § 9, cl. 4.

[5] *Id.* art. I, § 8, cl. 1.

[6] *License Tax Cases*, 72 U.S. (5 Wall.) at 471.

[7] Brushaber v. Union Pac. R.R., 240 U.S. 1, 12 (1916).

[8] *Id.*

[9] *See, e.g.,* Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 36–37 (1922).

[10] *See*, *e.g.*, United States v. Constantine, 296 U.S. 287, 293–94 (1935).

[11] *See*, *e.g.*, Collector v. Day, 78 U.S. (11 Wall.) 113, 120–21 (1871), *overruled by* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

[1] The Federalist No. 30 (Alexander Hamilton).

[2] Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 Harv. L. Rev. 83, 89 (2012); *see* Veazie Bank v. Fenno, 75 U.S. 533, 540 (1869) ("The [National Government] had been reduced to the verge of impotency by the necessity of relying for revenue upon requisitions on the States, and it was a leading object in the adoption of the Constitution to relieve the government, to be organized under it, from this necessity, and confer upon it ample power to provide revenue by the taxation of persons and property."); Bruce Ackerman, *Taxation and the Constitution*, Colum. L. Rev. 1, 6 (1999) ("The [Federalists] would never have launched their campaign against America's first Constitution, the Articles of Confederation, had it not been for its failure to provide adequate fiscal powers for the national government."); *see generally* The Federalist No. 30 (Alexander Hamilton) (advocating for a "General Power of Taxation").

[3] *See* Articles of Confederation of 1781, arts. II, VIII; The Federalist No. 30 (Alexander Hamilton); Ackerman, *supra* note 2 at 6 ("The Articles of Confederation stated that the 'common treasury . . . shall be supplied by the several States, in proportion to the value of all land within each State,' Articles of Confederation art. VIII (1781), but did not explicitly authorize the Continental Congress to impose any sanctions when a state failed to comply. This silence was especially eloquent in light of the second Article's pronouncement: 'Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by the confederation expressly delegated to the United States, in Congress assembled.'").

[4] Calvin H. Johnson, Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution 15 (Cambridge University Press) (2005); *see* Articles of Confederation of 1781, art. VIII.

funds.[5] As a result, the National Government raised "very little" revenue through state requisitions,[6] inhibiting its ability to resolve immediate fiscal problems, such as repaying its Revolutionary War debts.[7]

In the first draft of the Constitution, the taxing clause stated, "The legislature of the United States shall have the power to lay and collect taxes, duties, imposts, and excises," "without any qualification whatsoever.'"[8] After discussions about the first draft's unlimited terms and several rewrites, the Framers limited the objects of the taxing power—for United States debts, defense, and the general welfare.[9] The Framers also discussed whether the clause should include language to limit expressly the subjects of the taxing power.[10] One of the arguments against a general taxing power was the potential danger to state governments.[11] A general taxing power ultimately prevailed as the Framers believed the Constitution's federal system would prevent the oppression of one government by the other through its taxing power, a general taxing power would circumvent the need to overtax certain subjects, and a general taxing power would allow the government to efficiently raise funds in times of war.[12]

ArtI.S8.C1.1.3 Uniformity Clause and Indirect Taxes

Article I, Section 8, Clause 1:

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

Article I, Section 8, Clause 1 of the Constitution authorizes Congress to lay and collect duties, imposts, or excise taxes—collectively referred to as *indirect* taxes—and requires that they be "uniform throughout the United States."[1] The Supreme Court has held that an indirect tax satisfies the Uniformity Clause "only when the tax 'operates with the same force and effect

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[5] Johnson, *supra* note 4, at 16 ("Some states simply ignored the requisitions. Some sent them back to Congress for amendment, more to the states' liking. New Jersey said it had paid enough tax by paying the tariffs or 'imposts' on goods imported through New York or Philadelphia and it repudiated the requisition in full.").

[6] Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 Va. L. Rev. 1195, 1202 (2012); *see*, *e.g.*, Johnson, *supra* note 4, at 15 ("In the requisition of 1786—the last before the Constitution—Congress mandated that states pay $3,800,000, but it collected only $663."); *see* Metzger, *supra* note 2, at 89 ("Under the Articles of Confederation, states had failed to meet congressional requisitions on a massive scale and Congress was bankrupt.").

[7] Johnson, *supra* note 4, at 16–17 ("Congress's Board of Treasury had concluded in June 1786 that there was 'no reasonable hope' that the requisitions would yield enough to allow Congress to make payments on the foreign debts, even assuming that nothing would be paid on the domestic war debt. . . . Almost all of the money called for by the 1786 requisition would have gone to payments on the Revolutionary War debt. French and Dutch creditors were due payments of $1.7 million, including interest and some payment on the principal. Domestic creditors were due to be paid $1.6 million for interest only. Express advocacy of repudiation of the federal debt was rare, but with the failure of requisitions, payment was not possible. . . . Beyond the repayment of war debts, the federal goals were quite modest. The operating budget was only about $450,000 . . . . Without money, however, the handful of troops on the frontier would have to be disbanded and the Congress's offices shut."); *see* Cooter & Siegel, *supra* note 6, at 1204.

[8] 3 Joseph Story, Commentaries on the Constitution of the United States § 925 (1833).

[9] *Id.* at § 926.

[10] *Id.* at §§ 930–931; The Federalist No. 31 (Alexander Hamilton): *see* The Federalist No. 41 (James Madison); The Federalist No. 34 (Alexander Hamilton).

[11] 3 Joseph Story, Commentaries on the Constitution of the United States § 936 (1833); *see* The Federalist No. 31 (Alexander Hamilton); The Federalist No. 30 (Alexander Hamilton).

[12] 3 Joseph Story, Commentaries on the Constitution of the United States §§ 930–945 (1833); The Federalist No. 31 (Alexander Hamilton); *see* The Federalist No. 34 (Alexander Hamilton); The Federalist No. 30 (Alexander Hamilton).

[1] U.S. Const. art. I, § 8, cl. 1; *see* Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911) ("[T]he terms duties, imposts and excises are generally treated as embracing the indirect forms of taxation contemplated by the Constitution.").

in every place where the subject of it is found."[2] In general, an indirect tax does not violate the Uniformity Clause where the subject of the indirect tax is described in non-geographical terms.[3] If Congress uses geographical terms to describe the subject of the indirect tax, then the Supreme Court "will examine the classification closely to see if there is actual geographic discrimination."[4]

In *Knowlton v. Moore*,[5] the Supreme Court examined how the rule of uniformity applied to indirect taxes. In *Knowlton*, the Court adopted a less restrictive reading of the Uniformity Clause,[6] holding that, in selecting the subject of an indirect tax, Congress could define the class of objects subject to the tax and make distinctions between similar classes.[7] The *Knowlton* Court ruled that an inheritance tax that exempted legacies and distributive shares of personal property under $10,000 imposed a primary tax rate that varied based on the beneficiary's degree of relationship to the decedent, and progressively raised tax rates on legacies and distributive shares as they increased in size, did not violate the Uniformity Clause.[8] The Court held that the Uniformity Clause merely requires "geographical uniformity," meaning indirect taxes must operate in the same manner throughout the United States.[9]

The Court further clarified the meaning of the Uniformity Clause in *United States v. Ptasynski*.[10] In *Ptasynski*, the Court ruled that the Crude Oil Windfall Profit Tax Act of 1980,[11] which made the windfall profit tax inapplicable to "exempt Alaskan oil,"[12] did not violate the Uniformity Clause despite the Act's inclusion of favorable treatment for a geographically defined classification.[13] The Court explained, "Where Congress defines the subject of a tax in nongeographic terms, the Uniformity Clause is satisfied. . . . But where Congress does choose to frame a tax in geographic terms, we will examine the classification closely to see if there is actual geographic discrimination."[14] The Court held that the geographically defined classification was constitutional because Congress used "neutral factors" relating to the ecology, environment, and the remoteness of the location to conclude the exempt Alaskan oil

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[2] United States v. Ptasynski, 462 U.S. 74, 82 (1983) (quoting Head Money Cases, 112 U.S. 580, 594 (1884)).

[3] *Ptasynski*, 462 U.S. at 84; *see, e.g.,* Knowlton v. Moore, 178 U.S. 41, 106 (1900).

[4] *Ptasynski*, 462 U.S. at 85.

[5] 178 U.S. at 46.

[6] *Id.* at 84–106; *see id.* at 96 ("The proceedings of the Continental Congress also make it clear that the words 'uniform throughout the United States,' which were afterwards inserted in the Constitution of the United States, had, prior to its adoption, been frequently used, and always with reference purely to a geographical uniformity and as synonymous with the expression, 'to operate generally throughout the United States.' The foregoing situation so thoroughly permeated all the proceedings of the Continental Congress that we might well rest content with their mere statement. . . . The view that intrinsic uniformity was not then conceived is well shown.").

[7] *Id.* at 83–110; *see also Ptasynski*, 462 U.S. at 82.

[8] *Knowlton*, 178 U.S. at 110; *see id.* at 83–84.

[9] *Id.* at 87.

[10] 462 U.S. 74.

[11] Pub. L. No. 96–223, 94 Stat. 229 (1980).

[12] *Ptasynski*, 462 U.S. at 77; *see id.* at 77–78 ("[Exempt Alaskan oil] is defined as: 'any crude oil (other than Sadlerochit oil) which is produced (1) from a reservoir from which oil has been produced in commercial quantities through a well located north of the Arctic Circle, or (2) from a well located on the northerly side of the divide of the Alaska-Aleutian Range and at least 75 miles from the nearest point on the Trans-Alaska Pipeline System.' § 4994(e). Although the Act refers to this class of oil as 'exempt Alaskan oil,' the reference is not entirely accurate. The Act exempts only certain oil produced in Alaska from the windfall profit tax. Indeed, less than 20% of current Alaskan production is exempt. Nor is the exemption limited to the State of Alaska. Oil produced in certain offshore territorial waters—beyond the limits of any State—is included within the exemption.").

[13] *Id.* at 85.

[14] *Id.* at 84–85.

classification merited favorable treatment.[15] Moreover, the Court found nothing in the legislative history that suggests Congress intended to grant Alaska "an undue preference at the expense of other oil producing states."[16]

ArtI.S8.C1.1.4 Taxes to Regulate Conduct

Article I, Section 8, Clause 1:

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

Congress has broad discretion in selecting the "measure and objects" of taxation, and may use its taxing power to regulate private conduct.[1] For instance, the Supreme Court has sustained regulations on the contents of taxed packaged goods[2] and the packaging of taxed oleomargarine,[3] which were ostensibly designed to prevent fraud in the collection of the tax. It has also upheld measures taxing drugs[4] and firearms,[5] which prescribed rigorous restrictions under which such articles could be sold or transferred, and imposed heavy penalties upon persons dealing with them in any other way.

The Court has not invalidated a tax with a clear regulatory effect solely because Congress was motivated by a regulatory purpose.[6] Even where a tax is coupled with regulations that have no relation to the efficient collection of the tax, and no other purpose appears on the face of the statute, the Court has refused to inquire into the motives of the lawmakers and has sustained the tax despite its prohibitive proportions.[7] The Court has stated:

> It is beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed. . . . The principle applies even though the revenue obtained is obviously negligible . . . or the revenue purpose of the tax may be secondary.[8]

In some cases, however, the structure of a taxation scheme is such as to suggest that Congress actually intends to regulate under a separate constitutional authority.[9] As long as such separate authority is available to Congress, the imposition of a tax as a penalty for such regulation is valid.[10] In *National Federation of Independent Business v. Sebelius (NFIB)*,[11] the

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[15] *Id.* at 85.

[16] *Id.* at 85–86.

[1] Flint v. Stone Tracy Co., 220 U.S. 107, 167 (1911).

[2] Felsenheld v. United States, 186 U.S. 126 (1902).

[3] *In re* Kollock, 165 U.S. 526 (1897).

[4] United States v. Doremus, 249 U.S. 86 (1919); *cf.* Nigro v. United States, 276 U.S. 332 (1928).

[5] Sonzinsky v. United States, 300 U.S. 506 (1937).

[6] Without casting doubt on the ability of Congress to regulate or punish through its taxing power, the Court has overruled *United States v. Kahriger*, 345 U.S. 22 (1953), and *Lewis v. United States*, 348 U.S. 419 (1955), to the extent that the opinions precluded individuals from asserting their Fifth Amendment privilege from self-incrimination as a defense to prosecution for violations of tax statutory schemes requiring registration and information reporting. Marchetti v. United States, 390 U.S. 39 (1968); *see* Leary v. United States, 395 U.S. 6 (1969); Grosso v. United States, 390 U.S. 62 (1968); Haynes v. United States, 390 U.S. 85 (1968).

[7] McCray v. United States, 195 U.S. 27 (1904); *see* United States v. Doremus, 249 U.S. 86 (1919); Patton v. Brady, 184 U.S. 608 (1902).

[8] United States v. Sanchez, 340 U.S. at 44 (1950).

[9] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 393 (1940).

[10] *Id.*; *see also* Edye v. Robertson (Head Money Cases), 112 U.S. 580 (1884).

Court reaffirmed that it construes the Constitution to prohibit Congress from using the taxing power to enact taxes that are functionally regulatory penalties as a means of regulating in areas that Congress cannot regulate directly through a separate constitutional authority.[12] The Court has invalidated a few federal taxes on this basis.[13]

Discerning whether Congress, in passing a regulation that purports to be under the taxing authority, intends to exercise a separate constitutional authority, requires evaluation of a number of factors.[14] Under *Bailey v. Drexel Furniture Co.*,[15] decided in 1922, the Court, which had previously rejected a federal law regulating child labor as being outside of the Commerce Clause,[16] also rejected a 10% tax on the net profits of companies who knowingly employed child labor. The Court invalidated the child labor tax as a penalty exceeding Congress's constitutional authority and aiming to achieve a regulatory purpose "plainly within" the exclusive powers reserved to the states under the Tenth Amendment.[17] Four characteristics of the tax led the Court to conclude the tax was a penalty. First, the Court noted that the law in question set forth a specific and detailed regulatory scheme—including the ages, industry, and number of hours allowed—establishing when employment of underage youth would incur taxation.[18] Second, the tax was not commensurate with the degree of the infraction—i.e., a small departure from the prescribed course of conduct could feasibly lead to the 10% tax on net profits.[19] Third, the tax had a scienter requirement, so that the employer had to know that the child was below a specified age in order to incur taxation.[20] Fourth, the statute made the businesses subject to inspection by officers of the Secretary of Labor, positions not traditionally charged with the enforcement and collection of taxes.[21] The Court distinguished the child labor tax from acceptable regulatory taxes by emphasizing that in those cases Congress had authority outside the taxing power to regulate those activities.[22]

In the first half of the twentieth century, the Court continued to strike down federal taxes on the ground that they infringed on regulatory powers reserved to the states under the Tenth Amendment because Congress did not have separate constitutional authority to regulate the subject matter at issue. In 1935, in *United States v. Constantine*,[23] the Court struck down a federal excise tax on liquor dealers operating in violation of state law. The Court construed the Constitution to prohibit Congress from imposing the excise tax when the purpose of the tax was to punish rather than raise revenue.[24] The majority concluded that Congress exceeded its authority by penalizing liquor dealers for violating state law, because such regulation was reserved, under the Tenth Amendment, to the states.[25] Congress lacked authority to impose a penalty on liquor dealers following the repeal of the Eighteenth Amendment, which had

[11] 567 U.S. 519 (2012).

[12] *Id.* at 572–73.

[13] *See*, *e.g.*, United States v. Butler (Child Labor Tax Case), 297 U.S. 1, 68–69 (1936); United States v. Constantine, 296 U.S. 287, 293–94 (1935); Bailey v. Drexel Furniture Co. (Child Labor Tax Case), 259 U.S. 20, 37 (1922).

[14] Hill v. Wallace, 259 U.S. 44 (1922); *see also* Helwig v. United States, 188 U.S. 605 (1903).

[15] 259 U.S. 20.

[16] Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941).

[17] *Drexel Furniture Co.*, 259 U.S. at 37.

[18] *Id.* at 36.

[19] *Id.*

[20] *Id.* at 36–37.

[21] *Id.* at 37.

[22] *Id.* at 40–44.

[23] 296 U.S. 287 (1935).

[24] *Id.* at 294.

[25] *Id.* at 296.

established the national prohibition on alcohol.[26] The next year, in *United States v. Butler*,[27] the Court struck down a tax on agricultural producers that Congress had enacted to raise funds to subsidize specific crops and control agricultural commodity prices. The Court held that Congress did not hold the power to regulate the "purely local activity"[28] of controlling agricultural production, because the power to regulate local activity was reserved to the states under the Tenth Amendment.[29] The Court has since limited the applicability of these decisions.[30]

In subsequent cases, the Court upheld regulatory taxes without specifying whether Congress had authority to regulate the activity subject to tax under its other enumerated powers. For example, in *Sonzinsky v. United States*,[31] the Court rejected a challenge to a federal license tax on dealers, importers, and manufacturers of certain firearms. Similarly, in *United States v. Sanchez*,[32] the Court upheld a tax on unregistered transfers of marijuana that was challenged based on its penal nature.

In 2012, in *NFIB v. Sebelius*, the Court confirmed that the taxing power provides Congress with the authority to use taxes to carry out regulatory measures that might be impermissible if Congress enacted them under its other enumerated powers.[33] In *NFIB*, the Court upheld the constitutionality of a provision in the Patient Protection and Affordable Care Act (ACA) requiring individuals to either purchase minimum health insurance (commonly referred to as the "individual mandate") or pay a "penalty" in lieu of purchasing minimum health insurance.[34] Despite being labeled a penalty in the statute, the Court held the payment due in lieu of purchasing minimum health insurance (the exaction) was a constitutionally permissible use of Congress's authority under the taxing power.[35] More precisely, the Court ruled the exaction was a tax not a penalty for constitutional purposes, and thus the exaction was not impermissibly regulatory under the taxing power.[36]

Chief Justice John Roberts, in a majority holding,[37] distinguished the exaction in *NFIB* from its past precedent in which it held Congress lacked authority under the taxing power to use penalties disguised as taxes to regulate activities that it could not regulate directly through its other enumerated powers.[38] Specifically, the Court found that three of the four characteristics that it had used in *Drexel Furniture Co.* to conclude the child labor tax was a penalty for constitutional purposes were not present with respect to the individual mandate provision at issue in *NFIB*.[39] Unlike *Drexel Furniture Co.*, the Court found: (1) the exaction was not "prohibitory" because the exaction was "far less" than the cost of insurance; (2) there was no scienter requirement—the exaction was not levied based on a taxpayer's knowledge of

[26] *Id.* at 293–94.

[27] 297 U.S. 1, 63 (1936).

[28] *Id.* at 63–64.

[29] *Id.* at 68–69.

[30] *See* NFIB v. Sebelius, 567 U.S. 519, 572–73 (2012).

[31] 300 U.S. 506, 513–14 (1937).

[32] 340 U.S. 42, 44 (1950).

[33] *NFIB*, 567 U.S. 519.

[34] *Id.* at 574 (majority opinion).

[35] *Id.*

[36] *Id.* at 572–74.

[37] Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor and Elena Kagan joined this portion of Justice Roberts' opinion.

[38] *Id.* at 564–68.

[39] *Id.* at 565–66.

wrongdoing; and (3) the Internal Revenue Service (IRS) collected the exaction and the IRS was prohibited from using "those means most suggestive of a punitive sanction, such as criminal prosecution."[40]

The majority did not expressly address the first factor used by the Court in *Drexel Furniture Co.* to conclude the child labor tax was a penalty for constitutional purposes—whether the ACA set forth a specific and detailed course of conduct and imposed an exaction on those who transgress its standard. However, the majority did apply a functional approach that looked at the exaction's "substance and application" to conclude the exaction was a tax not a penalty for constitutional purposes.[41] The Court found that the exaction "look[ed] like a tax in many respects."[42] The Court observed that the exaction is located in the Internal Revenue Code (IRC); the requirement to pay the exaction is located in the IRC; the IRS enforces the exaction; the IRS assesses and collects the exaction "in the same manner as taxes"; the exaction does not apply to individuals who do not owe federal income taxes because their income is less than the filing threshold; taxpayers pay the exaction to the Treasury's general fund when they file their tax returns; the exaction is based on "such familiar factors" as taxable income, filing status, and the number of dependents; and the exaction "yields the essential factor of any tax: it produces at least some revenue for the government."[43] Additionally, in distinguishing penalties from taxes for constitutional purposes, the Court explained that, "if the concept of penalty means anything, it means punishment for an unlawful act or omission."[44] The Court emphasized that, besides the exaction itself, there were no additional "negative legal consequences" for failure to purchase health insurance.[45] The majority's discussion suggests that, for constitutional purposes, the prominence of regulatory motivations for tax provisions may become less important than the nature of the exactions imposed and the manner in which they are administered.

In those areas where activities are subject to both taxation and regulation, Congress's taxing authority is not limited from reaching illegal activities. For instance, Congress may tax an activity, such as the business of accepting wagers,[46] regardless of whether it is permitted or prohibited by the laws of the United States[47] or by those of a state.[48] However, Congress's authority to regulate using the taxing power "reaches only existing subjects."[49] For example, "Congress cannot authorize a trade or business within a state in order to tax it," because it would be "repugnant to the exclusive power of the State over the same subject."[50] Thus, so-called federal "licenses," so far as they relate to topics outside Congress's constitutional authority, merely express "the purpose of the [federal] government not to interfere . . . with the trade nominally licensed, if the required taxes are paid."[51] In those instances, whether a federally "licensed" trade shall be permitted at all is a question to be decided by a state.

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[40] *Id.* at 566.

[41] *Id.* at 565 (quoting United States v. Constantine, 296 U.S. 287, 294 (1935)).

[42] *Id.* at 563.

[43] *NFIB*, 567 U.S. at 563–64.

[44] *Id.* at 567 (quoting United States v. Reorganized CF&I Fabricators of Utah, Inc., 518 U.S. 213, 224 (1996)).

[45] *Id.* at 568.

[46] United States v. Kahriger, 345 U.S. 22 (1953).

[47] United States v. Stafoff, 260 U.S. 477, 480 (1923); United States v. Yuginovich, 256 U.S. 450, 462 (1921).

[48] United States v. Constantine, 296 U.S. 287, 293 (1935).

[49] License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867).

[50] *Id.*

[51] *Id.*

ArtI.S8.C1.1.5 Intergovernmental Tax Immunity Doctrine

Article I, Section 8, Clause 1:

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

There is no provision in the Constitution that expressly provides that the federal government is immune from state taxation,[1] just as there is no provision in the Constitution that expressly provides that states are immune from federal taxation.[2] However, the Supreme Court has applied the intergovernmental tax immunity doctrine to invalidate taxes that impair the sovereignty of the Federal Government or state governments. The intergovernmental tax immunity doctrine is a limitation on federal and state taxing powers by implication.[3] The Court has explained that the origins of the intergovernmental tax immunity doctrine lie in the Supremacy Clause,[4] the Tenth Amendment, and the preservation of the Constitution's system of dual federalism.[5]

The Court first articulated the principles underlying the intergovernmental tax immunity doctrine in 1819 in *McCulloch v. Maryland*.[6] In *McCulloch*, the Court ruled that the Supremacy Clause barred Maryland from imposing taxes on notes issued by the Second Bank of the United States and related penalties.[7] The Court reasoned that if a state had the power to tax the means of the Federal Government, the Supremacy Clause would be empty and without meaning.[8] Thus, the Court held states had "no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[9]

Initially, following *McCulloch*, there were few limitations on federal immunity from state taxation and state immunity from federal taxation.[10] The Court applied the intergovernmental tax immunity doctrine to prohibit federal and state governments from imposing a nondiscriminatory tax on the income or the assets an individual or business received from a contract with the other sovereign. In 1842, in *Dobbins v. Commissioners of Erie County*,[11] the Supreme Court held that the compensation of a federal officer was immune from state taxes.[12]

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[1] Collector v. Day, 78 U.S. (11 Wall.) 113, 127 (1871), *overruled by* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939).

[2] *Day*, 78 U.S. (11 Wall.) at 127.

[3] *Graves*, 306 U.S. at 477–78 (1939).

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

[5] *See*, *e.g.*, South Carolina v. Baker, 485 U.S. 505, 523, 523 n.14 (1988); United States v. New Mexico, 455 U.S. 720, 735–36 (1982); New York v. United States, 326 U.S. 572, 586–87 (1946); *Day*, 78 U.S. (11 Wall.) at 123–27; McCulloch, v. Maryland, 17 U.S. (4 Wheat.) 316, 427–37 (1819).

[6] 17 U.S. (4 Wheat.) at 427–37.

[7] *Id.* at 436.

[8] *Id.* at 433.

[9] *Id.* at 436.

[10] Jefferson Cnty. v. Acker, 527 U.S. 423, 436 (1999), *superseded on other grounds by statute*, Removal Clarification Act of 2011, Pub. L. No. 112–51, 125 Stat. 545 (broadening grounds for removal of certain litigation to federal courts); *see also* Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218 (1928) (holding a state tax on the privilege of distributing gasoline measured by gallons of gasoline sold was unconstitutional as applied to sales a distributor made to the United States), *abrogated by* Alabama v. King & Boozer, 314 U.S. 1 (1941).

[11] 41 U.S. (16 Pet.) 435, 450 (1842), *superseded by statute,* Public Salary Act of 1939, Pub. L. No. 76–32, tit. 1, ch. 59, § 4, 53 Stat. 574, 575 (codified as amended at 4 U.S.C. § 111).

[12] *Id.* at 450.

In 1870, in *Collector v. Day*,[13] the Court relied on the dual federalism principles laid out in *McCulloch* to hold that the salary of a state officer was immune from federal taxes.[14] In 1895, building upon *Day*, the Court held in *Pollock v. Farmers' Loan & Trust*[15] that the interest earned from municipal bonds was immune from a nondiscriminatory federal tax because it was a tax on the power of states and their instrumentalities to borrow money, which was repugnant to the Constitution.[16]

By the beginning of the twentieth century, the Supreme Court began to outline the limits of *Day* and the scope of state immunity from nondiscriminatory federal taxation. In 1903, the Court upheld a federal succession tax upon a bequest to a municipality for public purposes on the ground that the tax was payable by the executor of an estate before distribution to the legatee, the municipality.[17] A closely divided Court declined to "regard it as a tax upon the municipality though it might operate incidentally to reduce the bequest by the amount of the tax."[18] The Court noted "many, if not all, forms of taxation—indeed it may be said generally that few taxes are wholly paid by the person upon whom they are directly and primarily imposed."[19] When South Carolina embarked upon the business of dispensing "intoxicating liquors," its agents were held to be subject to the federal license tax on dealers in intoxicating liquors, the ground of the holding being that agents were not carrying out the ordinary functions of government, but carrying on an ordinary private business.[20]

Another decision marking a clear departure from the logic of *Collector v. Day* was *Flint v. Stone Tracy Co.*,[21] in which the Court sustained an act of Congress taxing the privilege of doing business as a corporation, the tax being measured by the income.[22] The argument that the tax imposed an unconstitutional burden on the exercise by a state of its reserved power to create corporate franchises was rejected, partly because of the principle of national supremacy and partly on the ground that state immunity did not extend to private businesses.[23] This case also qualified *Pollock v. Farmers' Loan & Trust Co.* to the extent that it allowed Congress to impose a privilege tax on the income of corporations from all sources, including state bond interest.[24]

Subsequent cases have sustained an estate tax on a decedent's estate that included state bonds,[25] a federal transportation tax on the transportation of merchandise in performance of a contract to sell and deliver it to a county,[26] custom duties on the importation of scientific

[13] 78 U.S. (11 Wall.) 113 (1871), *overruled by* Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939).

[14] *Id.* at 120–21.

[15] Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895), *overruled by* South Carolina v. Baker, 485 U.S. 505 (1988).

[16] *Id.* at 586 (citing Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449, 468 (1829) (holding federal bond interest was immune from state taxation)).

[17] Snyder v. Bettman, 190 U.S. 249 (1903).

[18] *Id.* at 254.

[19] *Id.*

[20] South Carolina v. United States, 199 U.S. 437 (1905); *see also* Ohio v. Helvering, 292 U.S. 360 (1394); *but see* New York v. United States, 326 U.S. 572 (1946) (abandoning the governmental/proprietary distinction in determining state immunity from federal taxation).

[21] 220 U.S. 107 (1911).

[22] *Id.* at 146, 177.

[23] *Id.* at 152–58.

[24] *See id.* at 162–65.

[25] Greiner v. Lewellyn, 258 U.S. 384, 387 (1922).

[26] Wheeler Lumber Bridge & Supply Co. of Des Moines v. United States, 281 U.S. 572, 579 (1930).

apparatus by a state university,[27] a federal admissions tax on admissions to athletic contests sponsored by a state institution when the state institution used the net proceeds from admissions to support a system of public education,[28] and a federal admissions tax on admissions to a municipal corporation's recreational facilities when the municipal corporation used the admissions charges to cover the recreational facilities' costs.[29] The income derived by independent contractors who were consulting engineers advising states on water supply and sewage disposal systems,[30] the compensation of trustees appointed to manage a street railway system temporarily taken over and operated by a state,[31] the net profits derived from the sale of state bonds,[32] and the net proceeds derived by a trust from the sale of oil produced under a lease of state lands[33] have all been held to be subject to federal taxation despite a possible economic burden on the states.

In *South Carolina v. Baker*,[34] the Court finally explicitly confirmed that it had overruled its holding in *Pollock* that state bond interest was immune from a nondiscriminatory federal tax.[35] The Court observed that "the more general rule that neither the federal nor the state governments could tax income an individual directly derived from any contract with another government"[36] had already been rejected in numerous decisions involving immunity under the intergovernmental tax immunity doctrine.[37] Thus, the Court concluded,

> We see no constitutional reason for treating persons who receive interest on government bonds differently than persons who receive income from other types of contracts with the government, and no tenable rationale for distinguishing the costs imposed on states by a tax on state bond interest from the costs imposed by a tax on the income from any other state contract.[38]

The specific ruling of *Day* that the Federal Government was prohibited from taxing the salaries of state government officers has been overruled.[39] But the principles underlying that

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[27] Bd. of Trs. v. United States, 289 U.S. 48, 59–60 (1933) ("explaining Congress has the exclusive power to regulate foreign commerce under Article I, Section 8, clause 3 of the U.S. Constitution and that the principles underlying state immunity from federal taxation do not provide a basis for state control over importation.").

[28] Allen v. Regents, 304 U.S. 439, 451–453 (1938) (citing South Carolina v. United States, 199 U.S. 437 (1905)).

[29] Wilmette Park Dist. v. Campbell, 338 U.S. 411, 413–14, 420 (1949).

[30] Metcalf & Eddy v. Mitchell, 269 U.S. 514, 518, 524–26 (1926).

[31] Helvering v. Powers, 293 U.S. 214, 225–27 (1934) (citing South Carolina v. United States, 199 U.S. 437 (1905)) and Ohio v. Helvering, 292 U.S. 360 (1394)).

[32] Willcuts v. Bunn, 282 U.S. 216, 223, 230–34 (1931).

[33] Helvering v. Mountain Producers Corp., 303 U.S. 376, 385–87 (1938) *overruling in part* Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 52 S. Ct. 443, 76 L. Ed. 815 (1932) *and* Gillespie v. Oklahoma, 257 U.S. 501 (1922).

[34] 485 U.S. 505 (1988).

[35] *Id.* at 524.

[36] *Id.* at 517.

[37] *Id.* at 518–525 (citing Washington v. United States, 460 U.S. 536 (1983); United States v. New Mexico, 455 U.S. 720 (1982); United States v. Cnty. of Fresno, 429 U.S. 452 (1977); United States v. City of Detroit, 355 U.S. 466 (1958); Oklahoma Tax Comm'n v. Texas Co., 336 U.S. 342 (1949); Alabama v. King & Boozer, 314 U.S. 1 (1941); Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466 (1939); Helvering v. Gerhardt, 304 U.S. 405 (1938); *Mountain Producers Corp.*, 303 U.S. 376 (1938); James v. Dravo Contracting Co., 302 U.S. 134 (1937)).

[38] *Id.* at 524–25.

[39] Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 486 (1939). *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), was decided in 1871 while the country was still in the throes of Reconstruction. As noted by Chief Justice Stone in a footnote to his opinion in *Helvering v. Gerhardt*, 304 U.S. 405, 414 n.4 (1938), the Court had not determined how far the Civil War Amendments had broadened the federal power at the expense of the states, but the fact that the taxing power had recently been used with destructive effect upon notes issued by state banks for circulation in *Veazie Bank v. Fenno*, 75 U.S. (8 Wall.) 533 (1869), suggested the possibility of similar attacks upon the existence of the states themselves. Two years later, the Court took the logical step of holding that a federal tax on railroad bond interest could

decision—that Congress may not lay a tax that would impair the sovereignty of the states—is still recognized as retaining some vitality.[40] The Court in *South Carolina v. Baker* summarized the modern intergovernmental tax immunity doctrine,[41] stating:

> States can never tax the United States directly but can tax any private parties with whom it does business, even though the financial burden falls on the United States, as long as the tax does not discriminate against the United States or those with whom it deals [and] the rule with respect to state tax immunity is essentially the same.[42]

The Court reasoned that under the modern doctrine there were "at least some" nondiscriminatory taxes that the Federal Government could impose directly on states that states could not impose directly on the Federal Government, but it did not address the extent to which states were immune from direct federal taxation.[43] In a footnote, the Court reaffirmed the principal from *New York v. United States*[44] that the issue of whether a federal tax violates state tax immunity under the intergovernmental tax immunity does not arise unless the tax is collected directly from a state.[45]

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not be imposed on the interest received by a municipal corporation that issued bonds to provide a loan to a railroad company because the federal tax was a tax on the municipal corporation. United States v. R.R., 84 U.S. (17 Wall.) 322 (1873). Then, the far-reaching extension of state immunity from federal taxation was granted in *Pollock v. Farmers' Loan & Tr. Co.*, 157 U.S. 429 (1895), when interest received by a private investor on state or municipal bonds was held to be exempt from federal taxation. Though relegated to virtual desuetude, *Pollock* was not expressly overruled until *South Carolina v. Baker*, 485 U.S. 505 (1988). As the apprehension of this era subsided, the doctrine of these cases that extended the reach of state immunity from federal taxation was pushed into the background. It never received the same wide application as did *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), in curbing the power of the states to tax operations or instrumentalities of the Federal Government. The Supreme Court has not issued an opinion significantly narrowing the national taxing power in the name of dual federalism since the early twentieth century. In 1931, the Court held that a federal excise tax on articles sold by manufacturers was inapplicable to the sale of a motorcycle to a municipal corporation for use by the corporation in its police service. Indian Motorcycle Co. v. United States, 283 U.S. 570, 579 (1931). Justices Stone and Brandeis dissented from this decision, and it is doubtful whether it would be followed today. *Cf.* Massachusetts v. United States, 435 U.S. 444 (1978) (upholding the application of a nondiscriminatory federal user fee on all civil aircraft that fly in U.S. navigable airspace to state-owned aircraft used exclusively for police functions when the user fees defrayed the costs of federal aviation programs). The Court in *Indian Motorcycle Co.* relied on its decision in *Panhandle Oil Co. v. Mississippi ex rel. Knox*, 277 U.S. 218 (1928), in which it invalidated the application of a state privilege tax to sales of gasoline a distributor made to the United States. The Court later rejected this reasoning from *Panhandle Oil Co.* in *Alabama v. King & Boozer*, 314 U.S. 1 (1941). In *King & Boozer*, the Court stated, "The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity." *King & Boozer*, 314 U.S. at 9.

[40] At least, if the various opinions in *New York v. United States*, 326 U.S. 572 (1946), retain force, and they may in view of (a later) *New York v. United States*, 505 U.S. 144 (1992), a Commerce Clause case rather than a tax case. *See also* South Carolina v. Baker, 485 U.S. 505, 523 n. 14 (1988).

[41] *South Carolina v. Baker*, 485 U.S. at 523.

[42] *Id.*

[43] *Id.*; *see id.* at 523 n.14. The Supreme Court's decision in *South Carolina v. Baker* came just three years after *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), where the Court held that the Tenth Amendment's limit on Congress's authority to regulate state activities was structural as opposed to substantive and that States must find their protection through the national political process (e.g., elections). The Court in *South Carolina v. Baker* observed that even in *Garcia* it "left open the possibility that some extraordinary defects in the national political process might render congressional regulation of state activities invalid under the Tenth Amendment." *Id.* In both *Garcia* and *South Carolina v. Baker*, the Court declined to identify and define the defects that would lead to invalidation of legislation. *Id.*; *see id.* at 520 n.11 ("To some, Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), may suggest further limitations on state tax immunity. We need not, however, decide here the extent to which the scope of the federal and state immunities differ or the extent, if any, to which States are currently immune from direct nondiscriminatory federal taxation."); *cf.* New York v. United States, 326 U.S. 572, 586 (1946) ("Concededly a federal tax discriminating against a State would be an unconstitutional exertion of power over a coexisting sovereignty within the same framework of government.").

[44] New York v. United States, 326 U.S. 572 (1946) (upholding the application of a nondiscriminatory federal excise tax to state sales of bottled mineral water taken from state-owned springs).

[45] *South Carolina v. Baker*, 485 U.S at 523 n.14.

ArtI.S8.C1.2 Spending Power

ArtI.S8.C1.2.1 Overview of Spending Clause

Article I, Section 8, Clause 1:

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

In its modern understanding, the Spending Clause of the U.S. Constitution ranks among Congress's most important powers. The Clause appears first in Article I, Section 8's list of enumerated legislative powers. It states in relevant part that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[1] The Court has construed the Spending Clause as legislative authority for federal programs as varied and consequential as Social Security,[2] Medicaid,[3] and federal education programs.[4] The spending power also underlies laws regulating local land-use decisions and the treatment of persons institutionalized by states,[5] as well as statutes prohibiting discrimination on certain protected grounds.[6]

The Spending Clause has not always been understood to confer such broad authority. The scope of Congress's spending power divided key members of the founding generation, and these disputes persisted throughout the nineteenth century.[7] The Supreme Court did not squarely address the substantive power of Congress's spending power until the 1930s, when it embraced a relatively broad view of Congress's discretion to identify the expenditures that further the general welfare.[8] Congress has used that power to pursue broad policy objectives, including objectives that it could not achieve legislating under its other enumerated powers. Under the usual framework, Congress offers federal funds in exchange for a recipient agreeing to honor conditions that accompany the funds. This offer and acceptance, the Court has said, is what lends Spending Clause legislation its legitimacy.

In its modern case law, the Court has reaffirmed the central holdings of its 1930s cases. However, the Court has also articulated and developed restrictions or limitations on the spending power. Chief among these are factors that ensure the knowing[9] and voluntary[10] acceptance of funding conditions. Other factors affect the Court's review of Spending Clause legislation as well.[11]

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[1] U.S. Const. art. I, § 8, cl. 1.

[2] Helvering v. Davis, 301 U.S. 619, 641 (1937).

[3] Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 332 (2015).

[4] Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006) (observing that "Congress enacted the" Individuals with Disabilities Education Act "pursuant to the Spending Clause"); Bennett v. Ky. Dep't of Educ., 470 U.S. 656, 665 (1985) (examining funds received by states under Title I of the of the Elementary and Secondary Education Act).

[5] Sossamon v. Texas, 563 U.S. 277, 281 (2011) (explaining that Congress enacted the Religious Land Use and Institutionalized Persons Act under its Spending and Commerce Clause powers).

[6] Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1569 (2022).

[7] *See* ArtI.S8.C1.2.2 Historical Background on Spending Clause.

[8] *See* ArtI.S8.C1.2.3 Early Spending Clause Jurisprudence.

[9] *See* ArtI.S8.C1.2.5 Clear Notice Requirement and Spending Clause.

[10] *See* ArtI.S8.C1.2.6 Anti-Coercion Requirement and Spending Clause.

[11] *See* ArtI.S8.C1.2.7 General Welfare, Relatedness, and Independent Constitutional Bars.

ArtI.S8.C1.2.2 Historical Background on Spending Clause

Article I, Section 8, Clause 1:

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

Under the Articles of Confederation, the Confederation Congress had authority to "ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses."[1] "All charges of war, and all other expenses" that were "incurred for the common defense or general welfare" were paid "out of a common treasury."[2]

For many of the Founding generation, though, this power to determine necessary expenses had limited utility.[3] The common treasury depended entirely on taxes levied by states under state law.[4] If a state failed to supply its quota for national expenses, the Confederation Congress had few effective alternatives. For example, in 1782 New Jersey urged the Confederation Congress to put a stop to the practice of other states paying the wages of troops of their own line rather than contributing those sums to the common treasury to support the Continental Army as a whole.[5] The Confederation Congress's response was that it had already done all it could to ensure that the "whole army" would be "regularly and duly paid" by setting revenue quotas for states, but given the lack of a national taxing power only states could take the actions necessary to meet those quotas.[6]

The Constitution ratified by the states plainly addressed the prior lack of a national taxing power. Congress had the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[7] What was far from plain, both before and after ratification, was the authority that the Spending Clause conferred on Congress to authorize expenditures.[8]

One collection of views, commonly associated with James Madison, argued that the Constitution was structured so that the general language of the Spending Clause was followed by a "specification of the objects alluded to by these general terms."[9] The Madisonian view judged the validity of a particular spending measure by asking whether the spending

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[1] Articles of Confederation of 1781, art. IX, para. 5.

[2] *Id.*, art. VIII, para. 1.

[3] *See, e.g.*, The Federalist No. 21 (Alexander Hamilton) ("The principle of regulating the contributions of the States to the common treasury by QUOTAS is another fundamental error in the Confederation.").

[4] Articles of Confederation of 1781, art. VIII, paras. 1–2 (specifying that the common treasury would be "supplied by the several States" according to land values and that "taxes for paying" each state's share of necessary sums "shall be laid and leveied by the authority and direction of the legislatures of the several States").

[5] 23 J. of the Cont'l Cong. 629 (Oct. 1, 1782). The Continental Congress provided for the raising of the Continental Army by establishing regimental quotas for each state to furnish. *See, e.g.*, 18 J. of the Cont'l Cong. 894 (Oct. 3, 1780). Troops furnished by a state were considered part of the state's "line." *See* Robert K. Wright, Jr., The Continental Army 438 (1983) (explaining that a "line" was that "portion of the Continental Army under the auspices of a specific state").

[6] *See* 23 J. of the Cont'l Cong. 629–31 (Oct. 1, 1782) (asserting that if "individual states undertake, without the previous warrant of Congress, to disperse any part of moneys required for and appropriated to the payment of the army, . . . the federal constitution must be so far infringed").

[7] U.S. Const. art. I, § 8, cl. 1.

[8] These disputes persisted long after the Founding generation. *See, e.g.*, Theodore Sky, To Provide for the General Welfare 245–46 (2003) (discussing then-Rep. Abraham Lincoln's Hamiltonian rejoinder to President James K. Polk's 1848 veto of a river-and-harbors bill).

[9] *See* The Federalist No. 41 (James Madison).

addressed a subject within one of Congress's other enumerated powers.[10] Another set of viewpoints, commonly associated with Alexander Hamilton, took a broader view.[11] Hamilton argued that the phrase "the general welfare" was as "comprehensive as any that could have been used."[12] The phrase embraced subject matter of such wide variety that it defied further specification or definition.[13]

ArtI.S8.C1.2.3 Early Spending Clause Jurisprudence

Article I, Section 8, Clause 1:

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

Some Supreme Court opinions issued prior to 1936 featured arguments from parties that a particular appropriation exceeded Congress's authority under the Spending Clause. Despite these arguments occasionally arising, the Court in the nineteenth and early twentieth centuries generally declined to address them. In 1892, the Court avoided the question of whether the Spending Clause permitted Congress to direct payments to the producers of domestic sugar, because if the appropriation exceeded Congress's spending powers, that conclusion would not yield the relief sought by those seeking to invalidate the producer payment.[1] Perhaps more important, in 1923, the Court relied on justiciability doctrines to dismiss separate challenges, brought by a state and an individual taxpayer, to a federal program offering grants to states to reduce maternal and infant mortality.[2] Until the New Deal, disputes about the scope of Congress's spending power were generally fought between and within the political branches, not in the courts.[3] However, the Court had held by the 1930s that the Spending Clause's use of the term "debts" allows Congress to pay claims that rest on moral considerations, in addition to those claims that rest on legally enforceable obligations of the United States.[4]

By 1937, the state of the case law had changed following three groundbreaking decisions. In 1936, the Court decided *United States v. Butler*, a challenge to the Agricultural Adjustment Act of 1933.[5] To boost agricultural commodities prices, the Act authorized the Secretary of Agriculture to levy fees on agricultural commodity processors and pay farmers of the same commodities who agreed to reduce their acreage under cultivation.[6] Processors challenged the

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[10] The Virginia Report of 1799–1800, at 201 (J.W. Randolph ed., 1850) ("Whenever, therefore, money has been raised by the general authority, and is to be applied to a particular measure, a question arises whether the particular measure be within the enumerated authorities vested in Congress.").

[11] Having endorsed the Hamiltonian view in his influential treatise on the Constitution, Justice Joseph Story is often listed alongside Hamilton as one of its chief proponents. *See, e.g.*, United States v. Butler, 297 U.S. 1, 66 (1936); *see also* 2 Joseph Story, Commentaries on the Constitution of the United States § 922 (1833).

[12] Alexander Hamilton, Report on the Subject of Manufactures 54 (1791).

[13] *Id.*

[1] *See* Marshall Field & Co. v. Clark, 143 U.S. 649, 695–96 (1892).

[2] *See* Massachusetts v. Mellon, 262 U.S. 447, 483, 488 (1923) (dismissing challenge by state and taxpayer on political question and standing grounds, respectively).

[3] *See, e.g.*, David E. Engdahl, *The Spending Power*, 44 Duke L.J. 1, 26–35 (1994).

[4] *See* United States v. Realty Co., 163 U.S. 427, 440 (1896). The Court reaffirmed this understanding in its New Deal-era cases. *See* Cincinnati Soap Co. v. United States, 301 U.S. 308, 317 (1937).

[5] 297 U.S. 1, 53 (1936).

[6] *See id.* at 58–59.

program as exceeding Congress's legislative authority. The Federal Government pointed to the Spending Clause as constitutional authority for the Act.[7]

For the first time in its history, the Court considered three perspectives of the authority granted by the Clause.[8] The Court first noted that though it had "never been authoritatively accepted," one could argue that the Spending Clause granted Congress authority to provide for the general welfare by regulating agriculture, whether or not taxation or expenditure figured in the regulation.[9] The Court rejected this view. The grant of such a "general and unlimited" regulatory power in the first clause of Article I, Section 8 could not be squared with the later enumeration of Congress's legislative powers.[10] The "only thing" that the Clause granted was "the power to tax for the purpose of providing funds for payment" of debts and supporting the general welfare.[11]

Having rejected the conception of the Spending Clause as general regulatory authority, the *Butler* Court then considered two long-standing views on the types of taxes and expenditures authorized by the Clause's reference to the "general welfare."[12] The Madisonian view held that "the grant of power to tax and spend for the general national welfare must be confined to the enumerated legislative fields committed to the Congress."[13] The Hamiltonian view cast the power as "separate and distinct from those later enumerated" and "not restricted" by them.[14] Recognizing that support existed among the Founders for both perspectives, the Court adopted the Hamiltonian view, stating that "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution."[15]

Even under this "broader construction" of the Clause, however, the Court held that the Act exceeded Congress's authority.[16] The producer fee and the farmer payments were part of a plan to regulate agriculture, which the Court held invaded the reserved powers of states.[17] If Congress could not directly regulate agriculture, it could not "purchase compliance" with such federal policies by offering funds to farmers that they could not afford to refuse.[18]

One year later, in 1937, the Court reaffirmed *Butler*'s embrace of the Hamiltonian perspective and offered further guidance on Congress's authority to identify expenditures that serve the general welfare.[19] In resolving a challenge to the Social Security Act's system of old-age benefits, the Court in *Helvering v. Davis* characterized Spending Clause analysis as requiring a fact-intensive distinction between "one welfare and another," that is, "between particular and general."[20] Congress had discretion to decide that expenditures aided the general welfare, unless that choice was "clearly wrong, a display of arbitrary power," or "not an

[7] *Id.* at 64.

[8] *See* United States v. Gerlach Live Stock Co., 339 U.S. 725, 738 (1950) (characterizing *Butler* as the Supreme Court's "first" declaration on the "substantive power" to tax and spend).

[9] *Butler*, 297 U.S. at 64.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 65.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 66.

[16] *Id.* at 66, 77–78.

[17] *Id.* at 68 (stating that the regulation of agriculture involved a power not delegated to the Federal Government).

[18] *Id.* at 70–71, 74.

[19] Helvering v. Davis, 301 U.S. 619, 640 (1937) (stating that, so far as the federal courts are concerned, differences between the Madisonian and Hamiltonian views had been "settled by decision" in *Butler*).

[20] *Id.*

exercise of judgment."[21] What qualified as the general welfare could change with the times.[22] Congress could thus conclude that legislation to support the destitute elderly, a "national" problem, would advance the general welfare.[23]

Whereas *Helvering* reaffirmed and expanded upon aspects of *Butler*, a companion case, *Charles C. Steward Machine Co. v. Davis*,[24] eroded *Butler*'s coercion conclusions. *Steward Machine Co.* involved a challenge to a federal payroll tax.[25] Employers who made contributions to an unemployment fund established under state law could credit the contribution against the federal tax, but only if the state's unemployment-fund law met standards set forth in federal law.[26] The Court held that this framework did not coerce states to enact unemployment-fund laws; the prospect of a tax credit was merely an "inducement."[27] States had the freedom of will to participate (or not) in the provision of unemployment relief, and if a state decided to participate it could rescind that decision at any time by repealing its unemployment-fund law.[28]

As the Court's first forays into debates about the Spending Clause drew to a close, a few points were clear. The Spending Clause did not bestow general regulatory powers on Congress. Instead, the power conferred was the power to tax and spend in aid of the general welfare. These fiscal powers were not limited by the Constitution's other grants of enumerated legislative powers. Congress instead had broad discretion to determine the types of expenditures that would further the general welfare, and the federal courts would not second-guess that choice. Where Congress's offer of federal funds came with conditions attached, the federal courts would view the funds as a mere inducement to accept the condition unless compulsion was apparent.

ArtI.S8.C1.2.4 Modern Spending Clause Jurisprudence Generally

Article I, Section 8, Clause 1:

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

The Supreme Court's early Spending Clause case law culminated, in 1937, with an embrace of a relatively expansive view of Congress's power to tax and spend in aid of the general welfare. That same expansive view permeates the Court's modern Spending Clause case law. The Court has repeatedly stated that, by allocating federal funds and attaching conditions to those funds,[1] Congress may pursue broad policy objectives.[2] Congress may even achieve policy outcomes that it could not directly legislate using its other enumerated powers.[3]

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[21] *Id.*

[22] *Id.* at 641.

[23] *Id.* at 644.

[24] 301 U.S. 548 (1937).

[25] *Id.* at 573–74.

[26] *Id.* at 574–75.

[27] *Id.* at 590.

[28] *Id.* at 590, 592–93.

[1] The Court has stated that Congress's authority to attach conditions to federal funds derives, in part, from the Necessary and Proper Clause. *See* Sabri v. United States, 541 U.S. 600, 605 (2004); *see also* ArtI.S8.C18.1 Overview of Necessary and Proper Clause.

Much of the Court's modern Spending Clause jurisprudence has focused on what the Court has termed "restrictions"[4] or "limits"[5] on the spending power. The Court today judges the constitutional validity of federal spending using five factors. First, Congress must unambiguously identify conditions attached to federal funds. Second, Congress must refrain from offers of funds that coerce acceptance of funding conditions. Third, spending must be in pursuit of the general welfare. Fourth, conditions on federal funds must relate to the federal interest in a program. Finally, a funding condition may not induce conduct on the part of the funds recipient that is itself unconstitutional.

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

Article I, Section 8, Clause 1:

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

The Court evaluates Spending Clause legislation by requiring Congress to state conditions attached to federal funds in unambiguous terms. This requirement derives from a distinction between legislation enacted pursuant to Congress's other enumerated powers and legislation enacted under the Spending Clause. When Congress legislates under its power to enforce the Fourteenth Amendment, for example, it can command action or proscribe conduct.[1] Spending Clause legislation, on the other hand, is akin to a contract.[2] Congress makes federal funds available, subject to stated conditions, and a recipient knowingly and voluntarily accepts the funds and the conditions.[3] Knowing and voluntary acceptance is what lends Spending Clause legislation its legitimacy.[4]

Much of the Court's modern Spending Clause case law involves states as recipients, and that context has shaped the Court's clear-notice doctrine.[5] In view of limits on Congress's ability to command action by states,[6] the Justices have stressed that knowing and voluntary acceptance is "critical to ensuring that Spending Clause legislation does not undermine the status of the States as independent sovereigns in our federal system."[7] In particular, the

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[2] Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1568 (2022); Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 213 (2013); Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 296 (2006); South Dakota v. Dole, 483 U.S. 203, 206–07 (1987); Fullilove v. Klutznick, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.).

[3] Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666, 686 (1999); Oklahoma v. U.S. Civ. Serv. Comm'n, 330 U.S. 127, 143 (1947).

[4] *Dole*, 483 U.S. at 207.

[5] Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 n.13 (1981).

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

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

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

[4] *Barnes*, 536 U.S. at 186.

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

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

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

clear-notice requirement—along with the anti-coercion principle discussed below—ensure that state officials bear political accountability for only those funding conditions that the officials had a legitimate chance of rejecting.[8]

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

Questions of enforcement of funding conditions have implicated the clear-notice requirement. The Court has stated that, typically, the remedy for noncompliance with a funding condition is for the Federal Government to take action against a grantee.[12] Unless a statute provides otherwise, a state will not usually have clear notice that noncompliance with a funding condition would result in a suit brought by someone other than the Federal Government, such as an end beneficiary of the program supported with conditioned funds.[13] However, the Court has found funding conditions enforceable by private parties when a statute conferred a specific monetary entitlement on a person bringing suit who lacked sufficient administrative procedures to challenge denial of that entitlement.[14]

The Court has applied clear-notice principles to determine whether a funds recipient plainly knew it could be held liable for the particular conduct at issue in the suit.[15] Congress must also speak with a clear voice regarding the scope of remedies authorized by statute.[16] If a private suit is authorized but statute does not specify remedies, the Court has stated that the funds recipient is on notice that it may be subject to the usual remedies for a breach of contract action.[17]

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

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

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

[11] *See id.*

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

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

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

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

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

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

ArtI.S8.C1.2.6 Anti-Coercion Requirement and Spending Clause

Article I, Section 8, Clause 1:

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

As discussed above, Spending Clause legislation derives its legitimacy from a funds recipient's knowing *and* voluntary acceptance of the conditions attached to federal funds.[1] While the clear-notice requirement is directed at ensuring a funds recipient's acceptance of Congress's conditions is knowing, the anti-coercion principle aims at acceptance that is voluntary.

Spending Clause legislation often advances policy objectives by using the prospect of federal funds as pressure or incentive to accept the conditions that go along with the funds.[2] States can either accept the incentive or assert their prerogative of not agreeing to federal stipulations.[3] There is a limit, however, to Congress's ability to exert influence on states through offers of conditioned funds.[4] Depending on how a conditional offer of funds is presented, permissible inducement can turn into impermissible compulsion.[5]

The Court's modern case law includes two applications of the anti-coercion principle.[6] In its first case, the 1987 decision in *South Dakota v. Dole*, the Court held that the threat of withholding 5% of highway funding from states that refused to adopt a minimum drinking age of twenty-one was only "relatively mild encouragement" to accept Congress's policy condition.[7] As Chief Justice John Roberts would later explain, this sum was less than one-half of one percent of South Dakota's budget at the time.[8]

In the second case, the 2012 decision in *National Federation of Independent Business (NFIB) v. Sebelius*, seven of nine Justices concluded that Congress presented states with a coercive funding condition by requiring them to expand Medicaid coverage to new populations or lose all Medicaid funds.[9] However, the seven Justices joined two different opinions: a plurality opinion authored by Chief Justice Roberts on behalf of himself and Justices Stephen Breyer and Elena Kagan, and a joint dissent by Justices Antonin Scalia, Anthony Kennedy, Clarence Thomas, and Samuel Alito. The fractured nature of this most recent application of the anti-coercion principle leaves its precise contours unclear.

Chief Justice Roberts explained that the condition confronting the Court was not a condition on the use of funds, but rather a threat to terminate "other significant independent

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[1] *See* ArtI.S8.C1.2.5 Clear Notice Requirement and Spending Clause.

[2] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 577 (2012) (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.) (stating that Congress may use its spending power to create "incentives for States to act in accordance with federal policies" (internal quotation marks omitted)); South Dakota v. Dole, 483 U.S. 203, 211 (1987) (stating that every "rebate from a tax when conditioned upon conduct is in some measure a temptation" (quoting Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 589 (1937)).

[3] Oklahoma v. U.S. Civ. Serv. Comm'n, 330 U.S. 127, 143–44 (1947); *see also* Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 271 (1991).

[4] See *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 577 (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.) (relating anti-commandeering rules to the anti-coercion principle).

[5] *See Dole*, 483 U.S. at 211.

[6] Coercion figures in the Court's early Spending Clause jurisprudence as well. *See* ArtI.S8.C1.2.3 Early Spending Clause Jurisprudence (discussing United States v. Butler, 297 U.S. 1 (1936) and Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937)).

[7] *Dole*, 483 U.S. at 211–12.

[8] *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 581 (plurality opinion of Roberts, C.J., joined by Breyer and Kagan, JJ.).

[9] *See id.* at 577.

grants" of funds.[10] Conditions that govern the use of funds ensure that grantees spend federal funds for only authorized purposes, while conditions of the Medicaid-expansion variety could properly be viewed as Congress's attempt to pressure states to accept policy changes.[11] Moreover, this instance of Medicaid expansion was not a mere modification of an existing program, as with past changes to Medicaid; it was the creation of a "new health care program."[12] States could not have anticipated the contours of this new program when they first agreed to participate in Medicaid, yet were required to participate in the new program to keep federal funding for pre-expansion Medicaid populations.[13]

Faced with such a policy condition, Chief Justice Roberts focused on the "financial inducement offered by Congress," or in other words, the amount of funding a state could lose if it declined to expand Medicaid coverage.[14] The threatened loss of federal funds equal to 10% of a state's overall budget—twenty times the portion of the state budget at issue in *Dole*—left states with no choice but to accept Medicaid expansion.[15]

The joint dissent, on the other hand, framed the coercion inquiry as whether "states really have no choice other than to accept the package."[16] This formulation appeared to place particular emphasis on the practical effects of a state declining Medicaid expansion.[17] For example, the joint dissent reasoned that though states possess separate taxing powers, as a practical matter those state powers could not be used to create alternate health care coverage under state law on the pre-expansion model of Medicaid.[18]

ArtI.S8.C1.2.7 General Welfare, Relatedness, and Independent Constitutional Bars

Article I, Section 8, Clause 1:

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

Beyond the clear-notice requirement and the anti-coercion rule, the Court evaluates Spending Clause legislation using three additional factors. First, spending must be in pursuit of the general welfare.[1] This determination is largely for Congress to make.[2] The Court substantially defers to Congress's decision that a particular expenditure advances the general

[10] *Id.* at 580.

[11] *Id.*

[12] *Id.* at 582–84 (stressing differences in patient population, federal-state cost sharing, and benefits packages, as between pre- and post-expansion Medicaid programs).

[13] *See id.*

[14] *Id.* at 580.

[15] *Id.* at 581.

[16] *Id.* at 679 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

[17] *See id.* (stating that "theoretical voluntariness is not enough").

[18] *See id.* at 683–84.

[1] South Dakota v. Dole, 483 U.S. 203, 207 (1987).

[2] Buckley v. Valeo, 424 U.S. 1, 90 (1976) ("It is for Congress to decide which expenditures will promote the general welfare."), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81; *cf.* Lyng v. Int'l Union, 485 U.S. 360, 373 (1988) (explaining that "the discretion about how best to spend money to improve the general welfare is lodged in Congress rather than the courts"); Mathews v. De Castro, 429 U.S. 181, 185 (1976) (similar).

welfare.[3] The Court has not invalidated Spending Clause legislation on the ground that it did not satisfy the general welfare requirement.[4] It has even questioned whether the general-welfare requirement is judicially enforceable.[5]

Second, a funding condition must reasonably relate to the federal interest in a program.[6] The Court has not held that a funding condition was unrelated to a federal interest. It has instead sustained a condition requiring states to set a minimum drinking age of twenty-one, because that condition promoted the federal interest in safe interstate travel.[7] The Court has also concluded that Congress could require a state to not employ in its federally supported programs a person who plays an active role in the affairs of a political party.[8] This condition advanced the federal interest in sound management of federal funds.[9]

Third, a funding condition may not induce states to act in a way that is itself unconstitutional.[10] This factor asks whether provisions of the Constitution, other than the Spending Clause, prohibit the conduct that the funding condition would prompt.[11] The constraining effect of other constitutional provisions is explored in other essays.[12] However, under the Court's modern case law, it appears that one provision of the Constitution in particular, the Tenth Amendment, is not properly understood as a capable of standing as an independent constitutional bar to a conditional offer of federal funds that otherwise satisfies the Court's five-factor analysis.[13]

Clause 2—Borrowing

ArtI.S8.C2.1 Borrowing Power of Congress

Article I, Section 8, Clause 2:

> *[The Congress shall have Power . . .] To borrow Money on the credit of the United States;* . . .

The original draft of the Constitution reported to the convention by its Committee of Detail empowered Congress "To borrow money and emit bills on the credit of the United States."[1]

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[3] *Dole*, 483 U.S. at 208; *see also Buckley*, 424 U.S. at 91 (stating that whether spending is wasteful, excessive, or unwise is irrelevant to judicial review of the general-welfare requirement).

[4] *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 674 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting).

[5] *Dole*, 483 U.S. at 208 n.2 ("The level of deference to the congressional decision is such that the Court has more recently questioned whether 'general welfare' is a judicially enforceable restriction at all." (citing *Buckley*, 424 U.S. at 90–91)).

[6] *Id.* at 207–08; *cf.* Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 295 (1958).

[7] *Dole*, 483 U.S. at 207–08.

[8] Oklahoma v. U.S. Civ. Serv. Comm'n, 330 U.S. 127, 143 (1947).

[9] *See id.*

[10] *Dole*, 483 U.S. at 210–11; King v. Smith, 392 U.S. 309, 333 n. 34 (1968).

[11] *See* United States v. Am. Libr. Ass'n, Inc., 539 U.S. 194, 214 (2003) (plurality op.) ("Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights," a federal statute requiring such filtering as a condition of federal funds "does not induce libraries to violate the Constitution, and is a valid exercise of Congress's spending power.").

[12] In addition, the Court has developed its unconstitutional conditions doctrine, in part, by examining Spending Clause legislation. *See* Amdt1.7.13.1 Overview of Unconstitutional Conditions Doctrine (summarizing the doctrine as resting on the principle "that the government normally may not require a person, as a condition of receiving a public benefit, to relinquish a constitutional right").

[13] *Cf. Dole*, 483 U.S. at 210 (characterizing Oklahoma v. U.S. Civ. Serv. Comm'n, 330 U.S. 127 (1947), as having held that "a perceived Tenth Amendment limitation on congressional regulation of state affairs did not concomitantly limit the range of conditions legitimately placed on federal grants").

[1] 2 Records of the Federal Convention of 1787, at 144, 308–09 (Max Farrand ed., 1937).

ArtI.S8.C2.1
Borrowing Power of Congress

When this section was reached in the debates, Gouverneur Morris moved to strike out the clause "and emit bills on the credit of the United States." James Madison suggested that it might be sufficient "to prohibit the making them a tender." After a spirited exchange of views on the subject of paper money, the convention voted, nine states to two, to delete the words "and emit bills."[2] Nevertheless, in 1870, the Court relied in part upon this clause in holding that Congress had authority to issue treasury notes and to make them legal tender in satisfaction of antecedent debts.[3]

When it borrows money "on the credit of the United States," Congress creates a binding obligation to pay the debt as stipulated and cannot thereafter vary the terms of its agreement. A law purporting to abrogate a clause in government bonds calling for payment in gold coin was held to contravene this clause, although the creditor was denied a remedy in the absence of a showing of actual damage.[4]

Clause 3—Commerce

ArtI.S8.C3.1 Overview of Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Commerce Clause gives Congress broad power to regulate interstate commerce and restricts states from impairing interstate commerce. Early Supreme Court cases primarily viewed the Commerce Clause as limiting state power rather than as a source of federal power. Of the approximately 1,400 Commerce Clause cases that the Supreme Court heard before 1900, most stemmed from state legislation.[1] As a consequence, the Supreme Court's early interpretations of the Commerce Clause focused on the meaning of "commerce" while paying less attention to the meaning of "regulate." During the 1930s, however, the Supreme Court increasingly heard cases on Congress's power to regulate commerce, with the result that its interstate Commerce Clause jurisprudence evolved markedly during the twentieth century.

ArtI.S8.C3.2 Meaning of Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

While the etymology of the word "commerce" suggests that "merchandise," or goods for sale, was integral to its original meaning,[1] Chief Justice John Marshall in *Gibbons v. Ogden* interpreted the Commerce Clause broadly.[2] *Gibbons* concerned whether the New York legislature could grant a monopoly to Aaron Ogden to operate steamships on New York waters and thereby prevent Thomas Gibbons from operating a steamship between New York and New

[2] *Id.* at 310.

[3] Knox v. Lee (Legal Tender Cases), 79 U.S. (12 Wall.) 457 (1871), overruling Hepburn v. Griswold, 75 U.S. (8 Wall.) 603 (1870).

[4] Perry v. United States, 294 U.S. 330, 351 (1935). *See also* Lynch v. United States, 292 U.S. 571 (1934).

[1] E. Prentice & J. Egan, The Commerce Clause of the Federal Constitution 14 (1898).

[1] The Oxford English Dictionary: "com- together, with, + merx, merci- merchandise, ware."

[2] 22 U.S. (9 Wheat.) 1 (1824).

Jersey pursuant to a license granted by Congress.[3] In defending his New York-granted steamship monopoly, Ogden argued that transporting passengers did not constitute "commerce" under the Commerce Clause. Finding New York's grant of a steamship monopoly violated the Commerce Clause, Chief Justice Marshall reasoned that commerce encompassed not only buying and selling but also, more generally, intercourse and consequently navigation. The Chief Justice wrote:

> The subject to be regulated is commerce. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more—it is intercourse.[4]

Marshall further noted the general understanding of the meaning of commerce, the Article I, Section 9 prohibition against Congress granting any preference "by any regulation of commerce or revenue, to the ports of one State over those of another," and Congress's power to impose embargoes.[5]

In *Gibbons*, Marshall qualified the word "intercourse" with the word "commercial," thus retaining the element of monetary transactions.[6] Initially, the Court viewed activities covered by Congress's interstate commerce clause power narrowly. Thus, the Court held the Commerce Clause did not reach mining or manufacturing regardless of whether the product moved in interstate commerce;[7] insurance transactions crossing state lines;[8] and baseball exhibitions between professional teams traveling from state to state.[9] Similarly, the Court held that the Commerce Clause did not apply to contracts to insert advertisements in periodicals in another state[10] or to render personal services in another state.[11]

Later decisions treated the Commerce Clause more expansively. In 1945, the Court held in *Associated Press v. United States* that a press association gathering and transmitting news to client newspapers to be interstate commerce.[12] Likewise, in 1943, the Court held in *American Medical Association v. United States* that activities of Group Health Association, Inc., which

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[3] Act of February 18, 1793, 1 Stat. 305, entitled "An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same."

[4] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189 (1824).

[5] *Id.* at 190–94.

[6] *Id.* at 193.

[7] Kidd v. Pearson, 128 U.S. 1 (1888); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923); United States v. E. C. Knight Co., 156 U.S. 1 (1895); *see also* Carter v. Carter Coal Co., 298 U.S. 238 (1936).

[8] Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869); see also the cases to this effect cited in United States v. Se. Underwriters Ass'n, 322 U.S. 533, 543–545, 567–568, 578 (1944).

[9] Fed. Baseball League v. Nat'l League of Pro. Baseball Clubs, 259 U.S. 200 (1922). When pressed to reconsider its decision, the Court declined, noting that Congress had not seen fit to bring the business under the antitrust laws by legislation having prospective effect; that the business had developed under the understanding that it was not subject to these laws; and that reversal would have retroactive effect. Toolson v. N.Y. Yankees, 346 U.S. 356 (1953). In *Flood v. Kuhn*, 407 U.S. 258 (1972), the Court recognized these decisions as aberrations, but thought the doctrine was entitled to the benefits of *stare decisis*, as Congress was free to change it at any time. The same considerations not being present, the Court has held that businesses conducted on a multistate basis, but built around local exhibitions, are in commerce and subject to, *inter alia*, the antitrust laws, in the instance of professional football, Radovich v. Nat'l Football League, 352 U.S. 445 (1957), professional boxing, United States v. Int'l Boxing Club, 348 U.S. 236 (1955), and legitimate theatrical productions, United States v. Shubert, 348 U.S. 222 (1955).

[10] Blumenstock Bros. v. Curtis Publ'g Co., 252 U.S. 436 (1920).

[11] Williams v. Fears, 179 U.S. 270 (1900). *See also* Diamond Glue Co. v. U.S. Glue Co., 187 U.S. 611 (1903); Browning v. City of Waycross, 233 U.S. 16 (1914); General Ry. Signal Co. v. Virginia, 246 U.S. 500 (1918). *But see* York Mfg. Co. v. Colley, 247 U.S. 21 (1918).

[12] Associated Press v. United States, 326 U.S. 1 (1945).

serve only its own members, are "trade" and capable of becoming interstate commerce.[13] The Court also held insurance transactions between an insurer and insured in different states to be interstate commerce.[14] Most importantly, the Court held that manufacturing,[15] mining,[16] business transactions,[17] and the like, which occur antecedent or subsequent to a move across state lines, are part of an integrated commercial whole and covered by the Commerce Clause. As such, Supreme Court case law on the meaning of "commerce" in "interstate commerce" covers movements of persons and things, whether for profit or not, across state lines;[18] communications; transmissions of intelligence, whether for commercial purposes or otherwise;[19] and commercial negotiations that involve transportation of persons or things, or flows of services or power, across state lines.[20]

ArtI.S8.C3.3 Meaning of Among the Several States in the Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Supreme Court has interpreted the phrase "among the several states" to exclude transactions that occur wholly within a state. In *Gibbons v. Ogden*, Chief Justice John Marshall observed that the phrase "among the several States" was "not one which would probably have been selected to indicate the completely interior traffic of a state."[1] He noted that although the phrase "may very properly be restricted to that commerce which concerns more states than one,"[2] "[c]ommerce among the states, cannot stop at the external boundary line of each state, but may be introduced into the interior."[3] Identifying transactions covered by the Commerce Clause, he stated:

> The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the states generally; but not to those which are completely within a particular state, which do not affect other states, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.[4]

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[13] Am. Med. Ass'n v. United States, 317 U.S. 519 (1943). *Cf.* United States v. Or. Med. Society, 343 U.S. 326 (1952).

[14] United States v. Se. Underwriters Ass'n, 322 U.S. 533 (1944).

[15] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[16] Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940). *See also* Hodel v. Va. Surface Mining and Reclamation Ass'n, 452 U.S. 264, 275–283 (1981); Mulford v. Smith, 307 U.S. 38 (1939) (agricultural production).

[17] Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Chi. Bd. of Trade v. Olsen, 262 U.S. 1 (1923).

[18] In many later formulations, crossing of state lines is no longer the *sine qua non*; wholly intrastate transactions with substantial effects on interstate commerce may suffice.

[19] *E.g.*, United States v. Simpson, 252 U.S. 465 (1920); Caminetti v. United States, 242 U.S. 470 (1917).

[20] The Court stated: "Not only, then, may transactions be commerce though non-commercial; they may be commerce though illegal and sporadic, and though they do not utilize common carriers or concern the flow of anything more tangible than electrons and information." United States v. Se. Underwriters Ass'n, 322 U.S. 533, 549–50 (1944).

[1] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824).

[2] *Id.* at 194.

[3] *Id.*

[4] 22 U.S. (9 Wheat.) 1, 194–195 (1824).

Subsequent to *Gibbons*, the Court held in a number of cases that Congress's Commerce Clause power did not extend to commerce that was "exclusively internal" to a state.[5] In these nineteenth and early twentieth century cases, the Court seemingly tied Congress's interstate commerce power to cross-border transactions notwithstanding Marshall's *Gibbons* reasoning that Congress's Commerce Clause power could extend to intrastate commerce that affects other states or implicates congressional power.[6] In its 1905 *Swift & Co. v. United States* decision, the Court revisited Marshall's expansive reading of the Commerce Clause to reason that, in a current of commerce, each element was within Congress's Commerce Clause power.[7] Looking at the interrelationship of industrial production to interstate commerce,[8] the Court noted that the cumulative impact[9] of minor transactions can impact interstate commerce.[10]

ArtI.S8.C3.4 Meaning of Regulate in the Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Court has interpreted "regulate" in the Commerce Clause as Congress's power to prescribe conditions and rules for commercial transactions, keep channels of commerce open, and regulate prices and terms of sale. In *Gibbons v. Ogden*, Chief Justice John Marshall discussed Congress's authority to "regulate," stating:

> It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution . . . If, as has always been understood, the sovereignty of congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several states, is vested in

[5] New York v. Miln, 36 U.S. (11 Pet.) 102 (1837); License Cases, 46 U.S. (5 How.) 504 (1847); Passenger Cases, 48 U.S. (7 How.) 283 (1849); Patterson v. Kentucky, 97 U.S. 501 (1879); Trade-Mark Cases, 100 U.S. 82 (1879); Kidd v. Pearson, 128 U.S. 1 (1888); Ill. Cent. R.R. v. McKendree, 203 U.S. 514 (1906); Keller v. United States, 213 U.S. 138 (1909); Hammer v. Dagenhart, 247 U.S. 251 (1918); Oliver Iron Co. v. Lord, 262 U.S. 172 (1923).

[6] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194–195 (1824). Marshall stated: "Commerce among the states must, of necessity, be commerce with[in] the states. The power of congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several states." *Id.* at 196. Commerce "among the several States," however, does not comprise commerce of the District of Columbia or the territories of the United States. Congress's power over their commerce is an incident of its general power over them. Stoutenburgh v. Hennick, 129 U.S. 141 (1889); Atl. Cleaners & Dyers v. United States, 286 U.S. 427 (1932); *In re* Bryant, 4 F. Cas. 514 (No. 2067) (D. Oreg. 1865). The Court has held transportation between two points in the same state to be interstate commerce when a part of the route is a loop outside the state. Hanley v. Kan. City S. Ry., 187 U.S. 617 (1903); W. Union Tel. Co. v. Speight, 254 U.S. 17 (1920). But such a deviation cannot be solely for the purpose of evading a tax or regulation in order to be exempt from the state's reach. Greyhound Lines v. Mealey, 334 U.S. 653, 660 (1948); Eichholz v. Pub. Serv. Comm'n, 306 U.S. 268, 274 (1939). Red cap services performed at a transfer point within the state of departure but in conjunction with an interstate trip are reachable. New York, N.H. & H. R.R. v. Nothnagle, 346 U.S. 128 (1953).

[7] Swift & Co. v. United States, 196 U.S. 375 (1905); Stafford v. Wallace, 258 U.S. 495 (1922); Chi. Bd. of Trade v. Olsen, 262 U.S. 1 (1923).

[8] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

[9] United States v. Darby, 312 U.S. 100 (1941); Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968); Perez v. United States, 402 U.S. 146 (1971); Russell v. United States, 471 U.S. 858 (1985); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991).

[10] NLRB v. Fainblatt, 306 U.S. 601 (1939); Kirschbaum v. Walling, 316 U.S. 517 (1942); United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Wickard v. Filburn, 317 U.S. 111 (1942); NLRB v. Reliance Fuel Oil Co., 371 U.S. 224 (1963); Katzenbach v. McClung, 379 U.S. 294 (1964); Maryland v. Wirtz, 392 U.S. 183 (1968); McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 241–243 (1980); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981).

> Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States.[1]

Similarly, in *Brooks v. United States*, the Court explained "regulate," observing:

> Congress can certainly regulate interstate commerce to the extent of forbidding and punishing the use of such commerce as an agency to promote immorality, dishonesty, or the spread of any evil or harm to the people of other states from the state of origin. In doing this, it is merely exercising the police power, for the benefit of the public, within the field of interstate commerce.[2]

In upholding a federal statute prohibiting shipping goods made with child labor in interstate commerce in order to extirpate child labor rather than bar intrinsically harmful goods, the Court said: "It is no objection to the assertion of the power to regulate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states."[3] Congress has also used its Commerce Clause power to enforce moral codes,[4] to ban racial discrimination in public accommodations,[5] and to protect the public from danger.[6] Consequently, Congress's power to regulate interstate commerce is among its most potent Article I, Section 8 powers.

ArtI.S8.C3.5 Historical Background

ArtI.S8.C3.5.1 Sherman Antitrust Act of 1890 and Sugar Trust Case

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

To curb the growth of industrial combinations, Congress passed the Sherman Antitrust Act (Sherman Act) in 1890. Under the Sherman Act, Congress sought to regulate commerce as "traffic." The Sherman Act prohibited "every contract, combination in the form of trust or otherwise," or "conspiracy in restraint of trade and commerce among the several States, or with foreign nations"[1] and made it a misdemeanor to "monopolize or attempt to monopolize any part of such commerce."[2]

In 1895, the Court considered the Sherman Act in *United States v. E. C. Knight Co. (Sugar Trust C)*[3] in which the government asked the Court to cancel certain agreements whereby the American Sugar Refining Company had acquired "nearly complete control of the manufacture

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[1] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 196–97 (1824).

[2] Brooks v. United States, 267 U.S. 432, 436–37 (1925).

[3] United States v. Darby, 312 U.S. 100, 114 (1941).

[4] *E.g.*, Caminetti v. United States, 242 U.S. 470 (1917) (transportation of female across state line for noncommercial sexual purposes); Cleveland v. United States, 329 U.S. 14 (1946) (transportation of plural wives across state lines); United States v. Simpson, 252 U.S. 465 (1920) (transportation of five quarts of whiskey across state line for personal consumption).

[5] Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Daniel v. Paul, 395 U.S. 298 (1969).

[6] *E.g.*, Reid v. Colorado, 187 U.S. 137 (1902) (transportation of diseased livestock across state line); Perez v. United States, 402 U.S. 146 (1971) (prohibition of all loan-sharking).

[1] 26 Stat. 209 (1890); 15 U.S.C. §§ 1–7.

[2] *Id.*

[3] 156 U.S. 1 (1895).

of refined sugar in the United States."[4] The Court rejected the government's claim on the grounds that the activities of the Sugar Trust had only an indirect effect on commerce, which Congress's Commerce Clause powers did not reach. Although the Court did not directly rule on the Sherman Act's constitutional validity, it analyzed the scope of Congress's commerce power when considering what activities the Sherman Act barred. Explaining the federal government's role in mitigating commercial power, Chief Justice Melville Fuller stated:

> [T]he independence of the commercial power and of the police power, and the delimitation between them, however sometimes perplexing, should always be recognized and observed, for, while the one furnishes the strongest bond of union, the other is essential to the preservation of the autonomy of the States as required by our dual form of government; and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality.[5]

The *E. C. Knight* Court reasoned that a hard and fast line should exist between commercial and police powers based on (1) production being local and subject to state oversight; (2) commerce among the states does not begin until goods "commence their final movement from their State of origin to their destination;" (3) a product's sale is merely an incident of its production and, while capable of "bringing the operation of commerce into play," affects it only incidentally; (4) such restraint as would reach commerce, as just defined, in consequence of combinations to control production "in all its forms," would be "indirect, however inevitable and whatever its extent," and as such beyond the purview of the Act.[6] Applying this reasoning, the *E. C. Knight* Court stated:

> The object [of the combination] was manifestly private gain in the manufacture of the commodity, but not through the control of interstate or foreign commerce. It is true that the bill alleged that the products of these refineries were sold and distributed among the several States, and that all the companies were engaged in trade or commerce with the several States and with foreign nations; but this was no more than to say that trade and commerce served manufacture to fulfill its function.[7]
>
> . . . [I]t does not follow that an attempt to monopolize, or the actual monopoly of, the manufacture was an attempt, whether executory or consummated, to monopolize commerce, even though, in order to dispose of the product, the instrumentality of commerce was necessarily invoked. There was nothing in the proofs to indicate any intention to put a restraint upon trade or commerce, and the fact, as we have seen, that trade or commerce might be indirectly affected was not enough to entitle complainants to a decree.[8]

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[4] *Id.* at 9.

[5] *Id.* at 13.

[6] *Id.* at 13–16.

[7] *Id.* at 17.

[8] *Id.* at 17. The doctrine of the case boiled down to the proposition that commerce was transportation only, a doctrine Justice John Marshall Harlan undertook to refute in his dissenting opinion. Justice Harlan stated: "Interstate commerce does not, therefore, consist in transportation simply. It includes the purchase and sale of articles that are intended to be transported from one State to another—every species of commercial intercourse among the States and with foreign nations." 156 U.S. at 22. Justice Harlan further stated:

> Any combination, therefore, that disturbs or unreasonably obstructs freedom in buying and selling articles manufactured to be sold to persons in other States or to be carried to other States—a freedom that cannot exist if the right to buy and sell is fettered by unlawful restraints that crush out competition—affects, not

Four years later, in *Addyston Pipe and Steel Co. v. United States*,[9] the Court applied the Sherman Act to hold an industrial combination unlawful. The defendants in *Addyston* were manufacturing concerns that had effected a division of territory among them, which the Court held to be a "direct" restraint on the distribution and transportation of the products of the contracting firms. In reaching its holding, however, the Court did not question *E. C. Knight*, which remained substantially undisturbed until the Court's 1905 *Swift* decision.[10]

ArtI.S8.C3.5.2 Current of Commerce Concept and 1905 Swift Case

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *Swift & Co. v. United States*, Justice Oliver Wendell Holmes referred to a "current of commerce" in providing a more expansive interpretation of the Commerce Clause. *Swift* concerned some thirty firms that bought livestock at stockyards, processed it into fresh meat, and then sold and shipped the fresh meat to purchasers in other states. The government alleged that the defendants had agreed, among other things, not to bid against each other in local markets, to fix prices, and to restrict meat shipments. On appeal to the Supreme Court, the defendants contended that some of the acts they were charged with were not acts in interstate commerce and consequently not covered by the Sherman Act. The Court ruled in favor of the government on the ground that the Sherman Act covered the "scheme as a whole" and that the local activities alleged were part of this general scheme.[1] Explaining why Congress's Commerce Clause power extended to acts that occurred within a single state, Justice Oliver Wendell Holmes reasoned:

> Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.[2]

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incidentally, but directly, the people of all the States; and the remedy for such an evil is found only in the exercise of powers confided to a government which, this court has said, was the government of all, exercising powers delegated by all, representing all, acting for all.
156 U.S. at 33 (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 405 (1819)).

[9] 175 U.S. 211 (1899).

[10] 196 U.S. 375 (1905). The Court applied the Sherman Act to break up combinations of interstate carriers in *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Joint-Traffic Ass'n*, 171 U.S. 505 (1898); and *N. Sec. Co. v. United States*, 193 U.S. 197 (1904).

In *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 229–39 (1948), Justice Wiley Rutledge, for the Court, critically reviewed the jurisprudence of the limitations on the Act and the deconstruction of the judicial constraints. In recent years, the Court's decisions have permitted the reach of the Sherman Act to expand along with the expanding notions of congressional power. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974); Hosp. Bldg. Co. v. Rex Hospital Trustees, 425 U.S. 738 (1976); McLain v. Real Estate Bd. of New Orleans, 444 U.S. 232 (1980); Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991). The Court, however, does insist that plaintiffs alleging that an intrastate activity violates the Act prove the relationship to interstate commerce set forth in the Act. *Gulf Oil Corp*, 419 U.S. at 194–99.

[1] Swift & Co. v. United States, 196 U.S. 375, 396 (1905).

[2] *Id.* at 398–99.

Likewise, the Court held that, even if title passed at the slaughterhouses, the sales were to persons in other states and shipments to such states were part of the transaction.[3] Thus, in *Swift*, the Court deemed sales to be part of the stream of interstate commerce if they enabled the manufacturer "to fulfill its function" although ten years earlier the Court had held in *United States v. E. C. Knight Co (Sugar Trust Case)*[4] that such sales were immaterial.

Thus, in *Swift*, the Court appeared to return to Chief Justice John Marshall's concept of commerce as traffic, which he had explored in *Gibbons v. Ogden*. As a result, activities that indirectly affected interstate trade could be deemed interstate commerce. The *Swift* Court stated: "But we do not mean to imply that the rule which marks the point at which state taxation or regulation becomes permissible necessarily is beyond the scope of interference by Congress in cases where such interference is deemed necessary for the protection of commerce among the States."[5] The Court also held that combinations of employees who engaged in intrastate activities such as manufacturing, mining, building, construction, and distributing poultry could be subject to the Sherman Act because of the effect, or intended effect, of these activities on interstate commerce.[6]

ArtI.S8.C3.5.3 Packers and Stockyards Act of 1921 and Grain Futures Act of 1922

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In 1921, Congress passed the Packers and Stockyards Act,[1] which brought the livestock industry in the country's chief stockyards under federal supervision. In 1922, Congress passed the Grain Futures Act[2] to regulate grain futures exchanges. In sustaining these laws, the Court relied on *Swift & Co. v. United States*. For example, in *Stafford v. Wallace*,[3] which involved the Packers and Stockyards Act, Chief Justice William Taft stated:

> The object to be secured by the act is the free and unburdened flow of livestock from the ranges and farms of the West and Southwest through the great stockyards and slaughtering centers on the borders of that region, and thence in the form of meat products to the consuming cities of the country in the Middle West and East, or, still as livestock, to the feeding places and fattening farms in the Middle West or East for further preparation for the market.[4]

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[3] *Id.* at 399–401.

[4] 156 U.S. 1 (1895).

[5] *Swift*, 196 U.S. at 400. *See also* Houston & Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914).

[6] Loewe v. Lawlor (The Danbury Hatters Case), 208 U.S. 274 (1908); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921); Coronado Co. v. United Mine Workers, 268 U.S. 295 (1925); United States v. Bruins, 272 U.S. 549 (1926); Bedford Co. v. Stone Cutters Ass'n, 274 U.S. 37 (1927); Local 167 v. United States, 291 U.S. 293 (1934); Allen Bradley Co. v. Union, 325 U.S. 797 (1945); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); United States v. Green, 350 U.S. 415 (1956); Callanan v. United States, 364 U.S. 587 (1961).

[1] 42 Stat. 159, 7 U.S.C. §§ 171–183, 191–195, 201–203.

[2] 42 Stat. 998 (1922), 7 U.S.C. §§ 1–9, 10a-17.

[3] 258 U.S. 495 (1922).

[4] *Id.* at 514.

The *Stafford* Court reasoned the stockyards were "not a place of rest or final destination."[5] Instead, they were "but a throat through which the current flows," and the sales there were not "merely local transactions. [T]hey do not stop the flow . . . but, on the contrary, [are] indispensable to its continuity."[6]

In *Chicago Board of Trade v. Olsen*,[7] involving the Grain Futures Act, the Court followed the reasoning in *Stafford*. Discussing *Swift*, Chief Justice Taft remarked:

> [*Swift*] was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. It refused to permit local incidents of a great interstate movement, which taken alone are intrastate, to characterize the movement as such.[8]

In *Olsen*, the Court examined how futures sales relate to cash sales and impact the interstate grain trade. Writing for the Court, Chief Justice Taft stated: "The question of price dominates trade between the States. Sales of an article which affect the country-wide price of the article directly affect the country-wide commerce in it."[9] Thus, a practice that demonstrably affects prices would affect interstate trade "directly" and, even though local in itself, would be subject to Congress's regulatory power under the Commerce Clause. In *Olsen*, Chief Justice Taft also stressed the importance of congressional deference. He stated:

> Whatever amounts to more or less constant practice, and threatens to obstruct or unduly to burden the freedom of interstate commerce is within the regulatory power of Congress under the commerce clause, and it is primarily for Congress to consider and decide the fact of the danger to meet it. This court will certainly not substitute its judgment for that of Congress in such a matter unless the relation of the subject to interstate commerce and its effect upon it are clearly nonexistent.[10]

ArtI.S8.C3.5.4 New Deal Legislation Generally

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Several days after President Franklin D. Roosevelt's first inauguration, Chief Justice Charles Evans Hughes described a problem the new Administration faced, stating: "When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable production are prostrated, the wells of commerce go dry."[1] Congress's legislative response to the Great Depression marked a significant expansion of federal economic regulation. Congress did not limit itself to regulating traffic among the states and the instrumentalities thereof. It also attempted to govern production and industrial relations in the field of production, areas over which states had historically exercised

[5] *Id.*

[6] *Id.* at 515–16. *See also* Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); Minnesota v. Blasius, 290 U.S. 1 (1933).

[7] 262 U.S. 1 (1923).

[8] *Id.* at 35.

[9] *Id.* at 40.

[10] *Id.* at 37, quoting Stafford v. Wallace, 258 U.S. 495, 521 (1922).

[1] Appalachian Coals, Inc. v. United States, 288 U.S. 344, 372 (1933).

legislative power. Confronted with this expansive exercise of congressional power, the Court reexamined Congress's interstate commerce power.

ArtI.S8.C3.5.5 National Industrial Recovery and Agricultural Adjustment Acts of 1933

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Passed on June 16, 1933, the National Industrial Recovery Act (NIRA) marked Congress's initial effort to address the Great Depression.[1] NIRA recognized the existence of "a national emergency productive of widespread unemployment and disorganization of industry" that burdened "interstate and foreign commerce," affected "the public welfare," and undermined "the standards of living of the American people." To alleviate these conditions, NIRA authorized the President to approve "codes of fair competition" if industrial or trade groups applied for such codes, or to prescribe such codes if there were no applications. Among other things, NIRA required the codes to provide certain guarantees respecting hours, wages, and collective bargaining.[2]

In *A. L. A. Schechter Poultry Corp. v. United States*,[3] the Supreme Court held the Live Poultry Code to be unconstitutional. Although practically all poultry Schechter handled came from outside the state, and hence via interstate commerce, the Court held that once the chickens arrived in Schechter's wholesale market, interstate commerce in them ceased. Although NIRA purported to govern business activities that "affected" interstate commerce, Chief Justice Charles Hughes interpreted "affected" to mean "directly" affect commerce. He stated:

> [T]he distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, . . . there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government.[4]

In short, the Court appeared to have returned in *Schechter* to the rationale of the *Sugar Trust* case.[5]

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[1] 48 Stat. 195.

[2] *Id.*

[3] 295 U.S. 495 (1935).

[4] *Id.* at 548. *See also id.* at 546.

[5] In *United States v. Sullivan*, 332 U.S. 689 (1948), the Court interpreted the Federal Food, Drug, and Cosmetic Act of 1938 to apply to a retailer's sale of drugs purchased from his wholesaler nine months after their interstate shipment had been completed. In an opinion written by Justice Hugo Black, the Court cited *United States v. Walsh*, 331 U.S. 432 (1947); *Wickard v. Filburn*, 317 U.S. 111 (1942); *United States v. Wrightwood Dairy Co.*, 315 U.S. 110 (1942); *United States v. Darby*, 312 U.S. 100 (1941). Justice Felix Frankfurter dissented on the basis of *FTC v. Bunte Bros.*, 312 U.S. 349 (1941). Subsequently, the Court repudiated the *Schechter* distinction between "direct" and "indirect" effects. *Cf.* Perez v. United States, 402 U.S. 146 (1971). *See also* McDermott v. Wisconsin, 228 U.S. 115 (1913), which preceded *Schechter* by more than two decades.

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

ArtI.S8.C3.5.5
National Industrial Recovery and Agricultural Adjustment Acts of 1933

Congress next attempted to address the Depression through the Agricultural Adjustment Act of 1933 (AAA).[6] The Court, however, set the AAA aside in *United States v. Butler* on the grounds that Congress had attempted to regulate production in violation of the Tenth Amendment.[7]

ArtI.S8.C3.5.6 Railroad Retirement and Securities Exchange Acts of 1934

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

To assist commerce and labor, Congress passed the Railroad Retirement Act (RRA) in 1934,[1] which ordered compulsory retirement for superannuated employees of interstate carriers and provided they receive pensions from a fund comprised of the compulsory contributions from the carriers and the carriers' present and future employees. In *Railroad Retirement Board v. Alton Railroad*,[2] however, a closely divided Court held the RRA to exceed Congress's Commerce Clause power and to violate the Due Process Clause of the Fifth Amendment. Writing for the majority, Justice Owen Roberts stated:

> We feel bound to hold that a pension plan thus imposed is in no proper sense a regulation of the activity of interstate transportation. It is an attempt for social ends to impose by sheer fiat noncontractual incidents upon the relation of employer and employee, not as a rule or regulation of commerce and transportation between the States, but as a means of assuring a particular class of employees against old age dependency. This is neither a necessary nor an appropriate rule or regulation affecting the due fulfillment of the railroads' duty to serve the public in interstate transportation.[3]

In dissent, Chief Justice Charles Hughes contended that "the morale of the employees [had] an important bearing upon the efficiency of the transportation service."[4] He added:

> The fundamental consideration which supports this type of legislation is that industry should take care of its human wastage, whether that is due to accident or age. That view cannot be dismissed as arbitrary or capricious. It is a reasoned conviction based upon abundant experience. The expression of that conviction in law is regulation. When expressed in the government of interstate carriers, with respect to their employees likewise engaged in interstate commerce, it is a regulation of that commerce. As such, so far as the subject matter is concerned, the commerce clause should be held applicable.[5]

In subsequent legislation, Congress levied an excise on interstate carriers and their employees, while by separate but parallel legislation, it created a fund in the Treasury from

[6] 48 Stat. 31.

[7] United States v. Butler, 297 U.S. 1, 63–64, 68 (1936).

[1] 48 Stat. 1283.

[2] 295 U.S. 330 (1935).

[3] *Id.* at 374.

[4] *Id.* at 379.

[5] *Id.* at 384.

which pensions would be paid along the lines of the original plan. The Court did not appear to question the constitutionality of this scheme in *Railroad Retirement Board v. Duquesne Warehouse Co*.[6]

New Deal legislation did not necessarily require expansive interpretations of congressional power. The Securities Exchange Act of 1934[7] created the Securities and Exchange Commission (SEC), authorized the Commission to promulgate regulations to keep dealings in securities honest, and closed the channels of interstate commerce and the mails to dealers refusing to register under the Act.

ArtI.S8.C3.5.7 Public Utility Holding Company and Bituminous Coal Conservation Acts of 1935

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In 1935, Congress passed the Public Utility Holding Company Act ("Wheeler-Rayburn Act")[1] and the Bituminous Coal Conservation Act.[2] The Wheeler-Rayburn Act required covered companies to register with the Securities and Exchange Commission and report on their business, organization, and financial structure or be prohibited from using mails and other interstate commerce facilities. Under Section 11, the so-called "death sentence" clause, the Wheeler-Rayburn Act closed channels of interstate communication after a certain date to certain types of public utility holding companies whose operations, Congress found, were calculated chiefly to exploit the investing and consuming public. In a series of decisions, the Court sustained these provisions,[3] relying principally on *Gibbons v. Ogden*.

The Court, however, disallowed the Guffey-Snyder Bituminous Coal Conservation Act (BCCA) of 1935,[4] which regulated the price of soft coal that was sold both in interstate commerce and "locally," and the hours of labor and wages in the mines. The BCCA declared these provisions to be separable, so that the invalidity of one set would not affect the validity of the other. However, a majority of the Court, in an opinion written by Justice George Sutherland, held that (1) these provisions were not separable because the BCCA constituted one connected scheme of regulation, and (2) the BCCA was unconstitutional because it invaded the reserved powers of the states over conditions of employment in productive industry.[5] Taking Chief Justice Charles Hughes' assertion in *A. L. A. Schechter Poultry Corp. v. United States* of the "fundamental" distinction between "direct" and "indirect" effects, which, in turn, drew upon the *Sugar Trust*, Justice Sutherland stated:

> Much stress is put upon the evils which come from the struggle between employers and employees over the matter of wages, working conditions, the right of collective

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[6] 326 U.S. 446 (1946). Indeed, in a case decided in June 1948, Justice Rutledge, speaking for a majority of the Court, listed the *Alton* case as one "foredoomed to reversal," though the formal reversal has never taken place. *See* Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 230 (1948). *Cf.* Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 19 (1976).

[7] 48 Stat. 881, 15 U.S.C. §§ 77b *et seq*.

[1] 49 Stat. 803, 15 U.S.C. §§ 79–79z-6.

[2] 49 Stat. 991.

[3] Elec. Bond Co. v. SEC, 303 U.S. 419 (1938); N. Am. Co. v. SEC, 327 U.S. 686 (1946); Am. Power & Light Co. v. SEC, 329 U.S. 90 (1946).

[4] 49 Stat. 991.

[5] Carter v. Carter Coal Co., 298 U.S. 238 (1936).

bargaining, etc., and the resulting strikes, curtailment and irregularity of production and effect on prices; and it is insisted that interstate commerce is greatly affected thereby. But . . . the conclusive answer is that the evils are all local evils over which the Federal Government has no legislative control. . . . Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.[6]

ArtI.S8.C3.5.8 National Labor Relations Act of 1935

Article I, Section 8, Clause 3:

[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

In *NLRB v. Jones & Laughlin Steel Corporation*, the Court reduced the distinction between "direct" and "indirect" effects, thereby enabling Congress to regulate productive industry and labor relations.[1] The National Labor Relations Act (NLRA) of 1935[2] granted workers a right to organize, forbade unlawful employer interference with this right, established procedures for workers to select representatives with whom employers were required to bargain, and created a board to oversee these processes.[3]

In an opinion by Chief Justice Charles Hughes, the Court upheld the NLRA, stating: "The close and intimate effect, which brings the subject within the reach of federal power may be due to activities in relation to productive industry although the industry when separately viewed is local."[4] Considering defendant's "far-flung activities,"[5] the Court expressed concern about strife between the industry and its employees, stating:

We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects in an intellectual vacuum. When industries

[6] *Id.* at 308–09.

[1] 301 U.S. 1 (1937). Prior to this decision, President Roosevelt, frustrated by the Court's invalidation of much of his New Deal program, proposed a "reorganization" of the Court that would have allowed him to name one new Justice for each Justice on the Court who was more than seventy years old, in the name of "judicial efficiency." The Senate defeated the plan, which some have attributed to the Court having begun to uphold New Deal legislation in cases such as *Jones & Laughlin*. *See* William E. Leuchtenberg, *The Origins of Franklin D. Roosevelt's 'Court-Packing' Plan*, 1966 Sup. Ct. Rev. 347 (P. Kurland ed.); Alpheus Thomas Mason, *Harlan Fiske Stone and FDR's Court Plan*, 61 Yale L. J. 791 (1952); 2 Merlo J. Pusey, Charles Evans Hughes 759–765 (1951).

[2] 49 Stat. 449, as amended, 29 U.S.C. §§ 151 *et seq*.

[3] While Congress passed the NLRA during the Great Depression, the 1898 Erdman Act, 30 Stat. 424, concerning unionization of railroad workers and facilitating negotiations with employers through mediation provided some precedent. The Erdman Act, however, fell largely into disuse because the railroads refused to mediate. Additionally, in *Adair v. United States*, 208 U.S. 161 (1908), the Court struck down a provision of the Erdman Act outlawing "yellow-dog contracts" by which employers exacted promises from workers to quit or not join unions as a condition of employment. The Court held the provision did not regulate commerce on the grounds that an employee's membership in a union was not related to conducting interstate commerce. *Cf.* Coppage v. Kansas, 236 U.S. 1 (1915).

In *Wilson v. New*, 243 U.S. 332 (1917), the Court upheld Congress's passage of an act to establish an eight-hour day and time-and-a-half overtime for all interstate railway employees to settle a threatened rail strike. While the Court cited the national emergency in its decision, the case implied that the power existed generally, suggesting that Congress's powers were not as limited as some judicial decisions had indicated.

The Court sustained Congress's passage of the Railway Labor Act (RLA) of 1926, 44 Stat. 577, as amended, 45 U.S.C. §§ 151 et seq., recognizing a substantial connection between interstate commerce and union membership. Tex. & New Orleans R.R. v. Brotherhood of Ry. Clerks, 281 U.S. 548 (1930). In a subsequent decision, the Court sustained applying the RLA to "back shop" employees of an interstate carrier who made repairs to locomotives and cars withdrawn from service for long periods on the grounds that these employees' activities related to interstate commerce. Virginian Ry. v. System Federation No. 40, 300 U.S. 515 (1937).

[4] NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 38 (1937).

[5] *Id.* at 41.

> organize themselves on a national scale, making their relation to interstate commerce the dominant factor in their activities, how can it be maintained that their industrial labor relations constitute a forbidden field into which Congress may not enter when it is necessary to protect interstate commerce from the paralyzing consequences of industrial war? We have often said that interstate commerce itself is a practical conception. It is equally true that interferences with that commerce must be appraised by a judgment that does not ignore actual experience.[6]

The Court held the NLRA to be within Congress's constitutional powers because a strike that interrupted business "might be catastrophic."[7] The Court also held that the NLRA applied to (1) two minor concerns,[8] (2) a local retail auto dealer on the ground that he was an integral part of a manufacturer's national distribution system,[9] (3) a labor dispute arising during alteration of a county courthouse because one-half of the cost was attributable to materials shipped from out-of-state,[10] and (4) a dispute involving a local retail distributor of fuel oil that it obtained from a wholesaler who imported it from another state.[11] The Court stated: "This Court has consistently declared that in passing the National Labor Relations Act, Congress intended to and did vest in the Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause."[12] Thus, the Court implicitly approved the National Labor Relations Board's jurisdictional standards, which assumed a prescribed dollar volume of business had a requisite effect on interstate commerce.[13]

ArtI.S8.C3.5.9 Agricultural Marketing Agreement Act of 1937

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

By passing the Agricultural Marketing Agreement Act (AMAA) on June 3, 1937,[1] Congress sought to bolster agriculture by authorizing the Secretary of Agriculture to fix the minimum prices of certain agricultural products, when the handling of such products occurs "in the current of interstate or foreign commerce or . . . directly burdens, obstructs or affects interstate or foreign commerce in such commodity or product thereof." In *United States v. Wrightwood Dairy Co.*,[2] the Court sustained an order of the Secretary of Agriculture that fixed the minimum prices to be paid to producers of milk in the Chicago "marketing area." The dairy company demurred to the regulation on the ground it applied to milk produced and sold intrastate. Sustaining the order, the Court said:

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[6] *Id.* at 41–42.

[7] *Id.* at 41.

[8] NLRB v. Fruehauf Trailer Co., 301 U.S. 49 (1937); NLRB v. Friedman-Harry Marks Clothing Co., 301 U.S. 58 (1937). In a later case, the Court noted that the amount of affected commerce was not material. NLRB v. Fainblatt, 306 U.S. 601, 606 (1939).

[9] Howell Chevrolet Co. v. NLRB, 346 U.S. 482 (1953).

[10] Journeymen Plumbers' Union v. Cnty. of Door, 359 U.S. 354 (1959).

[11] NLRB v. Reliance Fuel Oil Co., 371 U.S. 224 (1963).

[12] *Id.* at 226. *See also* Guss v. Utah Labor Bd., 353 U.S. 1, 3 (1957); *Fainblatt*, 306 U.S. at 607.

[13] *Reliance Fuel*, 371 U.S. at 225 n.2; Liner v. Jafco, 375 U.S. 301, 303 n.2 (1964).

[1] 50 Stat. 246, 7 U.S.C. §§ 601 *et seq*.

[2] 315 U.S. 110 (1942). The Court had previously upheld other legislation that regulated agricultural production through limitations on sales in or affecting interstate commerce. Currin v. Wallace, 306 U.S. 1 (1939); Mulford v. Smith, 307 U.S. 38 (1939).

> Congress plainly has power to regulate the price of milk distributed through the medium of interstate commerce . . . and it possesses every power needed to make that regulation effective. The commerce power is not confined in its exercise to the regulation of commerce among the States. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. The power of Congress over interstate commerce is plenary and complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. It follows that no form of State activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress. Hence the reach of that power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power.[3]

In *Wickard v. Filburn*,[4] the Court sustained even greater Congressional regulation over production. The Agricultural Adjustment Act (AAA) of 1938, as amended in 1941,[5] regulated production even when it was not intended for commerce but wholly for consumption on the producer's farm. Sustaining the AAA amendment, the Court noted that it supported the market, stating:

> It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions. . . . But if we assume that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce. The stimulation of commerce is a use of the regulatory function quite as definitely as prohibitions or restrictions thereon. This record leaves us in no doubt that Congress may properly have considered that wheat consumed on the farm grown, if wholly outside the scheme of regulation, would have a substantial effect in defeating and obstructing its purpose to stimulate trade therein at increased prices.[6]

The Court also stated:

> [Q]uestions of the power of Congress are not to be decided by reference to any formula which would give controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce. The Court's recognition of the relevance of the economic effects in the application of the Commerce Clause . . . has made the mechanical application of legal formulas no longer feasible.[7]

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[3] 315 U.S. at 118–19.

[4] 317 U.S. 111 (1942).

[5] 42 Stat. 31, 7 U.S.C. §§ 612c, 1281–82 *et seq*.

[6] 317 U.S. at 128–29.

[7] *Id.* at 120, 123–24. In United States v. Rock Royal Co-operative, Inc., 307 U.S. 533 (1939), the Court sustained an order under the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, regulating the price of milk in certain instances. Writing for the Court, Justice Stanley Reed stated:

> The challenge is to the regulation 'of the price to be paid upon the sale by a dairy farmer who delivers his milk to some country plant.' It is urged that the sale, a local transaction, is fully completed before any interstate commerce begins and that the attempt to fix the price or other elements of that incident violates the Tenth Amendment. But where commodities are bought for use beyond state lines, the sale is a part of interstate commerce. We have likewise held that where sales for interstate transportation were commingled with intrastate transactions, the existence of the local activity did not interfere with the federal power to regulate inspection of the whole. Activities conducted within state lines do not by this fact alone escape the sweep of the Commerce Clause. Interstate commerce may be dependent

ArtI.S8.C3.5.10 Fair Labor Standards Act of 1938

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In 1938, Congress enacted the Fair Labor Standards Act (FLSA), which prohibited shipping goods in interstate commerce that were manufactured by workmen whose employment did not comply with prescribed wages and hours.[1] The FLSA defined interstate commerce to mean "trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof." The FLSA further provided that "for the purposes of this act an employee shall be deemed to have been engaged in the production of goods [for interstate commerce] if such employee was employed . . . in any process or occupation directly essential to the production thereof in any State."[2] Sustaining an indictment under the FLSA, Chief Justice Harlan Stone, writing for a unanimous Court, stated:

> The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the States from and to which the commerce flows.[3]

In support of the decision, the Court invoked Chief Justice John Marshall's interpretations of the Necessary and Proper Clause in *McCulloch v. Maryland* and the Commerce Clause in *Gibbons v. Ogden*.[4] The Court rejected objections purporting to be based on the Tenth Amendment, stating:

> Our conclusion is unaffected by the Tenth Amendment which provides: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.' The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears

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upon them. Power to establish quotas for interstate marketing gives power to name quotas for that which is to be left within the state of production. Where local and foreign milk alike are drawn into a general plan for protecting the interstate commerce in the commodity from the interferences, burdens and obstructions, arising from excessive surplus and the social and sanitary evils of low values, the power of the Congress extends also to the local sales. *Id.* at 568–69.

[1] The Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 *et seq*.

[2] 52 Stat. 1060, as amended, 63 Stat. 910 (1949). The 1949 amendment substituted the phrase "in any process or occupation directly essential to the production thereof in any State" for the original phrase "in any process or occupation necessary to the production thereof in any State." In Mitchell v. H.B. Zachry Co., 362 U.S. 310, 317 (1960), the Court noted that the change "manifests the view of Congress that on occasion courts . . . had found activities to be covered, which . . . [Congress now] deemed too remote from commerce or too incidental to it." The 1961 amendments to the Act, 75 Stat. 65, departed from previous practices of extending coverage to employees individually connected to interstate commerce to cover all employees of any "enterprise" engaged in commerce or production of commerce; thus, there was an expansion of employees covered but not, of course, of employers, 29 U.S.C. §§ 201 et seq. *See* 29 U.S.C. §§ 203(r), 203(s), 206(a), 207(a).

[3] United States v. Darby, 312 U.S. 100, 115 (1941).

[4] *Id.* at 113, 114, 118.

that the new National Government might seek to exercise powers not granted, and that the States might not be able to exercise fully their reserved powers.[5]

Subsequent decisions of the Court took a broad view of which employees should be covered by the FSLA,[6] and in 1949, Congress narrowed the permissible range of coverage and disapproved some of the Court's decisions.[7] But, in 1961,[8] with extensions in 1966,[9] Congress expanded the FSLA's coverage by several million persons, introducing the "enterprise" concept by which all employees in a business producing anything in commerce or affecting commerce were covered by the minimum wage-maximum hours standards.[10] Sustaining the "enterprise concept" in *Maryland v. Wirtz*,[11] Justice John Harlan, writing for a unanimous Court, held the FSLA's expanded coverage legal based on two theories: (1) all of a business's significant labor costs, not just those costs attributable to employees engaged in production in interstate commerce, contribute to the business's competitive position in commerce; and (2) ending substandard labor conditions that affect all employees, not just those actually engaged in interstate commerce, facilitates labor peace, and smooth functioning of interstate commerce.[12]

ArtI.S8.C3.5.11 Dual Federalism and Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Prior to the 1930s, the Court had effectively followed a doctrine of "dual federalism," under which Congress's power to regulate activity largely depended on whether the activity had a "direct" rather than an "indirect" effect on interstate commerce.[1] When the Court adopted a less restrictive interpretation of the Commerce Clause during and after the New Deal, the question of how concerns over federalism might impact congressional regulation of private activities became moot. However, in a number of instances, the states themselves engaged in commercial activities, which would have been subject to federal legislation if a privately owned enterprise had engaged in the activity. Consequently, the Court sustained applying federal law

[5] *Id.* at 123–24.

[6] *E.g.*, Kirschbaum v. Walling, 316 U.S. 517 (1942) (operating and maintenance employees of building, part of which was rented to business producing goods for interstate commerce); Walton v. S. Package Corp., 320 U.S. 540 (1944) (night watchman in a plant the substantial portion of the production of which was shipped in interstate commerce); Armour & Co. v. Wantock, 323 U.S. 126 (1944) (employees on stand-by auxiliary fire-fighting service of an employer engaged in interstate commerce); Borden Co. v. Borella, 325 U.S. 679 (1945) (maintenance employees in building housing company's central offices where management was located though the production of interstate commerce was elsewhere); Martino v. Mich. Window Cleaning Co., 327 U.S. 173 (1946) (employees of a window-cleaning company the principal business of which was performed on windows of industrial plants producing goods for interstate commerce); Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207 (1959) (nonprofessional employees of architectural firm working on plans for construction of air bases, bus terminals, and radio facilities).

[7] *Cf.* Mitchell v. H.B. Zachry Co., 362 U.S. 310, 316–18 (1960).

[8] 75 Stat. 65.

[9] 80 Stat. 830.

[10] 29 U.S.C. §§ 203(r), 203(s).

[11] 392 U.S. 183 (1968).

[12] The Court overruled another aspect of this case in Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), which the Court also overruled in Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[1] *E.g.*, United States v. E. C. Knight Co., 156 U.S. 1 (1895); Hammer v. Dagenhart, 247 U.S. 251 (1918). Of course, for much of this time there existed a parallel doctrine under which federal power was not so limited. *E.g.*, Houston & Tex. Ry. v. United States (The Shreveport Rate Case), 234 U.S. 342 (1914).

to these state proprietary activities.[2] As Congress began to extend regulation to state governmental activities, the judicial response was inconsistent.[3] Although the Court may revisit constraining federal power on federalism grounds, Congress lacks authority under the Commerce Clause to regulate states when federal statutory provisions would "commandeer" a state's legislative or executive authority to implement a federal regulatory program.[4]

ArtI.S8.C3.6 Modern Doctrine

ArtI.S8.C3.6.1 United States v. Lopez and Interstate Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Construing modern interstate Commerce Clause doctrine in its 1995 decision of *United States v. Lopez*, the Court identified three general categories of commerce that were subject to Congress's Commerce Clause powers. These are (1) "channels of interstate commerce"; (2) "instrumentalities of interstate commerce, or persons or things in interstate commerce"; and (3) "activities having a substantial relation to interstate commerce."[1] In general, Congress's authority under the interstate Commerce Clause has expanded since the 1930s because of the volume of interstate commerce and Congress's ability to regulate intrastate activities that sufficiently affect interstate commerce. In *New York v. United States*, the Court noted:

> [T]he volume of interstate commerce and the range of commonly accepted objects of government regulation have expanded considerably in the last 200 years, and the regulatory authority of Congress has expanded along with them. As interstate commerce has become ubiquitous, activities once considered purely local have come to have effects on the national economy, and have accordingly come within the scope of Congress's commerce power.[2]

In addition, the Court has from time-to-time expressly noted that Congress's exercise of power under the Commerce Clause is akin to the police power exercised by the states.[3]

ArtI.S8.C3.6.2 Channels of Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *United States v. Lopez*, the Court identified "channels of interstate commerce" as being subject to Congress's Commerce Clause power.[1] Channels of interstate commerce encompasses physical conduits of interstate commerce such as highways, waterways, railroads, airspace,

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[2] *E.g.*, California v. United States, 320 U.S. 577 (1944); California v. Taylor, 353 U.S. 553 (1957).

[3] For example, federal regulation of the wages and hours of certain state and local governmental employees has alternatively been upheld and invalidated. *See* Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled in* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled in* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

[4] New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997). For elaboration, see the discussions under the Supremacy Clause and under the Tenth Amendment.

[1] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

[2] New York v. United States, 505 U.S. 144, 158 (1992).

[3] *E.g.,* Brooks v. United States, 267 U.S. 432, 436–437 (1925); United States v. Darby, 312 U.S. 100, 114 (1941).

[1] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

and telecommunication networks, as well as the use of such interstate channels for ends Congress wishes to prohibit. As early as 1849, the Court had noted that whether "the transportation of passengers is a part of commerce is not now an open question."[2] In *Hoke v. United States*, the Court expanded its description of interstate commerce to include "the transportation of persons and property."[3] When the Court decided *Caminetti v. United States* in 1917, the Court observed that it was long settled that not only "the transportation of passengers in interstate commerce" but also the use of such authority to keep those channels "free from immoral and injurious uses" falls within Congress's regulatory power under the Commerce Clause.[4]

Courts have upheld various acts of Congress as falling within its authority to regulate channels of interstate commerce. For example, in *United States v. Morrison*, the Court noted that federal courts have uniformly upheld a federal prohibition on traveling across state lines to commit intimate-partner abuse, reasoning that the prohibition regulates "the use of channels of interstate commerce—i.e., the use of the interstate transportation routes through which persons and goods move."[5]

In *Pierce County v. Guillen*, the Court considered the constitutionality of a law that prohibited using certain highway data identifying hazardous highway locations, which the Highway Safety Act (HSA) of 1966 required states to collect, in discovery or as evidence in state or federal court proceedings.[6] The Court observed that the provision had been adopted in response to states being reluctant to comply with the HSA's requirements due to concerns about potential liability for accidents that occurred in those hazardous locations before they could be addressed.[7] The Court concluded that the data collection requirement was adopted to help state and local governments "in reducing hazardous conditions in the Nation's channels of commerce," and that "Congress could reasonably believe that adopting a measure eliminating an unforeseen side effect of the information-gathering requirement . . . would result in more diligent efforts [by states] to collect the relevant information."[8] Accordingly, the Court held that the provision preventing use of the data in state and federal court proceedings—not just the data collection itself—was within the scope of Congress's Commerce Clause power.[9]

ArtI.S8.C3.6.3 Persons or Things in and Instrumentalities of Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *United States v. Lopez*, the Court identified "instrumentalities of interstate commerce, or persons or things in interstate commerce" as being subject to Congress's Commerce Clause power.[1] Consequently, Congress has authority to regulate persons or objects in interstate

[2] Smith v. Turner, 48 U.S. (7 How.) 283, 401 (1849).

[3] 227 U.S. 308, 320 (1913).

[4] 242 U.S. 470, 491 (1917).

[5] 529 U.S. 598, 613 n.5 (2000).

[6] 537 U.S. 129, 133–34, 146–48 (2003).

[7] *Id.* at 133–34, 147.

[8] *Id.* at 129, 147.

[9] *Id.* at 147–48.

[1] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

commerce and the instrumentalities[2] of interstate commerce. Regulation under this category is not limited to persons or objects crossing state lines but may extend to objects or persons that have or will cross state lines. Thus, for example, the Court has upheld federal laws that penalized convicted felons for possessing or receiving firearms that had been previously transported in interstate commerce, independent of any activity by the felons, with no other connection between the felons' conduct and interstate commerce.[3]

In *United States v. Sullivan*, the Court sustained a conviction for misbranding under the Federal Food, Drug and Cosmetic Act.[4] Sullivan, a pharmacist in Columbus, Georgia, had bought a properly labeled 1,000-tablet bottle of sulfathiazole from an Atlanta wholesaler. The bottle had been shipped to the Atlanta wholesaler by a Chicago supplier six months earlier. Three months after Sullivan received the bottle, he made two retail sales of 12 tablets each, placing the tablets in boxes not labeled in strict accordance with the law. Upholding the conviction, the Court concluded that there was no question of "the constitutional power of Congress under the Commerce Clause to regulate the branding of articles that have completed an interstate shipment and are being held for future sales in purely local or intrastate commerce."[5]

ArtI.S8.C3.6.4 Intrastate Activities Having a Substantial Relation to Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *United States v. Lopez*, the Court identified "activities having a substantial relation to interstate commerce" as being subject to Congress's Commerce Clause power.[1] Consequently, Congress's power extends beyond transactions or actions that involve crossing state or national boundaries to activities that, though local in nature, sufficiently "affect" commerce. The Court has stated that, "even activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States or with foreign nations."[2] This power derives from the Commerce Clause supplemented by the Necessary and Proper Clause.

The seminal case on Congress's authority to regulate certain intrastate commerce is *Wickard v. Filburn*, which sustained federal regulation of a wheat crop that was grown on a

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[2] Black's Law Dictionary defines instrumentality to mean "a thing used to achieve an end or purpose." For example, the Supreme Court used the example of a law prohibiting the destruction of an aircraft as a regulation of instrumentalities of interstate commerce. Perez v. United States, 402 U.S. 146, 150 (1971) (citing 18 U.S.C. § 32).

[3] Scarborough v. United States, 431 U.S. 563 (1977); Barrett v. United States, 423 U.S. 212 (1976). However, because such laws reach far into the traditional police powers of the states, the Court insists Congress clearly speak to its intent to cover such local activities. United States v. Bass, 404 U.S. 336 (1971). *See also* Rewis v. United States, 401 U.S. 808 (1971); United States v. Enmons, 410 U.S. 396 (1973). A similar tenet of construction has appeared in the Court's recent treatment of federal prosecutions of state officers for official corruption under criminal laws of general applicability. *E.g.*, McDonnell v. United States, 579 U.S. 550, 576–77 (2016) (narrowly interpreting the term "official act" to avoid a construction of the Hobbs Act and federal honest-services fraud statute that would "raise[ ] significant federalism concerns" by intruding on a state's "prerogative to regulate the permissible scope of interactions between state officials and their constituents."); McCormick v. United States, 500 U.S. 257 (1991); McNally v. United States, 483 U.S. 350 (1987).

[4] 332 U.S. 689 (1948).

[5] *Id.* at 698–99.

[1] United States v. Lopez, 514 U.S. 549, 558–59 (1995) (citations omitted).

[2] Fry v. United States, 421 U.S. 542, 547 (1975).

family farm and intended solely for home consumption.[3] The Court reasoned that even if the locally-grown and consumed wheat were never marketed, it supplied a need for the family that otherwise would have been satisfied through the market and therefore competes with wheat in commerce.[4] The Court also posited that if prices rose, the family might be induced to introduce the wheat onto the market.[5] Accordingly, the Court concluded, wheat grown on a farm for personal consumption could "have a substantial effect in defeating and obstructing [Congress's] purpose" in enacting the legislation if omitted from the regulatory scheme.[6]

Subsequent cases have applied a rational basis test to determine whether Congress may reasonably conclude that an activity affects interstate commerce, resulting in a broad application of the "affects" standard. In *Hodel v. Indiana*, the Court addressed provisions of the Surface Mining and Reclamation Control Act of 1977 designed to preserve "prime farmland." The trial court had relied on an interagency report that determined that the amount of such land disturbed annually by surface mining amounted to 0.006% of the total prime farmland acreage nationwide, concluding that the impact on commerce was "infinitesimal" or "trivial." Disagreeing, the Court said: "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends."[7] Moreover, "[t]he pertinent inquiry therefore is not how much commerce is involved but whether Congress could rationally conclude that the regulated activity affects interstate commerce."[8]

In a companion case, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, the Court reiterated that "[t]he denomination of an activity as a 'local' or 'intrastate' activity does not resolve the question whether Congress may regulate it under the Commerce Clause."[9] Rather, the Court stated, "the commerce power 'extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce.'"[10] Judicial review is narrow. A court must defer to Congress's determination of an "effect" if it is rational, and Congress must have acted reasonably in choosing the means.[11]

The expansion of the class-of-activities standard in the "affecting" cases has been a potent engine of regulation. In *Perez v. United States*,[12] the Court sustained the application of a federal "loan-sharking" law to a local culprit. The Court held that, although individual loan-sharking activities might be intrastate in nature, Congress possessed the power to determine that the activity was within a class of activities that affected interstate commerce, thus affording Congress an opportunity to regulate the entire class. Although the Court and

[3] 317 U.S. 111 (1942).

[4] *Id.* at 128.

[5] *Id.*

[6] *Id.* at 128–29.

[7] Hodel v. Indiana, 452 U.S. 314, 323–24 (1981).

[8] *Id.* at 324.

[9] 452 U.S. 264, 281 (1981).

[10] *Id.* at 281 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119 (1942)).

[11] *Id.* at 276, 277. The scope of review is restated in Preseault v. ICC, 494 U.S. 1, 17 (1990). Then-Justice William Rehnquist, concurring in the two *Hodel* cases, objected that the Court was making it appear that no constitutional limits existed under the Commerce Clause, whereas in fact it was necessary that a regulated activity must have a substantial effect on interstate commerce, not just some effect. He thought it a close case that the statutory provisions here met those tests. *Id.* at 307–13.

[12] 402 U.S. 146 (1971).

the congressional findings emphasized that loan-sharking was generally part of organized crime operating on a national scale and that loan-sharking was commonly used to finance organized crime's national operations, subsequent cases do not depend upon a defensible assumption of relatedness in the class.

The Court applied the federal arson statute to the attempted "torching" of a defendant's two-unit apartment building. The Court merely pointed to the fact that the rental of real estate "unquestionably" affects interstate commerce and that "the local rental of an apartment unit is merely an element of a much broader commercial market in real estate."[13] The apparent test of whether aggregation of local activity can be said to affect commerce was made clear next in an antitrust context.[14]

In a case allowing continuation of an antitrust suit challenging a hospital's exclusion of a surgeon from practice in the hospital, the Court observed that in order to establish the required jurisdictional nexus with commerce, the appropriate focus is not on the actual effects of the conspiracy but instead on the possible consequences for the affected market if the conspiracy is successful. The required nexus in this case was sufficient because competitive significance is measured by a general evaluation of the impact of the restraint on other participants and potential participants in the market from which the surgeon was excluded.[15]

ArtI.S8.C3.6.5 Limits on Federal Regulation of Intrastate Activity

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *United States v. Lopez*[1] the Court, for the first time in almost sixty years,[2] invalidated a federal law as exceeding Congress's authority under the Commerce Clause. The statute made it a federal offense to possess a firearm within 1,000 feet of a school.[3] The Court reviewed the doctrinal development of the Commerce Clause, especially the effects and aggregation tests, and reaffirmed that it is the Court's responsibility to decide whether a rational basis exists for concluding that a regulated activity sufficiently affects interstate commerce when a law is challenged.[4] As noted previously, the Court's evaluation started with a consideration of whether the legislation fell within the three broad categories of activity that Congress may

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[13] Russell v. United States, 471 U.S. 858, 862 (1985). In a later case the Court avoided the constitutional issue by holding the statute inapplicable to the arson of an owner-occupied private residence. Jones v. United States, 529 U.S. 848 (2000).

[14] Summit Health, Ltd. v. Pinhas, 500 U.S. 322 (1991).

[15] *Id.* at 330–32. The decision was 5-4, with the dissenters of the view that, although Congress could reach the activity, it had not done so.

[1] 514 U.S. 549 (1995). The Court was divided 5-4, with Chief Justice William Rehnquist writing the opinion of the Court, joined by Justices Sandra O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas, with dissents by Justices John Paul Stevens, David Souter, Stephen Breyer, and Ruth Bader Ginsburg.

[2] Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down regulation of mining industry as outside of Commerce Clause).

[3] 18 U.S.C. § 922(q)(1)(A). Congress subsequently amended the section to make the offense jurisdictionally turn on possession of "a firearm that has moved in or that otherwise affects interstate or foreign commerce." Pub. L. No. 104–208, 110 Stat. 3009–370.

[4] 514 U.S. at 556–57, 559.

regulate or protect under its commerce power: (1) the use of the channels of interstate commerce; (2) the use of instrumentalities of interstate commerce; or (3) activities that substantially affect interstate commerce.[5]

The Court reasoned that the criminalized activity did not implicate the first two categories.[6] As for the third, the Court found an insufficient connection. First, a wide variety of regulations of "intrastate economic activity" has been sustained where an activity substantially affects interstate commerce. But the statute being challenged, the Court continued, was a criminal law that had nothing to do with "commerce" or with "any sort of economic enterprise." Therefore, it could not be sustained under precedents "upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce."[7] The provision did not contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[8] The existence of such a section, the Court implied, would have saved the constitutionality of the provision by requiring a showing of some connection to commerce in each particular case.

Finally, the Court rejected arguments of the government and dissent that there was a sufficient connection between the offense and interstate commerce.[9] At base, the Court's concern was that accepting the attenuated connection arguments presented would eviscerate federalism. The Court stated:

> Under the theories that the government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard pressed to posit any activity by an individual that Congress is without power to regulate.[10]

Whether *Lopez* indicated a determination by the Court to police more closely Congress's exercise of its commerce power, so that it would be a noteworthy case,[11] or whether it was rather a "warning shot" across the bow of Congress, urging more restraint in the exercise of power or more care in the drafting of laws, was not immediately clear. The Court's decision five years later in *United States v. Morrison*,[12] however, suggests that stricter scrutiny of Congress's exercise of its commerce power is the chosen path, at least for legislation that falls outside the realm of economic regulation.[13] The Court will no longer defer, via rational basis review, to every congressional finding of substantial effects on interstate commerce, but instead will examine the nature of the asserted nexus to commerce, and will also consider

[5] *Id.* at 558–59. For an example of regulation of persons or things in interstate commerce, see Reno v. Condon, 528 U.S. 141 (2000) (information about motor vehicles and owners, regulated pursuant to the Driver's Privacy Protection Act, and sold by states and others, is an article of commerce).

[6] 514 U.S. at 559.

[7] *Id.* at 559–61.

[8] *Id.* at 561.

[9] *Id.* at 563–68.

[10] *Id.* at 564.

[11] "Not every epochal case has come in epochal trappings." *Id.* at 615 (Souter, J., dissenting) (wondering whether the case is only a misapplication of established standards or is a veering in a new direction).

[12] 529 U.S. 598 (2000). Once again, the Justices split 5-4, with Chief Justice Rehnquist's opinion for the Court being joined by Justices O'Connor, Scalia, Kennedy, and Thomas, and with Justices Souter, Stevens, Ginsburg, and Breyer dissenting.

[13] For an expansive interpretation in the area of economic regulation, decided during the same Term as Lopez, see Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995). *Lopez* did not "purport to announce a new rule governing Congress's Commerce Clause power over concededly economic activity." Citizens Bank v. Alafabco, Inc., 539 U.S. 52, 58 (2003).

whether a holding of constitutionality is consistent with its view of the commerce power as being a limited power that cannot be allowed to displace all exercise of state police powers.

In *Morrison* the Court applied *Lopez* principles to invalidate a provision of the Violence Against Women Act (VAWA) that created a federal cause of action for victims of gender-motivated violence. Gender-motivated crimes of violence "are not, in any sense of the phrase, economic activity,"[14] the Court explained, and there was allegedly no precedent for upholding commerce-power regulation of intrastate activity that was not economic in nature. The provision, like the invalidated provision of the Gun-Free School Zones Act, contained no jurisdictional element tying the regulated violence to interstate commerce. Unlike the Gun-Free School Zones Act, the VAWA did contain "numerous" congressional findings about the serious effects of gender-motivated crimes,[15] but the Court rejected reliance on these findings. "The existence of congressional findings is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation. [The issue of constitutionality] is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court."[16]

The problem with the VAWA findings was that they "relied heavily" on the reasoning rejected in *Lopez*—the "but-for causal chain from the initial occurrence of crime . . . to every attenuated effect upon interstate commerce." As the Court had explained in *Lopez*, acceptance of this reasoning would eliminate the distinction between what is truly national and what is truly local, and would allow Congress to regulate virtually any activity and basically any crime.[17] Accordingly, the Court "reject[ed] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." Resurrecting the dual federalism dichotomy, the Court could find "no better example of the police power, which the Founders denied the national government and reposed in the States, than the suppression of violent crime and vindication of its victims."[18]

Yet, the ultimate impact of these cases on Congress's power over commerce may be limited. In *Gonzales v. Raich*,[19] the Court reaffirmed an expansive application of *Wickard v. Filburn*, and signaled that its jurisprudence is unlikely to threaten the enforcement of broad regulatory schemes based on the Commerce Clause. In *Raich*, the Court considered whether the cultivation, distribution, or possession of marijuana for personal medical purposes pursuant to the California Compassionate Use Act of 1996 could be prosecuted under the federal Controlled Substances Act (CSA).[20] The respondents argued that this class of activities should be considered as separate and distinct from the drug-trafficking that was the focus of the CSA, and that regulation of this limited non-commercial use of marijuana should be evaluated separately.

In *Raich*, the Court declined the invitation to apply *Lopez* and *Morrison* to select applications of a statute, holding that the Court would defer to Congress if there was a rational

[14] *Morrison*, 529 U.S. at 613.

[15] Dissenting Justice Souter pointed to a "mountain of data" assembled by Congress to show the effects of domestic violence on interstate commerce. 529 U.S. at 628–30. The Court has evidenced a similar willingness to look behind congressional findings purporting to justify exercise of enforcement power under Section 5 of the Fourteenth Amendment. *See* discussion under "enforcement," Amdt14.S5.1 Overview of Enforcement Clause. In *Morrison* itself, the Court determined that congressional findings were insufficient to justify the VAWA as an exercise of Fourteenth Amendment power. 529 U.S. at 619–20.

[16] *Morrison*, 529 U.S. at 614.

[17] *Id.* at 615–16. Applying the principle of constitutional doubt, the Court in Jones v. United States, 529 U.S. 848 (2000), interpreted the federal arson statute as inapplicable to the arson of a private, owner-occupied residence. Were the statute interpreted to apply to such residences, the Court noted, "hardly a building in the land would fall outside [its] domain," and the statute's validity under *Lopez* would be squarely raised. 529 U.S. at 857.

[18] *Morrison*, 529 U.S. at 618.

[19] 545 U.S. 1 (2005).

[20] 84 Stat. 1242, 21 U.S.C. §§ 801 *et seq*.

basis to believe that regulation of home-consumed marijuana would affect the market for marijuana generally. The Court found that there was a "rational basis" to believe that diversion of medicinal marijuana into the illegal market would depress the price on the latter market.[21] The Court also had little trouble finding that, even in application to medicinal marijuana, the CSA was an economic regulation. Noting that the definition of "economics" includes "the production, distribution, and consumption of commodities,"[22] the Court found that prohibiting the intrastate possession or manufacture of an article of commerce is a rational and commonly used means of regulating commerce in that product.[23]

The Court's decision also contained an intertwined but potentially separate argument that Congress had ample authority under the Necessary and Proper Clause to regulate the intrastate manufacture and possession of controlled substances, because failure to regulate these activities would undercut the ability of the government to enforce the CSA generally.[24] The Court quoted language from *Lopez* that appears to authorize the regulation of such activities on the basis that they are an essential part of a regulatory scheme.[25] Justice Antonin Scalia, in concurrence, suggested that this latter category of activities could be regulated under the Necessary and Proper Clause regardless of whether the activity in question was economic or whether it substantially affected interstate commerce.[26]

ArtI.S8.C3.6.6 Regulation of Activity Versus Inactivity

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

While the Supreme Court has interpreted Congress's Commerce Clause authority to reach a wide range of activity, it has concluded that the Commerce Clause does not authorize Congress to regulate inactivity. In *National Federation of Independent Business (NFIB) v. Sebelius*,[1] the Court held that Congress does not have the authority under the Commerce Clause to impose a requirement compelling certain individuals to maintain a minimum level of health insurance. The "individual mandate" provisions of the Affordable Care Act generally subject individuals who failed to purchase health insurance to a monetary penalty, administered through the tax code.[2]

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[21] 545 U.S. at 19.

[22] *Id.* at 25, quoting Webster's Third New International Dictionary 720 (1966).

[23] *See also* Taylor v. United States, 579 U.S. 301, 307 (2016) (rejecting the argument that the government, in prosecuting a defendant under the Hobbs Act for robbing drug dealers, must prove the interstate nature of the drug activity). The *Taylor* Court viewed this result as following necessarily from the Court's earlier decision in *Raich*, because the Hobbs Act imposes criminal penalties on robberies that affect "all . . . commerce over which the United States has jurisdiction," 18 U.S.C. § 1951(b)(3) (2012), and *Raich* established the precedent that the market for marijuana, "including its intrastate aspects," is "commerce over which the United States has jurisdiction." *Taylor*, 579 U.S. at 307. *Taylor* was, however, expressly "limited to cases in which a defendant targets drug dealers for the purpose of stealing drugs or drug proceeds." *Id.* at 310. The Court did not purport to resolve what federal prosecutors must prove in Hobbs Act robbery cases "where some other type of business or victim is targeted." *Id.*

[24] 545 U.S. at 18, 22.

[25] *Id.* at 23–25.

[26] *Id.* at 34–35 (Scalia, J., concurring).

[1] 567 U.S. 519 (2012).

[2] Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111–148, as amended. The Act's "guaranteed-issue" and "community-rating" provisions necessitated the mandate because they prohibited insurance companies from denying coverage to those with pre-existing conditions or charging unhealthy individuals higher premiums than healthy individuals. *Id.* at §§ 300gg, 300gg-1, 300gg-3, 300gg-4. As these requirements provide an

Chief Justice John Roberts's controlling opinion[3] suggested that Congress's authority to regulate interstate commerce presupposes the existence of a commercial activity to regulate. Further, his opinion noted that the commerce power had been uniformly described in previous cases as involving the regulation of an "activity."[4] The individual mandate, on the other hand, compels an individual to become active in commerce on the theory that the individual's inactivity affects interstate commerce. Justice Roberts suggested that regulation of individuals because they are doing nothing would result in an unprecedented expansion of congressional authority with few discernable limitations. While recognizing that most people are likely to seek health care at some point in their lives, Justice Roberts noted that there was no precedent for the argument that individuals who might engage in a commercial activity in the future could, on that basis, be regulated today.[5]

ArtI.S8.C3.6.7 Regulation of Interstate Commerce to Achieve Policy Goals

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Congress has, at times, used its interstate Commerce Clause authority to pursue policy goals tangential or unrelated to the commercial nature of the activity being regulated. The Court has several times expressly noted that Congress's exercise of power under the Commerce Clause is akin to the police power exercised by the states.[1] Many of the 1964 public accommodations law applications have been premised on the point that large and small establishments alike may serve interstate travelers, making it permissible for Congress to regulate them under the Commerce Clause so as to prevent or deter racial discrimination.[2] For example, in *Heart of Atlanta Motel, Inc. v. United States*, the Court upheld a provision of Title II of the Civil Rights Act of 1964 that prohibited certain categories of business establishments that served interstate travelers from discriminating or segregating on the basis of race, color, religion, or national origin.[3] In that same case, the Court observed that Congress had used its authority over and interest in protecting interstate commerce to regulate gambling, criminal enterprises, deceptive sales practices, fraudulent security transactions, misbranding drugs, labor practices such as wages and hours, labor union membership, crop control, discrimination against shippers, injurious price cutting that affected small businesses, resale price maintenance, professional football, and racial discrimination in bus terminal restaurants.[4]

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incentive for individuals to delay purchasing health insurance until they become sick, this would impose new costs on insurers, leading them to significantly increase premiums on everyone.

[3] Although no other Justice joined Chief Justice Robert's opinion, four dissenting Justices reached similar conclusions regarding the Commerce Clause and the Necessary and Proper Clause. *NFIB*, 567 U.S. at 646–707 (joint opinion of Scalia, Kennedy, Thomas and Alito, JJ., dissenting).

[4] *See, e.g.*, United States v. Lopez, 514 U.S. 549, 573 (1995) ("Where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained").

[5] *NFIB*, 567 U.S. at 557.

[1] *E.g.*, Brooks v. United States, 267 U.S. 432, 436–437 (1925); United States v. Darby, 312 U.S. 100, 114 (1941). *See* Robert Eugene Cushman, The National Police Power Under the Commerce Clause, 3 Selected Essays on Constitutional Law 62 (1938).

[2] Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964); Daniel v. Paul, 395 U.S. 298 (1969).

[3] 379 U.S. 241, 245–47, 261–62 (1964).

[4] 379 U.S. 241, 256–57 (1964) (citing Champion v. Ames, 188 U.S. 321 (1903); Brooks v. United States, 267 U.S. 432 (1925); FTC v. Mandel Bros., Inc., 359 U.S. 385 (1959); SEC v. Ralston Purina Co., 346 U.S. 119 (1953); Weeks v. United States, 245 U.S. 618 (1918); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin Steel Corp., 301

ArtI.S8.C3.6.8 Civil Rights and Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

It has been generally established that Congress has power under the Commerce Clause to prohibit racial discrimination in the use of channels of commerce.[1] The Court firmly and unanimously sustained the power under the clause to forbid discrimination within the states when Congress in 1964 enacted a comprehensive measure outlawing discrimination because of race or color in access to public accommodations with a requisite connection to interstate commerce.[2] Hotels and motels were declared covered—that is, declared to "affect commerce"—if they provided lodging to transient guests; restaurants, cafeterias, and the like, were covered only if they served or offered to serve interstate travelers or if a substantial portion of the food which they served had moved in commerce.[3] The Court sustained the Act as applied to a downtown Atlanta motel that did serve interstate travelers,[4] to an out-of-the-way restaurant in Birmingham that catered to a local clientele but that had spent 46 percent of its previous year's out-go on meat from a local supplier who had procured it from out-of-state,[5] and to a rural amusement area operating a snack bar and other facilities, which advertised in a manner likely to attract an interstate clientele and that served food a substantial portion of which came from outside the state.[6]

Writing for the Court in *Heart of Atlanta Motel* and *McClung*, Justice Tom Clark denied that Congress was disabled from regulating the operations of motels or restaurants because those operations may be, or may appear to be, "local" in character. He wrote: "[T]he power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce."[7]

Although Congress was regulating on the basis of moral judgments and not to facilitate commercial intercourse, the Court still considered Congress's actions to be covered by the Commerce Clause. The *Heart of Atlanta* Court stated:

> That Congress [may legislate] . . . against moral wrongs . . . rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not

U.S. 1 (1937); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Baltimore & Ohio R. Co., 333 U.S. 169 (1948); Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Hudson Distrib., Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Radovich v. Nat'l Football League, 352 U.S. 445 (1957); Boynton v. Virginia, 364 U.S. 454 (1960)).

[1] Boynton v. Virginia, 364 U.S. 454 (1960); Henderson v. United States, 339 U.S. 816 (1950); Mitchell v. United States, 313 U.S. 80 (1941); Morgan v. Virginia, 328 U.S. 373 (1946).

[2] Civil Rights Act of 1964, tit. II, 78 Stat. 241, 243, 42 U.S.C. §§ 2000a et seq.

[3] 42 U.S.C. § 2000a(b).

[4] Heart of Atlanta Motel, Inc. v. United States. 379 U.S. 241 (1964).

[5] Katzenbach v. McClung, 379 U.S. 294 (1964).

[6] Daniel v. Paul, 395 U.S. 298 (1969).

[7] *Heart of Atlanta Motel, Inc.*, 379 U.S. at 258; *Katzenbach*, 379 U.S. at 301–04.

restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.[8]

The Court held that evidence supported Congress's conclusion that racial discrimination impeded interstate travel by more than 20 million Black citizens, which was an impairment Congress could legislate to remove.[9]

The Commerce Clause basis for civil rights legislation prohibiting private discrimination was important because early cases had interpreted Congress's power under the Fourteenth and Fifteenth Amendments as limited to official discrimination.[10] The Court's subsequent determination that Congress has broader powers under the Fourteenth and Fifteenth Amendments reduced the importance of the Commerce Clause in this area.[11]

ArtI.S8.C3.6.9 Criminal Law and Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Federal criminal jurisdiction based on the commerce or postal power has historically been an auxiliary criminal jurisdiction. That is, Congress has made federal crimes of acts that would usually constitute state crimes but for some contact, however tangential, with a matter subject to congressional regulation even though the federal interest in the acts may be minimal.[1] Early examples of this type of federal criminal statute include the Mann Act of 1910, which outlawed transporting a woman or girl across state lines for purposes of prostitution, debauchery, or other immoral acts,[2] the Dyer Act of 1919, which criminalized interstate transportation of stolen automobiles,[3] and the Lindbergh Law of 1932, which made transporting a kidnapped person across state lines a federal crime.[4] Congress subsequently expanded federal criminal law beyond prohibiting use of interstate facilities in the commission of a crime. Typical of this expansion is a statute making it a federal offense to "in any way or degree obstruct . . . delay . . . or affect . . . commerce . . . by robbery or extortion."[5] But Congress's authority to make crimes federal offenses is not unlimited. In its 1821 *Cohens v. Virginia* decision, the Court held that "Congress cannot punish felonies generally" and may enact only those criminal laws that are connected to one of its constitutionally enumerated

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[8] *Heart of Atlanta Motel, Inc.*, 379 U.S. at 257.

[9] 379 U.S. at 252–53; *Katzenbach*, 379 U.S. at 299–301.

[10] The Civil Rights Cases, 109 U.S. 3 (1883); United States v. Reese, 92 U.S. 214 (1876); Collins v. Hardyman, 341 U.S. 651 (1951).

[11] The Fair Housing Act (Title VIII of the Civil Rights Act of 1968), 82 Stat. 73, 81, 42 U.S.C. §§ 3601 *et seq*., was based on the Commerce Clause, but, in Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968), the Court held that legislation that prohibited discrimination in housing could be based on the Thirteenth Amendment and made operative against private parties. Similarly, the Court has concluded that, although section 1 of the Fourteenth Amendment is judicially enforceable only against "state action," Congress is not so limited under its enforcement authorization of section 5. United States v. Guest, 383 U.S. 745, 761, 774 (1966) (concurring opinions); Griffin v. Breckenridge, 403 U.S. 88 (1971).

[1] *E.g.*, Barrett v. United States, 423 U.S. 212 (1976); Scarborough v. United States, 431 U.S. 563 (1977); Lewis v. United States, 445 U.S. 55 (1980); McElroy v. United States, 455 U.S. 642 (1982).

[2] 18 U.S.C. § 2421.

[3] 18 U.S.C. § 2312.

[4] 18 U.S.C. § 1201.

[5] 18 U.S.C. § 1951. *See also id.* § 1952.

powers, such as the commerce power.[6] As a consequence, most federal offenses include a jurisdictional element that ties the underlying offense to one of Congress's constitutional powers.[7]

ArtI.S8.C3.7 Dormant Commerce Clause

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

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Even as the Commerce Clause empowers Congress to pass federal laws, it has also come to limit state authority to regulate commerce. In contrast to the doctrine of preemption, which generally applies in areas where Congress has acted,[1] the so-called "Dormant" Commerce Clause may bar state or local regulations even where there is no relevant congressional legislation. Although the Commerce Clause "is framed as a positive grant of power to Congress" and not an explicit limit on states' authority,[2] the Supreme Court has also interpreted the Clause to prohibit state laws that unduly restrict interstate commerce even in the absence of congressional legislation—i.e., where Congress is "dormant." This "negative" or "dormant" interpretation of the Commerce Clause "prevents the States from adopting protectionist measures and thus preserves a national market for goods and services."[3]

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

ArtI.S8.C3.7.2 Historical Background on Dormant Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Supreme Court has long rooted its Dormant Commerce Clause jurisprudence in historical circumstances, characterizing the doctrine as a response to the state barriers to trade that served as an impetus for developing a new Constitution.[1] Under the Articles of

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[6] *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821).

[7] *See* Luna Torres v. Lynch, 578 U.S. 452, 457 (2016).

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

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

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

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

[5] *Id.*

[1] *See* Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. 2449, 2460–2461 (2019); *see also* Hughes v. Oklahoma, 441 U.S. 322, 325–326 (1979) (highlighting as the "central concern of the Framers . . . the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation"). In Guy v. Baltimore, 100 U.S. 434, 440 (1880), the Court cautioned that state protectionist measures "would ultimately bring our commerce to that

Confederation, Congress lacked the authority to regulate interstate and foreign commerce.[2] The Annapolis Convention of 1786 was convened out of a desire to remove the protectionist barriers to trade that some states had imposed.[3] At the Philadelphia Convention in 1787, the Framers discussed Congress's authority to regulate interstate commerce in the context of that goal.[4]

In the *Federalist Papers*, Alexander Hamilton and James Madison discussed the benefits of a free national market, such as improving the circulation of commodities for export to foreign markets, increasing the diversity and scope of production, facilitating aid between the states, and providing for more advantageous terms of foreign trade.[5] They also warned that protectionism could lead to interstate conflicts.[6]

Despite these concerns, the Framers did not adopt a constitutional provision expressly addressing state and local regulations affecting interstate commerce. The Import-Export Clause provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws."[7] That clause has not been held to apply to trade among the states, however.[8] Similarly, in the *Federalist No. 32*, Hamilton asserted that the states' taxing authority "remains undiminished" save for imposts or duties on imports or exports.[9] He did not specify, however, whether Congress and the states also enjoyed concurrent power over interstate and foreign commerce. Instead, the Supreme Court has developed its Dormant Commerce Clause jurisprudence to serve as a limitation on some state regulations and taxes, and has linked that jurisprudence with the concerns and goals expressed by the various Framers.

'oppressed and degraded state,' existing at the adoption of the present Constitution, when the helpless, inadequate Confederation was abandoned and a National Government instituted, with full power over the entire subject of commerce, except that wholly internal to the States composing the Union."

[2] The Federalist No. 42 (James Madison) (discussing "[t]he defect of power in the existing Confederacy to regulate the commerce between its several members").

[3] Max Farrand, The Framing of the Constitution of the United States 7–10 (1913); Brandon P. Denning, *Confederation-Era Discrimination Aginst Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky. L.J. 37, 49–59 (2005).

[4] James Madison, Notes of Debates in the Federal Convention of 1787, at 14 (Ohio University Press 1966) (1840) ("The same want of a general power over Commerce, led to an exercise of the power separately, by the States, which not only proved abortive, but engendered rival, conflicting and angry regulations."); *see also* Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 470–471 (1941). Later in life, James Madison stated that the power had been granted to Congress mainly as "a negative and preventive provision against injustice among the states." 4 Letters and Other Writings of James Madison 14–15 (1865).

[5] For example, in the *Federalist No. 11*, Hamilton argued: "An unrestrained intercourse between the States themselves will advance the trade of each by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. Commercial enterprise will have much greater scope, from the diversity in the productions of different States."

[6] Madison wrote in the *Federalist No. 42* that, if the states regulated interstate trade, "it must be foreseen that ways would be found out to load the articles of import and export, during the passage through their jurisiction, with duties which would fall on the makers of the latter and the consumers of the former."

[7] U.S. Const. art. I, § 10, cl. 2.

[8] Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1869). *But see* Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 449 (1827) (noting that "the principles laid down in this case [regarding the Import-Export Clause] . . . apply equally to importations from a sister state"); Comptroller of Treasury of Md. v. Wynne, 575 U.S. 542, 570 (2015) (noting "the close relationship between" the Export-Import Clause and the Dormant Commerce Clause).

[9] The Federalist No. 32 (Alexander Hamilton).

ArtI.S8.C3.7.3 Early Dormant Commerce Clause Jurisprudence

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Supreme Court first described the principles that would become the dormant Commerce Clause doctrine in 1824. In *Gibbons v. Ogden*, the Court struck down New York's grant of a monopoly on steamboat traffic in New York waters.[1] The Court decided the case on Supremacy Clause grounds, ruling that the Federal Coastal Act of 1793 preempted the state law. Accordingly, the Court did not decide whether the Commerce Clause barred states from regulating interstate commerce. Chief Justice John Marshall recognized, however, the "great force" of Daniel Webster's argument that the state law violated the Commerce Clause because that clause conferred upon Congress an exclusive power to regulate national commerce.[2] In dicta, Chief Justice Marshall suggested that the power to regulate commerce between the states might be exclusively federal.[3] At the same time, he also recognized that any national power to regulate commerce coexisted with state regulatory authority over matters that could affect commerce, such as laws governing inspection, quarantine, and health, as well as "laws for regulating the internal commerce of a State."[4]

Chief Justice Marshall again addressed the nascent Dormant Commerce Clause doctrine in *Willson v. Black-Bird Creek Marsh Co.*[5] In that case, a sloop owner whose vessel ran into a dam across a navigable creek challenged a state law authorizing the construction of the dam, arguing that the law conflicted with the federal power to regulate interstate commerce. The Supreme Court rejected this argument, concluding that the state law could not "be considered as repugnant to the [federal] power to regulate commerce in its dormant state . . . ."[6] The Court did not explain the basis for its holding, however, or attempt to square it with the ruling in *Gibbons*.

Over time, the Court came to add more nuance than was present in its earliest dicta. In *Cooley v. Board of Wardens*,[7] the Court enunciated a doctrine of *partial* federal exclusivity that inquired into the subject of a regulation. The Court distinguished between subjects of interstate commerce that "imperatively demand a single uniform rule" nationwide, and subjects of commerce that do not demand such uniformity and which may require "that diversity, which alone can meet the local necessities."[8] While the Court held that Congress's power over the former category was exclusive, it also held that Congress and the states could concurrently regulate the latter category. Concluding that the regulation of pilotage was "incapable of uniformity throughout all the states," the Court upheld a Pennsylvania state law that required ships to hire a local pilot when entering or leaving the Port of Philadelphia.[9]

The Court first struck down a state law solely on Commerce Clause grounds more than two decades later. In the *State Freight Tax Case*, the Court held unconstitutional a statute that required every company transporting freight within the state, with certain exceptions, to pay a

[1] 22 U.S. 1 (1824).

[2] *Id.* at 209.

[3] *Id.* at 17–18.

[4] *Id.* at 2.

[5] 27 U.S. 245, 251 (1829).

[6] *Id.* at 252.

[7] 53 U.S. 299 (1851).

[8] *Id.* at 319.

[9] *Id.* at 306.

tax at specified rates on each ton of freight carried.[10] Two years later, in *Welton v. Missouri*,[11] the Court held unconstitutional a state law that required a peddler's license for merchants selling goods that came from other states. In doing so, it identified two separate goals that the dormant Commerce Clause might serve. First, it adopted *Cooley*'s consideration of the goal of uniformity of commercial regulation. It then provided the additional justification that Congress had not enacted specific legislation governing interstate commerce, which was "equivalent to a declaration that inter-State commerce shall be free and untrammelled." In other words, Congress's silence on the subject was an indication that states could not regulate it.[12]

Prior to 1945, the Court considered whether state regulations imposed unreasonable or undue burdens on interstate commerce, but did not generally weigh a regulation's burdens against its benefits. Instead, the Court distinguished between instances where a state regulated interstate commerce and thus imposed a "direct" and impermissible burden on interstate commerce, and those where it imposed an "indirect" burden or merely "affected" interstate commerce, such as in the course of exercising its police powers.[13] The Court indicated that "a state enactment [that] imposes a *direct burden* upon interstate commerce . . . must fall regardless of federal legislation," indicating that such laws would be invalid even if they were not actually discriminatory.[14]

The distinction between direct and indirect burdens was not always clear, however.[15] Then-Justice (and later Chief Justice) Harlan Stone criticized the direct-or-indirect framework "too mechanical, too uncertain in its application, and too remote from actualities, to be of value," and argued that the Court was "doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."[16] The same Justice later articulated the modern balancing test for review of state regulations of or affecting interstate commerce.[17]

Many early Dormant Commerce Clause cases addressed regulation of interstate transportation, including trains and motor vehicles. For example, in the *Minnesota Rate Cases*, the Supreme Court applied the direct/indirect burden test to invalidate Minnesota's adoption of maximum charges for freight and passenger transportation.[18] Other transportation-related cases did not yield a uniform application of the doctrine. In one case, the Court held that states could not set charges for the transportation of persons and freight because such regulation

[10] Case of the State Freight Tax, 82 U.S. 232 (1873).

[11] 91 U.S. 275 (1875).

[12] *Id.* at 282.

[13] *E.g.*, The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 400 (1913) ("The principle which determines this classification underlies the doctrine that the states cannot, under any guise, impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which, from its nature, should be under the control of the one authority, and be free from restriction, save as it is governed in the manner that the national legislature constitutionally ordains."); Hall v. DeCuir, 95 U.S. 485, 488 (1877).

[14] *The Minnesota Rate Cases*, 230 U.S. at 396; *see also* W. Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1, 37 (1910) (invalidating a Kansas state fee on Western Union for the benefit of in-state schools).

[15] *See* James M. McGoldrick, Jr., *The Dormant Commerce Clause: The Origin Story and the "Considerable Uncertainties"—1824 to 1945*, 52 Creighton L. Rev. 243, 276–284 (2019) (surveying the Court's varying approaches to the direct/indirect test).

[16] Di Santo v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting).

[17] S. Pac. Co. v. Arizona, 325 U.S. 761 (1945); ArtI.S8.C3.7.8 Facially Neutral Laws and Dormant Commerce Clause.

[18] 230 U.S. at 396–97.

must be uniform.[19] In another case, the Court struck down a Louisiana law requiring that all businesses engaged in interstate transportation of passengers provide equal treatment to all passengers regardless of race or color when transiting through Louisiana.[20] In other cases, the Court upheld a variety of state regulations of trains that had been justified on public safety grounds.[21]

Similarly, the Court recognized that states may enact and enforce comprehensive schemes for licensing and regulation of motor vehicles,[22] though it did not uphold all such schemes.[23] As with regulation of trains, the Court was particularly deferential towards laws that were rooted in safety concerns.[24] The Court also upheld state regulations related to navigation on the basis that the activities were local and did not require nationally uniform rules.[25] By contrast, the Court tended to invalidate facially neutral laws that had an impermissibly protectionist purpose or effect, such as the protection of local producers or industries.[26] For example, in *Minnesota v. Barber*, the Court invalidated a law requiring fresh meat sold in Minnesota to

[19] Wabash, St. Louis & Pac. Ry. v. Illinois, 118 U.S. 557 (1886). After *Wabash*, the Court still upheld states' authority to set rates for passengers and freight taken up and put down within their borders. R.R. Comm'n of Wis. v. Chi., Burlington & Quincy R.R., 257 U.S. 563 (1922).

[20] Hall v. DeCuir, 95 U.S. 485 (1877). Some scholars have drawn a connection between *Hall v. DeCuir* and the Court's decision in *Plessy v. Ferguson*, 163 U.S. 537, to uphold the segregation of railroad accommodations under the Equal Protection Clause of the Fourteenth Amendment. Joseph William Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 Nw. U. L. Rev. 1283, 1396 (1996). The Court later distinguished *DeCuir* from *Plessy* by explaining that, in the latter case, the state laws requiring segregated railway cars "applied only between places in the same state." The Roanoke, 189 U.S. 185, 198 (1903).

[21] *E.g.*, Smith v. Alabama, 124 U.S. 465 (1888) (upholding Alabama law requiring locomotive engineers to be examined and licensed by the state); N.Y., New Haven & Hartford R.R. v. New York, 165 U.S. 628 (1897) (upholding New York law forbidding heating of passenger cars by stoves). In some very fact-specific rulings, the Court considered regulations that imposed requirements that trains stop at designated cities and towns. *Compare* Gladson v. Minnesota, 166 U.S. 427 (1897), and Lake Shore & Mich. S. Ry. v. Ohio, 173 U.S. 285 (1899) (upholding such regulations), *with* Ill. Cent. R.R. v. Illinois, 163 U.S. 142 (1896) (invalidating such a law as an unconstitutional burden on interstate commerce). Many other challenged regulations were "full-crew laws" that regulated the number of employees required to operate a train. *E.g.*, Chi., Rock Island & Pac. Ry. v. Arkansas, 219 U.S. 453 (1911); St. Louis, Iron Mtn. & S. Ry. v. Arkansas, 240 U.S. 518 (1916); Mo. Pac. R.R. v. Norwood, 283 U.S. 249 (1931). The connection of state train regulations to public safety was not always apparent. *E.g.*, Terminal R.R. Ass'n of St. Louis v. Brotherhood of R.R. Trainmen, 318 U.S. 1 (1943) (upholding law requiring railroad to provide caboose cars for its employees); Hennington v. Georgia, 163 U.S. 299 (1896) (upholding law forbidding freight trains to run on Sundays). *But see* Seaboard Air Line Ry. v. Blackwell, 244 U.S. 310 (1917) (voiding as too onerous a law requiring trains to come to almost a complete stop at all grade crossings, which would have doubled trains' running time over a 123-mile stretch of track that contained 124 highway crossings at grade).

[22] *E.g.*, Hendrick v. Maryland, 235 U.S. 610 (1915) (upholding state vehicle registration requirement); Kane v. New Jersey, 242 U.S. 160 (1916) (upholding law requiring imposition of various fees and requirements on nonresident drivers); Bradley v. Pub. Util. Comm'n, 289 U.S. 92 (1933) (holding that a state could deny an interstate firm a necessary certificate of convenience to operate as a common carrier on the basis that the route was overcrowded); H. P. Welch Co. v. New Hampshire, 306 U.S. 79 (1939) (upholding maximum hours for drivers of motor vehicles); Eichholz v. Pub. Serv. Comm'n of Mo., 306 U.S. 268 (1939) (allowing reasonable regulations of traffic).

[23] *E.g.*, Mich. Pub. Util. Comm'n v. Duke, 266 U.S. 570 (1925) (holding that a state could not impose common-carrier responsibilities on a business operating between states that did not hold itself out as a carrier for the public); Buck v. Kuykendall, 267 U.S. 307 (1925) (holding that a requirement that common carriers for hire obtain a certificate of public convenience and necessity was an unconstitutional ban on competition).

[24] *E.g.*, Maurer v. Hamilton, 309 U.S. 598 (1940) (upholding ban on the operation of any motor vehicle carrying any other vehicle above the operator's head); S.C. Highway Dep't v. Barnwell Bros., 303 U.S. 177 (1938) (upholding truck weight restrictions and width restrictions even though such restrictions were not in effect in most other states).

[25] Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1 (1888); Kelly v. Washington, 302 U.S. 1 (1937).

[26] Best & Co. v. Maxwell, 311 U.S. 454, 457 (1940) ("The freedom of commerce . . . is not to be fettered by legislation, the actual effect of which is to discriminate in favor of interstate businesses, whatever may be the ostensible reach of the language.") (footnote omitted).

have been inspected in the state within 24 hours of slaughter, effectively excluding meat slaughtered in other states from the Minnesota market.[27]

Finally, the Supreme Court's early Dormant Commerce Clause jurisprudence also shows an effort to grapple with what constituted "commerce." In some cases, the Court found that a state action had not violated the Dormant Commerce Clause because interstate commerce had not yet begun. For example, the Court upheld a municipal tax that covered cut logs that floated in a river until the spring thaw permitted them to be floated to another state, reasoning that interstate commerce did not begin until the logs were committed to a common carrier for transportation or transport actually began.[28] In a case regarding limitations on the manufacture and sale of "intoxicating liquors," the Court distinguished between the purchase, sale, and incidental transportation of manufactured goods including alcohol, which constituted commerce; and the manufacture of alcohol, which was "the fashioning of raw materials into a change of form for use" and did not constitute commerce.[29]

ArtI.S8.C3.7.4 Modern Dormant Commerce Clause Jurisprudence Generally

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In its modern Dormant Commerce Clause jurisprudence, the Supreme Court has applied two primary principles. First, subject to certain exceptions, state and local laws that "discriminate[ ] against out-of-state goods or nonresident economic actors" are considered *per se* invalid and are generally struck down absent a showing that they are narrowly tailored to advance a legitimate local purpose.[1] Second, for laws that regulate "evenhandedly" and are not facially discriminatory, the Court applies a balancing test and upholds laws that serve a "legitimate local purpose" unless the burden on interstate commerce clearly exceeds the local benefits.[2] While the Court has acknowledged Congress's primacy in regulating interstate commerce, it has also asserted its own role in interpreting the scope of that authority.[3]

The application of these two principles in modern Dormant Commerce Clause jurisprudence has been highly fact-specific. While the Court has articulated a basic framework for reviewing state regulations, it has not successfully defined clear rules that can be consistently applied, resulting in holdings that sometimes appear unpredictable. In particular,

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[27] Minnesota v. Barber, 136 U.S. 313 (1890). *See also Buck*, 267 U.S. at 315; *see also* Baldwin v. G.A.F. Seelig, 294 U.S. 511 (1935) (striking down a regulation on the price of interstate milk purchases that kept the price of milk artificially high within the state).

[28] Coe v. Errol, 116 U.S. 517, 525 (1886). In general, the Court did not permit states to regulate a purely interstate activity or prescribe prices of purely interstate transactions. *E.g.*, W. Union Tel. Co. v. Foster, 247 U.S. 105 (1918); Lemke v. Farmers Grain Co., 258 U.S. 50 (1922); State Corp. Comm'n of Kan. v. Wichita Gas Co., 290 U.S. 561 (1934). But the Court sustained price and other regulations imposed prior to or subsequent to the travel in interstate commerce of goods produced for such commerce or received from such commerce. For example, decisions late in the early period of the Court's jurisprudence upheld state price-fixing schemes applied to goods intended for interstate commerce. Milk Control Bd. v. Eisenberg Co., 306 U.S. 346; Parker v. Brown, 317 U.S. 341 (1943).

[29] Kidd v. Pearson, 128 U.S. 1, 20 (1888).

[1] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2461 (2019); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338–339 (2008); Granholm v. Heald, 544 U.S. 460, 487 (2005).

[2] *E.g.*, Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986) (citing Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)); *Davis*, 553 U.S. at 338–339.

[3] S. Pac. Co. v. Arizona, 325 U.S. 761, 769, 770 (1945) ("[T]his Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests. . . . [I]n general Congress has left it to the courts to formulate the rules thus interpreting the commerce clause in its application . . . .").

some Justices have criticized the balancing test, arguing that facially nondiscriminatory laws should be upheld without the need for balancing.[4]

ArtI.S8.C3.7.5 General Prohibition on Facial Discrimination

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Subject to limited exceptions, the Supreme Court has struck down state laws that discriminate against out-of-state goods or nonresident economic actors, allowing such laws only when the regulatory entity meets the burden of showing that it is "narrowly tailored to advance a legitimate local purpose" and that there is no reasonable, nondiscriminatory regulatory alternative.[1] A law that "clearly discriminates against interstate commerce [ ] will be struck down . . . unless the discrimination is demonstrably justified by a valid factor unrelated to economic protectionism."[2] Put another way, the Court applies a "virtually *per se* rule of invalidity" to state laws that evince economic protectionism.[3]

Applying this rule, the Court has struck down as discriminatory some regulations that expressly treat out-of-state or interstate interests less favorably, or that expressly grant advantages to in-state businesses. For example, the Court invalidated an Oklahoma law that required coal-fired electric utilities in the state, producing power for sale in the state, to burn a mixture containing at least 10% Oklahoma-mined coal.[4] Similarly, the Court invalidated a state law that permitted a state public utility commission to restrict the export of hydroelectric power to neighboring states when the commission determined that the energy was required for use within the state.[5]

Since the advent of the modern framework for evaluating Dormant Commerce Clause challenges, the Court has also continued to strike down state laws that purport to be facially neutral, but which have either the purpose or the effect of depriving out-of-state businesses of a competitive advantage. In *Hunt v. Washington State Apple Advertising Commission*, the Court invalidated a North Carolina regulation requiring apples shipped in closed containers to display no grade other than the applicable federal grade.[6] Washington State mandated that all

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[4] *See* Bendix Autlolite Corp. v. Midwesco Enters., Inc., 486 U.S. 888, 896 (1988) (Scalia, J., concurring) ("[Weighing] the governmental interests of a State against the needs of interstate commerce is [a] task squarely within the responsibility of Congress."); *see also* Camps Newfound/Owatonna v. Harrison, 520 U.S. 564, 620, 636–637 (1997) (Thomas, J., dissenting) (describing the Court's Dormant Commerce Clause jurisprudence as "unworkable," and arguing that it should be abandoned in favor of considering state taxation laws under the Import-Export Clause); South Dakota v. Wayfair, 138 S. Ct. 2080, 2100 (2018) (Thomas, J., concurring) (arguing that the Court's Dormant Commerce Clause precent "can no longer be rationally justified"); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2477 (2019) (Gorsuch, J., dissenting) (describing the Court's dormant Commerce Clause doctrine as "peculiar").

[1] Tenn. Wine & Spirits Retailers Ass'n, 139 S. Ct. at 2461 (internal quotations omitted); Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008); Hughes v. Oklahoma, 441 U.S. 322, 336 (1979); Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 353 (1977).

[2] Wyoming v. Oklahoma, 502 U.S. 437, 454 (1992)

[3] Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

[4] *Wyoming*, 502 U.S. 437.

[5] New England Power Co. v. New Hampshire, 455 U.S. 331 (1982); *see also* Hughes v. Oklahoma, 441 U.S. 322 (1979) (striking down a ban on transporting minnows caught in the state for sale outside the state); Sporhase v. Nebraska, 458 U.S. 941 (1982) (invalidating a ban on the withdrawal of groundwater from any well in the state intended for use in another state); Camps Newfound/Owatonna, Inc. v. Harrison, 520 U.S. 564 (1997) (striking down a state tax law that disfavored businesses that primarily served nonresidents).

[6] 432 U.S. 333 (1977).

apples produced and shipped in interstate commerce pass a much more rigorous inspection than that mandated by the United States. The Court held that the inability to display the recognized state grade in North Carolina had the practical effect of discriminating against interstate commerce, could not be defended as a consumer protection measure, and therefore was unconstitutional.[7]

In some cases, the Supreme Court has emphasized the availability of less discriminatory alternatives for achieving a regulatory goal. In *Dean Milk Co. v. Madison*, an Illinois-based dairy processor challenged a local ordinance in Madison, Wisconsin that required all milk sold in the city to be pasteurized at an approved plant within five miles of the city.[8] The Court concluded that the ordinance "plainly discriminates against interstate commerce," and noted that it was "immaterial" that the ordinance discriminated against Wisconsin milk from outside the Madison area as well as out-of-state milk.[9] The Court also reasoned that "reasonable nondiscriminatory alternatives" were available for the inspection of milk or implementation of safety standards, and that the ordinance could not "be justified in view of the character of the local interests and the available methods of protecting them."[10]

The Court has rejected some claims that state regulations are facially discriminatory. In *Minnesota v. Clover Leaf Creamery Co.*, the Court upheld a state law banning the retail sale of milk products in plastic, nonreturnable containers but permitting sales in other nonreturnable, nonrefillable containers, such as paperboard cartons.[11] The Court found no discrimination against interstate commerce, despite a state-court finding that the measure was intended to benefit the local pulpwood industry, because both in-state and out-of-state interests could not use plastic containers. In *Exxon Corp. v. Governor of Maryland*, the Court upheld a statute that prohibited producers or refiners of petroleum products from operating retail service stations in Maryland.[12] The statute did not on its face discriminate against out-of-state companies, but as there were no producers or refiners in Maryland, "the burden of the divestiture requirements" fell solely on such companies. The Court held, however, that "this fact does not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce at the retail level," as the statute does not "distinguish between in-state and out-of-state companies in the retail market."[13]

ArtI.S8.C3.7.6 State Proprietary Activity (Market Participant) Exception

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Supreme Court has recognized limited exceptions to the *per se* invalidity of discriminatory state laws under the Dormant Commerce Clause. Under the market participant exception, states that "themselves 'participat[e] in the market'" may "'exercis[e]

[7] *Id.* at 351–353; *see also* W. Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 194–195 (1994); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986).

[8] 340 U.S. 349 (1951).

[9] *Id.* at 354.

[10] *Id.* at 354–356; *see also Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S at 354.

[11] 449 U.S. 456, 470–474 (1981).

[12] 437 U.S. 117 (1978).

[13] *Id.* at 125–126.

the right to favor [their] own citizens over others.'"[1] For example, a state does not unconstitutionally discriminate against out-of-state businesses when it chooses to buy or sell goods or services with its own residents or businesses

In *Hughes v. Alexandria Scrap Corp.*, the Court upheld a Maryland bounty scheme by which the state paid scrap processors for each "hulk" automobile destroyed, and which substantially disadvantaged out-of-state processors.[2] Reasoning that the scheme was a means of participating in the market to bid up the price of hulks rather than a regulation of the market, the Court held that "entry by the State itself into the market itself as a purchaser, in effect, of a potential article of interstate commerce [does not] create[ ] a burden upon that commerce if the State restricts its trade to its own citizens or businesses within the State."[3] In *Reeves, Inc. v. Stake*, the Court held that South Dakota could limit the sale of cement from a government-operated plant to in-state residents in times of shortage.[4] The Court noted that "[t]here is no indication of a constitutional plan to limit the ability of States themselves to operate freely in the free market."[5]

Despite these decisions, the scope of the market participant exception has not been carefully defined, particularly with respect to whether a state acts as a market participant in "downstream regulation."[6]

ArtI.S8.C3.7.7 Congressional Authorization of Otherwise Impermissible State Action

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In general, the Court has recognized that Congress's plenary authority over interstate commerce enables Congress to "keep the way open, confine it broadly or closely, or close it entirely, subject only to the restrictions placed upon its authority by other constitutional provisions and the requirement that it shall not invade the domains of action reserved exclusively for the states."[1] Because the Dormant Commerce Clause protects this legislative domain, Congress may authorize state laws that otherwise would be considered

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[1] Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 339 (2008) (quoting Hughes v. Alexandria Scrap Co., 426 U.S. 794, 810 (1976)).

[2] 426 U.S. 794.

[3] *Id.* at 808; *see also* McBurney v. Young, 569 U.S. 221, 236 (2013) (to the extent that the Virginia Freedom of Information Act created a market for public documents in Virginia, the Commonwealth was the sole manufacturer of the product, and therefore did not violate the Dormant Commerce Clause when it limited access to those documents under the Act to citizens of the Commonwealth).

[4] 447 U.S. 429 (1980).

[5] *Id.* at 437; *see also* White v. Mass. Council of Constr. Emps., 460 U.S. 204 (1983) (holding that a city may favor its own residents in construction projects paid for with city funds). The Court reached a different result in *S.-Cent. Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82 (1984), in which it held unconstitutional a requirement that timber taken from state lands in Alaska be processed within the state. The Court distinguished Alaska's requirement from the laws at issue in other market-participant doctrine cases based on the fact that the Alaska law restricted resale, affected foreign commerce, and involved a natural resource).

[6] *See S.-Cent. Timber Dev., Inc.*, 467 U.S. at 97–98 (cautioning that "[u]nless the 'market' is relatively narrowly defined, the doctrine has the potential of swallowing up the rule that States may not impose substantial burdens on interstate commerce even if they act with the permissible state purpose of fostering local industry").

[1] Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 434 (1946).

discriminatory.[2] For example, in 1852, the Supreme Court held that the Wheeling Bridge unlawfully obstructed the free navigation of the Ohio River.[3] Soon thereafter, Congress enacted legislation declaring the bridge to be a "lawful structure[ ]."[4] In a subsequent opinion, the Court acknowledged that the act of Congress superseded its earlier ruling.[5] Some Justices, however, have questioned whether Congress may in fact override the dormant Commerce Clause.[6]

Congress's intent to permit otherwise impermissible state actions must "be unmistakably clear," however.[7] The Court has struck down various state regulations where it held that there was no federal law expressing a sufficiently clear intent to authorize a particular burden on interstate commerce.[8]

One line of cases has addressed states' authority to regulate and tax the insurance business. In *United States v. South-Eastern Underwriters Association*, the Court held that insurance transactions across state lines constituted interstate commerce and thus could not be subjected to discriminatory state taxation.[9] Less than a year later, Congress passed the McCarran-Ferguson Act, which provided that "the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States."[10] Following the enactment of that law, the Court upheld a South Carolina statute that taxed the premiums of business done in that state by foreign insurance companies.[11]

In a series of cases relating to state prohibition laws enacted in the 1890s, the Court emphasized that states could prohibit the manufacture and sale of alcohol within their boundaries, but could not prevent the importation or sale of alcohol in its original package from

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[2] Ne. Bancorp, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 472 U.S. 159, 174 (1985) ("When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.")

[3] Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518 (1852).

[4] Ch. 111, 10 Stat. 112, § 6.

[5] Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421 (1856).

[6] *E.g.*, Comptroller of Treasury v. Wynne, 575 U.S. 542, 572 (2015) (Scalia, J., dissenting) ("The clearest sign that the negative Commerce Clause is a judicial fraud is the utterly illogical holding that congressional consent enables States to enact laws that would otherwise constitute impermissible burdens upon interstate commerce. . . . How could congressional consent lift a constitutional prohibition?"); Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 426 (1946) ("[I]f the commerce clause 'by its own force' forbids discriminatory state taxation, or other measures, how is it that Congress by expressly consenting can give that action validity?").

[7] S.-Cent. Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 90, 92 (1984) (explaining that this rule ensures that there is a "collective decision" to impose a burden on interstate commerce and reduces the risk that unrepresented, out-of-state interests will be adversely affected by a state's unilateral regulations). Likewise, Congress must specify when it intends to reduce the degree of scrutiny to be applied to a state action. *See* Maine v. Taylor, 477 U.S. 131, 139 (1986) (holding that the Lacey Act's reinforcement of state bans on importation of fish and wildlife neither authorizes state law that otherwise would be unconstitutional, nor shifts analysis from the presumption of invalidity for discriminatory laws to the balancing test for state laws that burden commerce only incidentally).

[8] *E.g.*, Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66 (2003) (holding that the Federal Agriculture Improvement and Reform Act of 1996 addressed laws regulating the composition and labeling of fluid milk products, but did not mention pricing laws, and thus did not authorize a California program to regulate the minimum prices paid by California dairy processors to producers); *S.-Cent. Timber Dev.*, 467 U.S. at 92 (holding that consistency between federal and state policy was "insufficient indicium" that Congress intended to authorize the state to apply a similar policy for timber harvested from state lands).

[9] 322 U.S. 533 (1944).

[10] Act of Mar. 9, 1945, ch. 20, § 1, 59 Stat. 33, 15 U.S.C. § 1011.

[11] Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 429 (1946) (explaining that Congress "[o]bviously [intended] to give support to the existing and future state systems for regulating and taxing the business of insurance").

another state so long as Congress remained silent on the issue.[12] Congress then enacted the Wilson Act, which empowered states to regulate imported liquor on the same terms as domestic liquor.[13] But the Court interpreted the Wilson Act narrowly to authorize states to regulate the resale of imported liquor, and not direct shipment to consumers for personal use.[14] Congress then responded in 1913 by enacting the Webb-Kenyon Act, which authorized states to limit direct shipments of liquor for personal use.[15]

Following the repeal of Prohibition, the Supreme Court has repeatedly considered the relationship between the Twenty-First Amendment and the Dormant Commerce Clause as they govern state alcohol laws.[16] Section 2 of the Amendment prohibited the "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof."[17] In its recent case law, the Court has emphasized that "the aim of § 2 was not to give States a free hand to restrict the importation of alcohol for purely protectionist purposes."[18] The Court has thus invalidated various state alcohol laws that discriminated in favor of in-state businesses where it has determined that a challenged requirement "[cannot] be justified as a public health or safety measure or on some other legitimate nonprotectionist ground."[19]

ArtI.S8.C3.7.8 Facially Neutral Laws and Dormant Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

For laws that are neither facially discriminatory nor protectionist in purpose or effect, the Supreme Court now applies a balancing approach to determine if they impermissibly burden interstate commerce. The Court first articulated the modern balancing test in 1945, in *Southern Pacific Co. v. Arizona*.[1] In that case, the Court held that an Arizona train-length law

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[12] Bowman v. Chi. & Nw. Ry., 125 U.S. 465 (1888); Leisy v. Hardin, 135 U.S. 100 (1890). Relying on the distinction between manufacture and commerce, the Court applied *Mugler* to authorize states to prohibit the manufacture of liquor for an out-of-state market. Kidd v. Pearson, 128 U.S. 1 (1888). For a lengthier discussion of the Court's temperance-law jurisprudence, see Granholm v. Heald, 544 U.S. 460, 476–482 (2005); and Tennessee Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2464–2467 (2019).

[13] Ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121).

[14] Rhodes v. Iowa, 170 U.S. 412 (1898); *see also* Scott v. Donald, 165 U.S. 58, 100 (1897) (holding that the Wilson Act did not authorize a South Carolina law requiring all liquor sales to be channeled through the state liquor commissioner); Vance v. W. A. Vandercook Co., 170 U.S. 438 (1898).

[15] 37 Stat. 699 (codified at 27 U.S.C. § 122). The Supreme Court upheld the constitutionality of the Webb-Kenyon Act in Clark Distilling Co. v. W. Md. Ry., 242 U.S. 311 (1917).

[16] *See* Amdt21.S2.1 Discrimination Against Interstate Commerce.

[17] U.S. Const. amend. XXI, § 2.

[18] *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2469 (citing *Granholm*, 544 U.S. at 486–487, and Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 276 (1984)).

[19] *E.g.*, *id.* at 2474–2476 (holding that a Tennessee two-year residency requirement for retail liquor license applicants was not justified on public health and safety grounds and violated the Commerce Clause); *Bacchus*, 468 U.S. at 273–276 (invalidating tax exemption favoring certain in-state alcohol producers); Healy v. Beer Inst., 491 U.S. 324, 340–341 (1989) (holding unconstitutional a Connecticut law requiring out-of-state shippers of beer to affirm that their wholesale price for products sold in the state was no higher than the prices they charged to wholesalers in bordering states); *Granholm*, 544 U.S. at 492–493 (holding that discriminatory direct-shipment law that favored in-state wineries was not reasonably necessary to protect states' asserted interests in policing underage drinking and facilitating tax collection).

[1] 325 U.S. 761 (1945). Prior to 1945, Chief Justice Stone authored a series of opinions presaging this standard. See DiSanto v. Pennsylvania, 273 U.S. 34, 44 (1927) (Stone, J., dissenting) (advocating "consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual

imposed an unconstitutional burden on interstate commerce. Writing for the majority, Justice Harlan Stone explained that courts would generally uphold regulations as within state authority "[w]hen the regulation of matters of local concern is local in character and effect, and its impact on the national commerce does not seriously interfere with its operation, and the consequent incentive to deal with them nationally is slight."[2]

According to the Court, determining whether a state or local regulation was valid required a "reconciliation of the conflicting claims of state and national power," which "is to be attained only by some appraisal and accommodation of the competing demands of the state and national interests involved."[3] To weigh those conflicting claims, the Court would consider "the nature and extent of the burden which the state regulation . . . imposes on interstate commerce, and whether the relative weights of the state and national interests involved are such as to make inapplicable the rule, generally observed, that the free flow of interstate commerce and its freedom from local restraints in matters requiring uniformity of regulation are interests safeguarded by the commerce clause from state interference."[4] Applying that balancing test to the Arizona law under review, the Court concluded that it was "obstructive to interstate train operation," would have "a seriously adverse effect on transportation efficiency and economy," and "passes beyond what is plainly essential for safety."[5]

A more commonly cited articulation of the modern balancing test comes from *Pike v. Bruce Church, Inc*.[6] In that case, the Court explained:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will, of course, depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[7]

Since the adoption of the balancing test for evaluating facially neutral laws under the Dormant Commerce Clause, the Court has issued divergent rulings on state regulations.[8] It has not expressly identified what constitutes an intolerable burden on interstate commerce, though it has held that a state law does not necessarily impose an undue burden on interstate commerce merely because it increases compliance costs or causes some entities to stop doing

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effect on the flow of commerce"); California v. Thompson, 313 U.S. 109 (1941) (overruling *DiSanto*); Parker v. Brown, 317 U.S. 341, 362–368 (1943). A notable exception to this approach was *South Carolina Highway Department v. Barnwell Bros.*, in which Justice Stone authored an opinion upholding truck weight and width restrictions that were more limiting than almost all other states, based on a review of whether "the legislative choice is without rational basis." 303 U.S. 177, 192 (1938). Although the Court has not reversed *Barnwell Bros.*, its application of the rational basis test to subsequent Dormant Commerce Clause challenges has been limited. *See* Clark v. Paul Gray, Inc., 306 U.S. 583, 594 (1939).

[2] *S. Pac. Co.*, 325 U.S. at 767.

[3] *Id.* at 768–69.

[4] *Id.* at 770–71.

[5] *Id.* at 781–782.

[6] 397 U.S. 137 (1970).

[7] *Id.* at 142 (citation omitted).

[8] Several cases applying the balancing approach—both before and after *Pike v. Bruce Church*—have addressed regulation of the transportation industry. *E.g.*, Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) (invalidating Illinois law requiring a particular kind of mudguards on trucks and trailers because of the burden on interstate commerce that would result from truckers shifting cargo to differently designed vehicles); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 447 (1978) (holding that Wisconsin truck-length limitations placed no more than "the most speculative contribution to highway safety"); Kassel v. Consolidated Freightways Corp., 450 U.S. 662 (1981) (invalidating Iowa truck-length limitations on similar grounds).

business in that state.[9] Likewise, the Court has not articulated a definition of "legitimate local purpose," though it has identified categories of interests that could be considered legitimate or illegitimate. In *Pike*, for example, the Court indicated that states had a legitimate interest in addressing safety (particularly in the context of long-standing local regulation), protecting in-state consumers, protecting or promoting in-state businesses, and maxmimizing the financial return to in-state industries.[10] Under the Court's balancing approach, however, the existence of a legitimate local interest is not alone a sufficient basis to uphold a law that burdens interstate commerce. The Court has also explained that "[s]hielding in-state industries from out-of-state competition is almost never a legitimate local purpose."[11]

Cases that have arisen in the context of financial regulation illustrate the fact-specific nature of the balancing test. In *Lewis v. BT Investment Managers, Inc.*, the Court struck down a state law prohibiting ownership of local advisory businesses by out-of-state banks, holding companies, and trust companies. It acknowledged that "banking and related financial activities are of profound local concern" and that "[d]iscouraging economic concentration and protecting the citizenry against fraud are undoubtedly legitimate state interests."[12] The Court nevertheless held that "disparate treatment of out-of-state bank holding companies cannot be justified as an incidental burden necessitated by legitimate local concerns," in part because "some intermediate form of regulation" could accomplish the same goals.[13] Likewise, in *CTS Corp. v. Dynamics Corp. of America*, the Court recognized the state's legitimate interest in regulating its corporations and resident shareholders. In that case, it upheld the state law, finding that the state's interest outweighed any burden on interstate commerce from the effects of the law.[14] By contrast, in *Edgar v. MITE Corp.*, the Court reasoned that states did *not* have a legitimate interest in protecting *nonresident* shareholders.[15]

At times, the Court has applied an extraterritoriality principle in its Dormant Commerce Clause analysis, holding that certain facially neutral state laws are unconstitutional because they attempt to regulate beyond a state's borders.[16] The Court has recognized that this principle "protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State" and "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not

[9] Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 127 (1978) (holding that a Maryland law prohibiting oil producers oil refiners from operating gas stations within the state did not impermissibly burden interstate commerce even where the law would cause some refiners to stop selling in Maryland, because those refiners could "be promptly replaced by other interstate refiners").

[10] 397 U.S. at 143.

[11] Maine v. Taylor, 477 U.S. 131, 148 (1986).

[12] 447 U.S. 27, 38, 43–44 (1980).

[13] *Id.* at 43–44.

[14] 481 U.S. 69, 88, 93 (1987).

[15] 457 U.S. 624, 644 (1982).

[16] Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 524 (1935) (striking down a law requiring milk sellers in New York to pay an out-of-state milk producer the minimum price set by New York law in order to equalize the price of milk from in-state and out-of-state producers, and explaining that "commerce between the states is burdened unduly when one state regulates by indirection the prices to be paid to producers in another"); Edgar v. MITE Corp., 457 U.S. 624, 642–643 (1982) (emphasizing the extraterritorial effect of an Illinois regulation of take-over attempts of companies that had specified business contacts with the state); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 580 (1986) (striking down a New York law requiring liquor distillers and producers selling to wholesalers within the state to affirm that the prices they charged were no higher than the lowest price at which the same product would be sold in any other state in the month covered by the affirmation); Healy v. Beer Inst., 491 U.S. 324, 332 (1989) (striking down a Connecticut price-affirmation statute for out-of-state beer shippers, and confirming that "a state law that has the 'practical effect' of regulating commerce occurring wholly outside that State's borders is invalid under the Commerce Clause").

the commerce has effects within the [regulating] State."[17] The Court has not articulated a general rule for when it will consider a state's law to have the practical effect of regulating extraterritorial commerce.[18]

For both discriminatory and facially neutral laws, the Court's "critical consideration" is a law's "overall effect . . . on both local and interstate activity."[19] Yet determining whether a law is discriminatory and *per se* invalid, or facially netural and subject to the balancing test, is not straightforward. While the Court has cautioned that "no clear line" separates these two categories of regulations,[20] it has identified some categories of laws that are generally discriminatory: laws that aim to create "barriers to allegedly ruinous outside competition," "to create jobs by keeping industry within the State," "to preserve the State's financial resources from depletion by fencing out indigent immigrants," and to "accord [a state's] own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders" would all be invalidated.[21]

ArtI.S8.C3.7.9 Local Laws and Traditional Government Functions

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

At times, the Supreme Court has taken a more lenient approach under the Dormant Commerce Clause toward local laws that relate to government actions it identifies as traditional government functions, and which "may be directed toward any number of legitimate goals unrelated to protectionism."[1] In such cases, the Court has held that "a government function is not susceptible to standard Dormant Commerce Clause scrutiny owing to its likely motivation by legitimate objectives distinct from the simple economic protectionism the Clause abhors."[2]

The Court has not identified an exhaustive list of traditional government functions or a test for identifying them, but one paradigmatic example is the govenrment's role in waste collection. In *United Haulers Association, Inc. v. Oneida-Herkimer Solid Waste Management Authority*, the Court upheld a law requiring trash haulers to bring waste to a processing plant owned by a state-created public benefit corporation. The Court explained that it would be "particularly hesitant to interfere . . . under the guise of the Commerce Clause" where a local government engaged in a traditional government function.[3] *United Haulers* contrasted with earlier rulings that addressed garbarge transport and disposal laws without discussing whether those laws related to a traditional government function.[4] For example, in *C & A*

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[17] *Healy*, 491 U.S. at 336–337; *Edgar*, 457 U.S. at 642.

[18] *See* Pharm. Rsch. & Mfrs. of Am. v. Walsh, 538 U.S. 644, 669 (2003) (holding that the rule applied in *Baldwin* and *Healy* "is not applicable to this case" because the challenged statute was not a price control or price affirmation statute and did not regulate the price of any out-of-state transaction).

[19] *Brown-Forman*, 476 U.S. at 579 (1986).

[20] *Id.*

[21] Philadelphia v. New Jersey, 437 U.S. 617, 626–627 (1978) (citing cases).

[1] United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343 (2007).

[2] Dep't of Revenue of Ky. v. Davis, 553 U.S. 328, 341 (2008).

[3] 550 U.S. at 344.

[4] In *Philadelphia v. New Jersey*, the Supreme Court struck down a New Jersey statute that banned the importation of most solid or liquid wastes that originated outside the state. 437 U.S. at 629. Then, in *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353 (1992), the Court applied

Carbone, Inc. v. Clarkstown,[5] the Court invalidated a local "flow control" ordinance requiring that all solid waste within the town be processed at a designated transfer station before leaving the town. Underlying the restriction was the town's desire to guarantee a minimum waste flow to the private contractor that constructed a solid waste transfer station. The Court declined to apply *Carbone* in *United Haulers* because the ordinance at issue in the latter case required haulers to bring waste to facilities owned and operated by a state-created public benefit corporation, as opposed to a private processing facility.[6] The Court found this difference constitutionally significant because "[d]isposing of trash has been a traditional government activity for years, and laws that favor the government in such areas—but treat every private business, whether in-state or out-of-state, exactly the same—do not discriminate against interstate commerce for purposes of the Commerce Clause."[7]

The Court has applied a traditional governmental function lens in other contexts. In *Department of Revenue of Kentucky v. Davis*, the Court upheld Kentucky's exemption of interest on its municipal bonds from state income taxes while imposing income taxes on bond interest from other states, after concluding that the issuance of debt securities to pay for public projects is a "quintessentially public function."[8] Curiously, the Court declined to apply the *Pike v. Bruce Church, Inc.* balancing analysis, holding that "the current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary . . . to satisfy a *Pike* burden in this particular case."[9]

ArtI.S8.C3.7.10 Foreign Commerce and State Powers

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

State taxation and regulation of commerce from abroad are also subject to negative commerce clause constraints. In the seminal case of *Brown v. Maryland*,[1] in the course of striking down a state statute requiring "all importers of foreign articles or commodities," preparatory to selling the goods, to take out a license, Chief Justice John Marshall developed a lengthy exegesis explaining why the law was void under both the Import-Export Clause[2] and the Commerce Clause. According to the Chief Justice, an inseparable part of the right to import was the right to sell, and a tax on the sale of an article is a tax on the article itself. Thus, the

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Philadelphia to hold unconstitutional a Michigan law prohibiting private landfill operators from accepting solid waste that originates outside the county where their facilities are located.

[5] 511 U.S. 383 (1994).

[6] *United Haulers*, 550 U.S. at 334.

[7] *Id.* The Court has applied *United Haulers* in other contexts. In *Department of Revenue of Kentucky v. Davis*, the Court upheld Kentucky's exemption of interest on its municipal bonds from state income taxes while imposing income taxes on bond interest from other states, after concluding that the issuance of debt securities to pay for public projects is a "quintessentially public function." 553 U.S. at 342. The Court declined to apply the *Pike* balancing analysis, however, holding that "the current record and scholarly material convince us that the Judicial Branch is not institutionally suited to draw reliable conclusions of the kind that would be necessary . . . to satisfy a *Pike* burden in this particular case."

[8] 553 U.S. at 342.

[9] *Id.* at 353.

[1] 25 U.S. (12 Wheat.) 419 (1827).

[2] Article I, § 10, cl. 2. This aspect of the doctrine of the case was considerably expanded in *Low v. Austin,* 80 U.S. (13 Wall.) 29 (1872), and subsequent cases, to bar states from levying nondiscriminatory, ad valorem property taxes upon goods that are no longer in import transit. This line of cases was overruled in Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

taxing power of the states did not extend in any form to imports from abroad so long as they remain "the property of the importer, in his warehouse, in the original form or package" in which they were imported. This is the famous "original package" doctrine. Only when the importer parts with his importations, mixes them into his general property by breaking up the packages, may the state treat them as taxable property.

Obviously, to the extent that the Import-Export Clause was construed to impose a complete ban on taxation of imports so long as they were in their original packages, there was little occasion to develop a Commerce Clause analysis that would have reached only discriminatory taxes or taxes upon goods in transit.[3] In other respects, however, the Court has applied the foreign commerce aspect of the clause more stringently against state taxation.

Thus, in *Japan Line, Ltd. v. County of Los Angeles,*[4] the Court held that, in addition to satisfying the four requirements that govern the permissibility of state taxation of interstate commerce,[5] "When a State seeks to tax the instrumentalities of foreign commerce, two additional considerations . . . come into play. The first is the enhanced risk of multiple taxation. . . . Second, a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential."[6] Multiple taxation is to be avoided with respect to interstate commerce by apportionment so that no jurisdiction may tax all the property of a multistate business, and the rule of apportionment is enforced by the Supreme Court with jurisdiction over all the states. However, the Court is unable to enforce such a rule against another country, and the country of the domicile of the business may impose a tax on full value. Uniformity could be frustrated by disputes over multiple taxation, and trade disputes could result.

Applying both these concerns, the Court invalidated a state tax, a nondiscriminatory, ad valorem property tax, on foreign-owned instrumentalities, i.e., cargo containers, of international commerce. The containers were used exclusively in international commerce and were based in Japan, which did in fact tax them on full value. Thus, there was the actuality, not only the risk, of multiple taxation. National uniformity was endangered, because, although California taxed the Japanese containers, Japan did not tax American containers, and disputes resulted.[7]

On the other hand, the Court has upheld a state tax on all aviation fuel sold within the state as applied to a foreign airline operating charters to and from the United States. The Court found the *Complete Auto* standards met, and it similarly decided that the two standards specifically raised in foreign commerce cases were not violated. First, there was no danger of double taxation because the tax was imposed upon a discrete transaction—the sale of fuel—that occurred within only one jurisdiction. Second, the one-voice standard was satisfied, because the United States had never entered into any compact with a foreign nation

[3] *See, e.g.*, Halliburton Oil Well Co. v. Reily, 373 U.S. 64 (1963); Minnesota v. Blasius, 290 U.S. 1 (1933). After the holding in *Michelin Tire*, the two clauses are now congruent. The Court has observed that the two clauses are animated by the same policies. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 449–50 n.14 (1979).

[4] 441 U.S. 434 (1979).

[5] Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). A state tax failed to pass the nondiscrimination standard in *Kraft General Foods, Inc. v. Iowa Dept. of Revenue and Finance,* 505 U.S. 71 (1992). Iowa imposed an income tax on a unitary business operating throughout the United States and in several foreign countries. It taxed the dividends that a corporation received from its foreign subsidiaries, but not the dividends it received from its domestic subsidiaries. Therefore, there was a facial distinction between foreign and domestic commerce.

[6] 441 U.S. at 446, 448. *See also* Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60 (1993) (sustaining state sales tax as applied to lease of containers delivered within the state and used in foreign commerce).

[7] 441 U.S. at 451–57. For income taxes, the test is more lenient, accepting not only the risk but the actuality of some double taxation as something simply inherent in accounting devices. Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 187–192 (1983).

precluding such state taxation, having only signed agreements with others, which had no force of law, aspiring to eliminate taxation that constituted impediments to air travel.[8] Also, a state unitary-tax scheme that used a worldwide-combined reporting formula was upheld as applied to the taxing of the income of a domestic-based corporate group with extensive foreign operations.[9]

Extending *Container Corp.*, the Court in *Barclays Bank v. Franchise Tax Bd. of California*[10] upheld the state's worldwide-combined reporting method of determining the corporate franchise tax owed by unitary multinational corporations, as applied to a foreign corporation. The Court determined that the tax easily satisfied three of the four-part *Complete Auto* test—nexus, apportionment, and relation to state's services—and concluded that the nondiscrimination principle—perhaps violated by the letter of the law—could be met by the discretion accorded state officials. As for the two additional factors, as outlined in *Japan Lines*, the Court pronounced itself satisfied. Multiple taxation was not the inevitable result of the tax, and that risk would not be avoided by the use of any reasonable alternative. The tax, it was found, did not impair federal uniformity or prevent the Federal Government from speaking with one voice in international trade, in view of the fact that Congress had rejected proposals that would have preempted California's practice.[11] The result of the case, perhaps intended, is that foreign corporations have less protection under the negative Commerce Clause.[12]

The power to regulate foreign commerce was always broader than the states' power to tax it, an exercise of the "police power" recognized by Chief Justice John Marshall in *Brown v. Maryland*.[13] That this power was constrained by notions of the national interest and preemption principles was evidenced in the cases striking down state efforts to curb and regulate the actions of shippers bringing persons into their ports.[14] On the other hand, quarantine legislation to protect the states' residents from disease and other hazards was commonly upheld though it regulated international commerce.[15] A state game-season law applied to criminalize the possession of a dead grouse imported from Russia was upheld because of the practical necessities of enforcement of domestic law.[16]

Nowadays, state regulation of foreign commerce is likely to be judged by the extra factors set out in *Japan Line*.[17] Thus, the application of a state civil rights law to a corporation

[8] Wardair Canada v. Florida Dep't of Revenue, 477 U.S. 1, 10 (1986).

[9] Container Corp. of America v. Franchise Tax Board, 463 U.S. 159 (1983). The validity of the formula as applied to domestic corporations with foreign parents or to foreign corporations with foreign parents or foreign subsidiaries, so that some of the income earned abroad would be taxed within the taxing state, is a question of some considerable dispute.

[10] 512 U.S. 298 (1994).

[11] Reliance could not be placed on Executive statements, the Court explained, because "the Constitution expressly grants Congress, not the President, the power to 'regulate Commerce with foreign Nations.'" 512 U.S. at 329. "Executive Branch communications that express federal policy but lack the force of law cannot render unconstitutional California's otherwise valid, congressionally condoned, use of worldwide combined reporting." *Id.* at 330. Dissenting Justice Scalia noted that, although the Court's ruling correctly restored preemptive power to Congress, "it permits the authority to be exercised by silence. *Id.* at 332."

[12] *The Supreme Court, Leading Cases, 1993 Term*, 108 Harv. L. Rev. 139, 139–49 (1993).

[13] 25 U.S. (12 Wheat.) 419, 443–44 (1827).

[14] New York City v. Miln, 36 U.S. (11 Pet.) 102 (1837) (upholding reporting requirements imposed on ships' masters), *overruled by* Henderson v. Mayor of New York, 92 U.S. 259 (1876); Passenger Cases, 48 U.S. (7 How.) 283 (1849); Chy Lung v. Freeman, 92 U.S. 275 (1876).

[15] Campagnie Francaise De Navigation a Vapeur v. Louisiana State Bd. of Health, 186 U.S. 380 (1902); Louisiana v. Texas, 176 U.S. 1 (1900); Morgan v. Louisiana, 118 U.S. 455 (1886).

[16] New York *ex rel.* Silz v. Hesterberg, 211 U.S. 31 (1908).

[17] Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 456 n.20 (1979) (construing Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948)).

transporting passengers outside the state to an island in a foreign province was sustained in an opinion emphasizing that, because of the particularistic geographic situation the foreign commerce involved was more conceptual than actual, there was only a remote hazard of conflict between state law and the law of the other country and little if any prospect of burdening foreign commerce.

ArtI.S8.C3.7.11 State Taxation

ArtI.S8.C3.7.11.1 Overview of State Taxation and Dormant Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In 1959, the Supreme Court acknowledged that, with respect to the taxing power of the states in light of the negative (or "dormant") Commerce Clause, "some three hundred full-dress opinions" as of that year had not resulted in "consistent or reconcilable" doctrine but rather in something more resembling a "quagmire."[1] Although many of the principles still applicable in constitutional law may be found in the older cases, the Court has worked to drain that quagmire, though at different times for taxation and for regulation.

The task of drawing the line between state power and the commercial interest has proved a comparatively simple one in the field of foreign commerce, the two things being in great part territorially distinct.[2] With "commerce among the States," affairs are very different. Interstate commerce is conducted by persons and corporations that are ordinarily engaged also in local business, often through activities that comprise the most ordinary subject matter of state power. In this field, the Court consequently has been unable to rely upon sweeping solutions. To the contrary, its judgments have often been fact-bound and difficult to reconcile, and this is particularly the case with respect to the infringement of interstate commerce by the state taxing power.[3]

ArtI.S8.C3.7.11.2 Early Dormant Commerce Clause Jurisprudence and State Taxation

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The Supreme Court's Dormant Commerce Clause jurisprudence dealing with how state taxing power relates to interstate commerce developed gradually with the Court first striking down a state tax as violating the Commerce Clause in 1873 in the *State Freight Tax Case*.[1] In the *State Freight Tax Case*, the Court considered the validity of a Pennsylvania statute that

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[1] Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457–58 (1959) (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344 (1954)). Justice Felix Frankfurter was similarly skeptical of definitive statements. "To attempt to harmonize all that has been said in the past would neither clarify what has gone before nor guide the future. Suffice it to say that especially in this field opinions must be read in the setting of the particular cases and as the product of preoccupation with their special facts." Freeman v. Hewit, 329 U.S. 249, 251–52 (1946).

[2] *See* J. Hellerstein & W. Hellerstein, State and Local Taxation: Cases and Materials ch. 5 (8th ed. 2005).

[3] In addition to the sources previously cited, see J. Hellerstein & W. Hellerstein, *supra* note 2. For a succinct description of the history, see W. Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37 (1987).

[1] Case of the State Freight Tax, 82 U.S. (15 Wall.) 232 (1873).

required every company transporting freight within the state, with certain exceptions, to pay a tax at specified rates on each ton of freight carried by it. The Court's reasoning was forthright: Transportation of freight constitutes commerce.[2] A tax upon freight transported from one state to another effects a regulation of interstate commerce.[3] Hence, a state law imposing a tax upon freight, taken up within the state and transported out of it or taken up outside the state and transported into it, violates the Commerce Clause.[4]

Relying on the doctrine established in *Cooley v. Board of Wardens*,[5] the Supreme Court stated:

> [W]henever the subjects over which a power to regulate commerce is asserted are in their nature national or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Surely transportation of passengers or merchandise through a State, or from one state to another, is of this nature. It is of national importance that over that subject there should be but one regulating power, for if one State can directly tax persons or property passing through it, or tax them indirectly by levying a tax upon their transportation, every other may, and thus commercial intercourse between States remote from each other may be destroyed. . . . It was to guard against the possibility of such commercial embarrassments, no doubt, that the power of regulating commerce among the States was conferred upon the Federal government.[6]

The principle thus established in the *State Freight Tax Case*—that a state may not tax interstate commerce—confronted the principle that a state may tax all purely domestic business within its borders and all property "within its jurisdiction." The task before the Court was to determine where to draw the line between the immunity claimed by interstate business, on the one hand, and the prerogatives claimed by local power on the other. In the *State Tax on Railway Gross Receipts Case*, decided the same day as the *State Freight Tax Case*, the Supreme Court considered the constitutionality of a state tax upon gross receipts of all railroads chartered by the state, when part of the receipts had been derived from interstate transportation of the same freight that had been held immune from tax *pursuant* to the *State Freight Tax Case*.[7] If the latter tax—the state tax upon gross receipts of all railroads chartered by the state—was regarded as a tax on interstate commerce, it too would violate the Constitution. But to the Court, the tax on gross receipts of an interstate transportation company was not a tax on commerce. The Court stated: "[I]t is not everything that affects

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[2] *Id.* at 275.

[3] *Id.* at 275–76, 279.

[4] *Id.* at 281–82.

[5] 53 U.S. (12 How.) 299 (1851). While the issue of exclusive federal power and the separate issue of the Dormant Commerce Clause was present in the *License Cases*, 46 U.S. (5 How.) 504 (1847) and the *Passenger Cases*, 48 U.S. (7 How.) 283 (1849), the Court did not establish a definitive rule. Chief Justice Roger Taney viewed the Commerce Clause only as a grant of power to Congress, containing no constraint upon the states, and the Court's role was to void state laws in contravention of federal legislation. *License Cases*, 46 U.S. (5 How.) 504, 573 (1847); *Passenger Cases*, 48 U.S. (7 How.) 283, 464 (1849).

In *Cooley*, the Court, upholding a state law that required ships to engage a local pilot when entering or leaving the port of Philadelphia, enunciated a doctrine of *partial* federal exclusivity. According to Justice Benjamin Curtis's opinion, the state act was valid on the basis of a distinction between those subjects of commerce that "imperatively demand a single uniform rule" operating throughout the country and those that "as imperatively" demand "that diversity which alone can meet the local necessities of navigation," that is to say, of commerce. As to the former, the Court held Congress's power to be "exclusive"; as to the latter, it held that the states enjoyed a power of "concurrent legislation." 48 U.S. at 317–20. The Philadelphia pilotage requirement was of the latter kind. *Id.*

[6] *Case of the State Freight Tax*, 82 U.S. at 279–80.

[7] State Tax on Railway Gross Receipts, 82 U.S. (15 Wall.) 284 (1872).

commerce that amounts to a regulation of it, within the meaning of the Constitution."[8] The Court reasoned that a gross receipts tax upon a railroad company, which concededly affected commerce, did not directly regulate commerce. The Court explained: "Very manifestly it is a tax upon the railroad company. . . . That its ultimate effect may be to increase the cost of transportation must be admitted. . . . Still it is not a tax upon transportation, or upon commerce. . . ."[9]

The Court differentiated these two cases in part on the basis of *Cooley*, reasoning that some subjects embraced within the meaning of commerce demand uniform, national regulation, whereas other similar subjects permit of diversity of treatment, until Congress acts; and in part on the basis of a concept of a "direct" tax on interstate commerce, which was impermissible, and an "indirect" tax, which was permissible until Congress acted.[10] Those two concepts were sometimes conflated and sometimes treated separately. In any event, the Court itself was clear that interstate commerce could not be taxed at all, even if the tax was a nondiscriminatory levy applied alike to local commerce.[11] In the *Minnesota Rate Cases*, the Court stated: "Thus, the States cannot tax interstate commerce, either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it . . . ; or upon persons or property in transit in interstate commerce."[12] However, the Court sustained taxes that imposed only an "indirect" burden on interstate commerce. For instance, the Court sustained property taxes and taxes in lieu of property taxes applied to all businesses, including instrumentalities of interstate commerce.[13] Generally, courts sustained taxes that were imposed on some local, rather than interstate, activity or if the tax was exacted before interstate movement had begun or after it had ended.

An independent basis for invalidation was that the tax was discriminatory—that its impact was intentionally or unintentionally felt by interstate commerce and not by local commerce—perhaps in pursuit of parochial interests. Many early cases actually involving discriminatory taxation were decided on the basis of the impermissibility of taxing interstate commerce at all, but the category was soon clearly delineated as a separate ground for invalidation.[14]

Following the Great Depression and under the leadership of Justice, and later Chief Justice, Harlan Stone, the Court attempted to move away from the principle that interstate commerce may not be taxed and the use of the direct-indirect distinction. Instead, a state or local tax would be voided only if, in the opinion of the Court, it created a risk of multiple taxation for interstate commerce not felt by local commerce.[15] It became much more important to the validity of a tax that it be apportioned to an interstate company's activities within the

[8] *Id.* at 293.

[9] *Id.* at 294. This case was overruled 14 years later, when the Court voided substantially the same tax in *Philadelphia Steamship Co. v. Pennsylvania,* 122 U.S. 326 (1887).

[10] *See* The Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 398–412 (1913) (reviewing and summarizing at length both taxation and regulation cases). *See also* Missouri *ex rel.* Barrett v. Kan. Nat. Gas Co., 265 U.S. 298, 307 (1924).

[11] Robbins v. Shelby Cnty. Taxing Dist., 120 U.S. 489, 497 (1887); Leloup v. Port of Mobile, 127 U.S. 640, 648 (1888).

[12] *The Minnesota Rate Cases*, 230 U.S. at 400–401.

[13] The Del. R.R. Tax, 85 U.S. (18 Wall.) 206, 232 (1873). *See* Cleveland, Cincinnati, Chi. & St. Louis Ry. v. Backus, 154 U.S. 439 (1894); Postal Tel. Cable Co. v. Adams, 155 U.S. 688 (1895). *See* cases cited in J. Hellerstein & W. Hellerstein, State and Local Taxation: Cases and Materials 195 *et seq* (8th ed.).

[14] *E.g.*, Welton v. Missouri, 91 U.S. 275 (1876); Robbins v. Shelby Cnty. Taxing Dist., 120 U.S. 489 (1887); Darnell & Son Co. v. City of Memphis, 208 U.S. 113 (1908); Bethlehem Motors Co. v. Flynt, 256 U.S. 421 (1921).

[15] W. Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); Int'l Harvester Co. v. Dep't of Treasury, 322 U.S. 340 (1944); Int'l Harvester Co. v. Evatt, 329 U.S. 416 (1947).

taxing state, so as to reduce the risk of multiple taxation.[16] But in some cases, the Court continued to suggest that interstate commerce may not be taxed at all, even by a properly apportioned levy, and reasserted the direct-indirect tax distinction.[17] Following a series of cases that suggested difficulty in applying the Court's precedents,[18] the Court adopted the modern standard which is discussed in the essay Modern Dormant Commerce Clause Jurisprudence on State Taxation Generally.[19]

ArtI.S8.C3.7.11.3 Modern Dormant Commerce Clause Jurisprudence and State Taxation

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In the area of taxation, the transition from the earliest formulations to the modern standard was gradual.[1] Both taxation and regulation now, however, are evaluated under a judicial balancing formula comparing the burden on interstate commerce with the importance of the state interest, save for discriminatory state action that cannot be justified at all.

During the 1940s and 1950s, there was conflict within the Court between the view that interstate commerce could not be taxed at all, at least "directly," and the view that the Dormant Commerce Clause protected against the risk of double taxation.[2] In *Northwestern States Portland Cement Co. v. Minnesota*,[3] the Court reasserted the principle expressed in *Western Live Stock*—that the Framers did not intend to immunize interstate commerce from its just share of the state tax burden even though it increased the cost of doing business.[4] In *Northwestern States*, the Court held that a state could constitutionally impose a nondiscriminatory, fairly apportioned net income tax on an out-of-state corporation engaged exclusively in interstate commerce in the taxing state. The Court stated: "For the first time outside the context of property taxation, the Court explicitly recognized that an exclusively interstate business could be subjected to the states' taxing powers."[5] Thus, in *Northwestern States*, foreign corporations that maintained a sales office and employed sales staff in the taxing state for solicitation of orders for their merchandise that, upon acceptance of the orders

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[16] *E.g.*, Gwin, White & Prince, Inc. v. Henneford, 305 U.S. 434 (1939); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947); Cent. Greyhound Lines v. Mealey, 334 U.S. 653 (1948). Notice the Court's distinguishing of *Cent. Greyhound* in *Okla. Tax Comm'n v. Jefferson Lines, Inc.,* 514 U.S. 175, 188–91 (1995).

[17] Freeman v. Hewit, 329 U.S. 249 (1946); Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951).

[18] For example, the states carefully phrased tax laws so as to impose on interstate companies not a license tax for doing business in the state, which was not permitted, Ry. Express Agency v. Virginia, 347 U.S. 359 (1954), but as a franchise tax on intangible property or the privilege of doing business in a corporate form, which was permissible. Ry. Express Agency v. Virginia, 358 U.S. 434 (1959); Colonial Pipeline Co. v. Traigle, 421 U.S. 100 (1975). Also, the Court increasingly found the tax to be imposed on a local activity in instances it would previously have seen to be an interstate activity. *E.g.*, Memphis Nat. Gas Co. v. Stone, 335 U.S. 80 (1948); Gen. Motors Corp. v. Washington, 377 U.S. 436 (1964); Standard Pressed Steel Co. v. Dep't of Revenue, 419 U.S. 560 (1975).

[19] ArtI.S8.C3.7.4 Modern Dormant Commerce Clause Jurisprudence Generally.

[1] Scholars dispute just when the modern standard was firmly adopted. The conventional view is that it was articulated in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), but there also seems little doubt that the foundation of the present law was laid in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959).

[2] *Compare* Freeman v. Hewit, 329 U.S. 249, 252–256 (1946), *with* W. Live Stock v. Bureau of Revenue, 303 U.S. 250, 258, 260 (1938).

[3] 358 U.S. 450 (1959).

[4] *Id.* at 461–62. *See W. Live Stock*, 303 U.S. at 254.

[5] W. Hellerstein, *State Taxation of Interstate Business: Perspectives on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37, 54 (1987).

at their home office in another jurisdiction, were shipped to customers in the taxing state, were held liable to pay the latter's income tax on that portion of the net income of their interstate business as was attributable to such solicitation.

Subsequent years, however, saw inconsistent rulings that turned almost completely upon the use of or failure to use "magic words" by legislative drafters. That is, it was constitutional for states to tax a corporation's net income, properly apportioned to the taxing state, as in *Northwestern States*, but no state could levy a tax on a foreign corporation for the privilege of doing business in the state, notwithstanding the similarity of the taxes.[6]

In *Complete Auto Transit, Inc. v. Brady*,[7] the Court overruled the cases embodying the distinction and articulated a standard that has governed subsequent cases. A tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[8]

ArtI.S8.C3.7.11.4 Nexus Prong of Complete Auto Test for Taxes on Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *Complete Auto Transit, Inc. v. Brady*,[1] the Court held that a state tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[2] The first prong of the *Complete Auto* test, which this essay concerns,[3] asks whether the tax applies to an activity with a "substantial nexus" with the taxing state, which requires the taxpayer to "avail[ ] itself of the substantial privilege of carrying on business in that jurisdiction."[4] This requirement runs parallel to the "minimum contacts" requirement under the Due Process Clause that a state must meet to exercise control over a person, that person's property, or a transaction involving the person.[5] Specifically, under the due process requirement, there must be "some definite link, some minimum connection between a state and the person, property, or transaction it seeks to

[6] Spector Motor Serv., Inc. v. O'Connor, 340 U.S. 602 (1951). The attenuated nature of the purported distinction was evidenced in *Colonial Pipeline Co. v. Traigle,* 421 U.S. 100 (1975), in which the Court sustained a nondiscriminatory, fairly apportioned franchise tax that was measured by the taxpayer's capital stock, imposed on a pipeline company doing an exclusively interstate business in the taxing state, on the basis that it was a tax imposed on the privilege of conducting business in the corporate form.

[7] 430 U.S. 274 (1977).

[8] *Id.* at 279. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980)).

[1] 430 U.S. 274 (1977).

[2] *Id.* at 279. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980)).

[3] ArtI.S8.C3.7.11.5 Apportionment Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.6 Discrimination Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.7 Benefit Prong of Complete Auto Test for Taxes on Interstate Commerce.

[4] *See* Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 11 (2009) (internal citations and quotations omitted).

[5] *See* MeadWestvaco Corp. v. Ill. Dep't of Revenue, 553 U.S. 16, 24 (2008).

tax."[6] The "broad inquiry" under "both constitutional requirements"[7] is "whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state—" i.e., "whether the state has given anything for which it can ask return."[8]

Until the Court's 2018 decision in *South Dakota v. Wayfair*,[9] the Court imposed a relatively narrow interpretation of the minimum contacts test in two cases, which involved a state's ability to require an out-of-state seller to collect and remit tax from a sale to a consumer within that state. First, in the 1967 case of *National Bellas Hess, Inc. v. Department of Revenue*, the Court held that unless a retailer maintained a physical presence with the state, the state lacked the power to require that retailer to collect a local use tax.[10] A quarter of a century later, the Court reaffirmed *Bellas Hess*'s physical presence rule under the Commerce Clause in *Quill v. North Dakota*.[11]

In *South Dakota v. Wayfair*, however, the Court overruled both cases, rejecting the rule that a retailer must have a physical presence within a state before the state may require the retailer to collect a local use tax.[12] Several reasons undergirded the *Wayfair* Court's rejection of the physical presence rule. First, the Court noted that the rule did not comport with modern Dormant Commerce Clause jurisprudence, which viewed the substantial nexus test as "closely related" to and having "significant parallels" with the due process minimum contacts analysis.[13] Second, Justice Anthony Kennedy viewed the *Quill* rule as unmoored from the underlying purpose of the Commerce Clause: to prevent states from engaging in economic discrimination.[14] Contrary to this purpose, the *Quill* rule created artificial market distortions that placed businesses with a physical presence in a state at a competitive disadvantage relative to remote sellers.[15] Third, the *Wayfair* Court viewed the physical presence rule, in contrast with modern Commerce Clause jurisprudence, as overly formalistic.[16] More broadly, the majority opinion criticized the *Quill* rule as ignoring the realities of modern e-commerce wherein a retailer may have "substantial virtual connections" to a state without having a physical presence.[17]

As the Court in *Wayfair* noted, the substantial nexus inquiry has tended to reject formal rules in favor of a more flexible inquiry.[18] Thus, maintenance of one full-time employee within the state (plus occasional visits by non-resident engineers) to make possible the realization and continuance of contractual relations seemed to the Court to make almost frivolous a claim of lack of sufficient nexus.[19] The application of a state business-and-occupation tax on the gross

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[6] *See* Miller Bros. Co. v. Maryland, 347 U.S. 340, 344–45 (1954).

[7] *See MeadWestvaco Corp.* 553 U.S. at 24 .

[8] *See* Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940).

[9] South Dakota v. Wayfair, No. 17-494, slip op. at 22 (U.S. June 21, 2018).

[10] 386 U.S. 753, 758 (1967).

[11] *See* 504 U.S. 298 (1992).

[12] *See Wayfair*, slip op at 22.

[13] *Id.* at 10–12. The Court, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985), concluded that it is "settled law that a business need not have a physical presence in a State to satisfy the demands of due process." *See Wayfair*, slip op. at 11.

[14] *See Wayfair*, slip op. at 12 (noting that the purpose of the Commerce Clause was to prevent states from engaging in economic discrimination and not to "permit the Judiciary to create market distortions.") *Id.*

[15] *Id.* at 12–13.

[16] *Id.* at 14–15.

[17] *Id.* at 15.

[18] *Id.* at 14.

[19] Standard Pressed Steel Co. v. Dep't of Revenue, 419 U.S. 560 (1975). *See also* Gen. Motors Corp. v. Washington, 377 U.S. 436 (1964).

receipts from a large wholesale volume of pipe and drainage products in the state was sustained, even though the company maintained no office, owned no property, and had no employees in the state, its marketing activities being carried out by an in-state independent contractor.[20] The Court also upheld a state's application of a use tax to aviation fuel stored temporarily in the state prior to loading on aircraft for consumption in interstate flights.[21]

Providing guidance on *what* states may tax, the Court's unitary business principle looks at whether the taxpayer's intrastate and extra-state activities form a "single unitary business" or if the extra-state activities are unrelated to the instrastate activities and instead form a discrete business.[22] In *MeadWestvaco Corp. v. Illinois Department of Revenue*, the Supreme Court stated:

> When there is no dispute that the taxpayer has done some business in the taxing State, the inquiry shifts from whether the State may tax to what it may tax. To answer that question, [the Court has] developed the unitary business principle. Under that principle, a State need not isolate the intrastate income-producing activities from the rest of the business but may tax an apportioned sum of the corporation's multistate business if the business is unitary. The court must determine whether intrastate and extrastate activities formed part of a single unitary business, or whether the out-of-state values that the State seeks to tax derive[d] from unrelated business activity which constitutes a discrete business enterprise. . . . If the value the State wishe[s] to tax derive[s] from a 'unitary business' operated within and without the State, the State [may] tax an apportioned share of the value of that business instead of isolating the value attributable to the operation of the business within the State. Conversely, if the value the State wished to tax derived from a discrete business enterprise, then the State could not tax even an apportioned share of that value.[23]

However, notwithstanding the existence of a unitary business, a "minimal connection" or "nexus" must still exist between the state and the taxpayer's interstate activities to meet constitutional standards as well as a "rational relationship" between the amount taxed and the taxpayer's intrastate activities.[24] As the Court explained in *Container Corp. v. Franchise Tax Board*:

> The Due Process and Commerce Clauses of the Constitution do not allow a State to tax income arising out of interstate activities—even on a proportional basis—unless there

[20] Tyler Pipe Indus. v. Dep't of Revenue, 483 U.S. 232, 249–51 (1987). The Court agreed with the state court's holding that "the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Id.* at 250.

[21] United Air Lines v. Mahin, 410 U.S. 623 (1973).

[22] MeadWestvaco Corp. v. Ill. Dep't of Revenue, 128 S. Ct. 1498, 1505–06 (2008).

[23] *Id.* (citations and internal quotation marks omitted). The holding of this case was that the concept of "operational function," which the Court had introduced in prior cases, was "not intended to modify the unitary business principle by adding a new ground for apportionment." *Id.* at 1507–08. In other words, the Court declined to adopt a basis upon which a state could tax a non-unitary business.

[24] Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 165–66 (1983) .

is a 'minimal connection' or 'nexus' between the interstate activities and the taxing State and 'a rational relationship between the income attributed to the State and the intrastate values of the enterprise.'[25]

ArtI.S8.C3.7.11.5 Apportionment Prong of Complete Auto Test for Taxes on Interstate Commerce

Article I, Section 8, Clause 3:

[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .

In *Complete Auto Transit, Inc. v. Brady*,[1] the Court held that a state tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[2] The second prong of the *Complete Auto* test, which this essay concerns, is the apportionment of the tax.[3] This requirement is of long standing,[4] but its importance has broadened as the scope of the states' taxing powers has enlarged. When a business carries on a single integrated enterprise both within and without the state, the state may not exact from interstate commerce more than the state's fair share. Avoidance of multiple taxation, or the risk of multiple taxation, is the test of an apportionment formula. Generally speaking, this factor has been seen as both a Commerce Clause and a due process requisite,[5] although, as one recent Court decision notes, some tax measures that are permissible under the Due Process Clause nonetheless could run afoul of the Commerce Clause.[6] The Court has declined to impose any particular formula on the states, reasoning that to do so would be to require the Court to engage in"extensive judicial lawmaking," for which it was ill-suited and for which Congress had ample power and ability to legislate.[7]

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[25] *Id.* (internal quotation marks omitted). *See also* ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307, 316–17 (1982); Hunt-Wesson, Inc. v. Franchise Tax Bd., 528 U.S. 458 (2000) (interest deduction not properly apportioned between unitary and non-unitary business).

[1] 430 U.S. 274 (1977).

[2] *Id.* at 279. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980)).

[3] ArtI.S8.C3.7.11.4 Nexus Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.6 Discrimination Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.7 Benefit Prong of Complete Auto Test for Taxes on Interstate Commerce.

[4] *E.g.*, Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18, 26 (1891); Maine v. Grand Trunk Ry., 142 U.S. 217, 278 (1891).

[5] *See* Allied-Signal, Inc. v. Dir., Div. of Taxation, 504 U.S. 768 (1992); Tyler Pipe Indus. v. Dep't of Revenue, 483 U.S. 232, 251 (1987); Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159 (1983); F. W. Woolworth Co. v. N.M. Tax. & Revenue Dep't, 458 U.S. 354 (1982); ASARCO Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982); Exxon Corp. v. Wis. Dep't of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425 (1980); Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978). *Cf.* Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).

[6] Comptroller of the Treasury of Md. v. Wynne, No. 13-485, slip op. at 13 (U.S. May 18, 2015) ("The Due Process Clause allows a State to tax '*all* the income of its residents, even income earned outside the taxing jurisdiction.' But 'while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause.") (internal citations omitted). The challenge in *Wynne* was brought by Maryland residents, whose worldwide income three dissenting Justices would have seen as subject to Maryland taxation based on their domicile in the state, even though it resulted in the double taxation of income earned in other states. *Id.* at 2 (Ginsburg, J., dissenting) ("For at least a century, 'domicile' has been recognized as a secure ground for taxation of residents' worldwide income."). However, the majority took a different view, holding that Maryland's taxing scheme was unconstitutional under the Dormant Commerce Clause because it did not provide a full credit for taxes paid to other states on income earned from interstate activities. *Id.* at 21–25 (majority opinion).

[7] Moorman Mfg. Co. v. Bair, 437 U.S. 267, 278–80 (1978).

In *Goldberg v. Sweet*, the Court articulated an "internally consistent test" and an "externally consistent test" when it upheld as properly apportioned a state tax on the gross charge of any telephone call originated or terminated in the state and charged to an in-state service address, regardless of where the telephone call was billed or paid.[8] Explaining its "internally consistent test" and its "externally consistent test" for determining whether a tax has been fairly apportioned, the *Goldberg* Court wrote:

> We determine whether a tax is fairly apportioned by examining whether it is internally and externally consistent. To be internally consistent, a tax must be structured so that if every State were to impose an identical tax, no multiple taxation would result. Thus, the internal consistency test focuses on the text of the challenged statute and hypothesizes a situation where other States have passed an identical statute. The external consistency test asks whether the State has taxed only that portion of the revenues from the interstate activity which reasonably reflects the in-state component of the activity being taxed.[9]

In *American Trucking Ass'ns v. Scheiner*, the Supreme Court held that a state registration tax met the internal consistency test because every state honored every other states', and a motor fuel tax similarly was sustained because it was apportioned to mileage traveled in the state, whereas lump-sum annual taxes, an axle tax and an identification marker fee, being unapportioned flat taxes imposed for the use of the state's roads, were voided under the internal consistency test, because if every state imposed them, then the burden on interstate commerce would be great.[10] Similarly, in *Comptroller of the Treasury of Maryland v. Wynne*, the Court held that Maryland's personal income tax scheme—which taxed Maryland residents on their worldwide income and nonresidents on income earned in the state and did not offer Maryland residents a full credit for income taxes they paid to other states—"fails the internal consistency test."[11] The Court did so because if every state adopted the same approach, taxpayers who "earn[ ] income interstate" would be taxed twice on a portion of that income, while those who earned income solely within their state of residence would be taxed only once.[12]

Deference to state taxing authority was evident in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, in which the Court sustained a state sales tax on the price of a bus ticket for travel that originated in the state but terminated in another state.[13] The tax was unapportioned to reflect the intrastate travel and the interstate travel.[14] The tax in *Oklahoma* was different from the tax upheld in *Central Greyhound*, the Court held, because the tax in *Central Greyhound* constituted a levy on gross receipts, payable by the seller, whereas the tax in

[8] Goldberg v. Sweet, 488 U.S. 252 (1989). The tax law provided a credit for any taxpayer who was taxed by another state on the same call. Actual multiple taxation could thus be avoided, the risks of other multiple taxation was small, and it was impracticable to keep track of the taxable transactions.

[9] *Id.* at 261, 262 (citations omitted).

[10] Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987).

[11] Comptroller of the Treasury of Md. v. Wynne, No. 13-485, slip op. at 22 (U.S. May 18, 2015). The Court in *Wynne* expressly declined to distinguish between taxes on gross receipts and taxes on net income or between taxes on individuals and taxes on corporations. *Id.* at 7, 9. The Court also noted that Maryland could "cure the problem with its current system" by granting a full credit for taxes paid to other states, but the Court did "not foreclose the possibility" that Maryland could comply with the Commerce Clause in some other way. *Id.* at 25.

[12] *Id.* at 22–23.

[13] Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

[14] *Id.* The Court distinguished *Oklahoma Tax Comm'n v. Jefferson Lines, Inc.* from *Central Greyhound Lines v. Mealey*, 334 U.S. 653 (1948), in which the Court struck down a state statute that failed to apportion its taxation of interstate bus ticket sales to reflect the distance traveled within the state.

Oklahoma was a sales tax, also assessed on gross receipts, but payable by the buyer.[15] The *Oklahoma* tax, the Court continued, was internally consistent, because if every state imposed a tax on ticket sales within the state for travel originating there, no sale would be subject to more than one tax.[16] The tax was also externally consistent, the Court held, because it was a tax on the sale of a service that took place in the state, not a tax on the travel.[17]

In *Fulton Corp. v. Faulkner*, the Court, however, found discriminatory and thus invalid a state intangibles tax on a fraction of the value of corporate stock owned by state residents inversely proportional to the state's exposure to the state income tax.[18]

ArtI.S8.C3.7.11.6 Discrimination Prong of Complete Auto Test for Taxes on Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *Complete Auto Transit, Inc. v. Brady*,[1] the Court held that a state tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[2] The third prong of the *Complete Auto* test, which this essay concerns, goes to whether the tax discriminates against interstate commerce.[3]

The "fundamental principle" governing the discrimination factor is simple and fully consonant with the broader application of the Dormant Commerce Clause. As the Supreme Court recognized in *Boston Stock Exchange v. State Tax Commission*: "'No State may, consistent with the Commerce Clause, impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'"[4] That is, a tax that by its terms or operation imposes greater burdens on out-of-state goods or activities than on competing in-state goods or activities will be struck down as discriminatory under the Commerce Clause.[5] In *Armco, Inc. v. Hardesty*,[6] the Court voided as discriminatory the imposition on an out-of-state wholesaler of a state tax that was levied on manufacturing and wholesaling but that relieved manufacturers subject to the manufacturing tax of liability for

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[15] Okla. Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

[16] *Id.*

[17] *Id.* Indeed, the Court analogized the tax to that in *Goldberg v. Sweet,* 488 U.S. 252 (1989), a tax on interstate telephone services that originated in or terminated in the state and that were billed to an in-state address.

[18] Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). The state had defended on the basis that the tax was a "compensatory" one designed to make interstate commerce bear a burden already borne by intrastate commerce. The Court recognized the legitimacy of the defense, but it found the tax to meet none of the three criteria for classification as a valid compensatory tax. *Id.* at 333–44. *See also* S. Cent. Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) (tax not justified as compensatory).

[1] 430 U.S. 274 (1977).

[2] *Id.* at 279. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980)).

[3] ArtI.S8.C3.7.11.4 Nexus Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.5 Apportionment Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.7 Benefit Prong of Complete Auto Test for Taxes on Interstate Commerce.

[4] Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 329 (1977) (quoting Nw. States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959)). The principle, as we have observed above, is a long-standing one under the Commerce Clause. *E.g.*, Welton v. Missouri, 91 U.S. 275 (1876).

[5] Maryland v. Louisiana, 451 U.S. 725, 753–760 (1981). *But see* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 617–619 (1981). *See also* Or. Waste Sys., Inc. v. Dep't of Env't Quality, 511 U.S. 93 (1994) (surcharge on in-state disposal of solid wastes that discriminates against companies disposing of waste generated in other states invalid).

paying the wholesaling tax. Even though the former tax was higher than the latter, the Court found that the imposition discriminated against the interstate wholesaler.[7] Similarly, in *Bacchus Imports, Ltd. v. Dias*, the Court held a state excise tax on wholesale liquor sales, which exempted sales of specified local products, to violate the Commerce Clause.[8] The Court also held that a state statute that granted a tax credit for ethanol fuel if the ethanol was produced in the state, or if it was produced in another state that granted a similar credit to the state's ethanol fuel, to be discriminatory and in violation of the Commerce Clause in *New Energy Co. of Indiana v. Limbach*.[9] The Court reached the same conclusion as to Maryland's personal income tax scheme in *Comptroller of the Treasury of Maryland v. Wynne*, which taxed Maryland residents on their worldwide income and nonresidents on income earned in the state and did not offer Maryland residents a full credit for income taxes they paid to other states, finding the scheme "inherently discriminatory."[10]

Expanding, although neither unexpectedly nor exceptionally, its dormant commerce jurisprudence, the Court in *Camps Newfound / Owatonna, Inc. v. Town of Harrison*[11] applied its nondiscrimination element of the doctrine to invalidate the state's charitable property tax exemption statute, which applied to nonprofit firms performing benevolent and charitable functions, but which excluded entities serving primarily out-of-state residents. As such, the tax scheme was designed to encourage entities to care for local populations and to discourage attention to out-of-state individuals and groups. Camps Newfound/Owatonna Inc., however, operated a church camp for children, most of whom resided out-of-state. In holding the tax to violate the Commerce Clause, the Court underscored that there was no reason to distinguish nonprofits from for-profit companies for Commerce Clause purposes.

> For purposes of Commerce Clause analysis, any categorical distinction between the activities of profit-making enterprises and not-for-profit entities is therefore wholly illusory. Entities in both categories are major participants in interstate markets. And, although the summer camp involved in this case may have a relatively insignificant

[6] 467 U.S. 638 (1984).

[7] The Court applied the "internal consistency" test here too, in order to determine the existence of discrimination. 467 U.S. at 644–45. Thus, the wholesaler did not have to demonstrate it had paid a like tax to another state, only that if other states imposed like taxes it would be subject to discriminatory taxation. *See also* Tyler Pipe Indus. v. Wash. Dept. of Revenue, 483 U.S. 232 (1987); Am. Trucking Ass'ns v. Scheiner, 483 U.S. 266 (1987); Amerada Hess Corp. v. Dir., N.J. Tax'n Div., 490 U.S. 66 (1989); Kraft Gen. Foods v. Iowa Dep't of Revenue, 505 U.S. 71 (1992).

[8] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

[9] New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988). *Compare* Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) (state intangibles tax on a fraction of the value of corporate stock owned by in-state residents inversely proportional to the corporation's exposure to the state income tax violated Dormant Commerce Clause), *with* Gen. Motors Corp. v. Tracy, 519 U.S. 278 (1997) (state imposition of sales and use tax on all sales of natural gas except sales by regulated public utilities, all of which were in-state companies, but covering all other sellers that were out-of-state companies did not violate Dormant Commerce Clause because regulated and unregulated companies were not similarly situated).

[10] Comptroller of the Treasury of Md. v. Wynne, No. 13-485, slip op. at 23 (U.S. May 18, 2015) ("[T]he internal consistency test reveals what the undisputed economic analysis shows: Maryland's tax scheme is inherently discriminatory and operates as a tariff."). In so doing, the Court noted that Maryland could "cure the problem with its current system" by granting a full credit for taxes paid to other states, but it did "not foreclose the possibility" that Maryland could comply with the Commerce Clause in some other way. *Id.* at 25.

[11] 520 U.S. 564 (1997). The decision was 5-4 with a strong dissent by Justice Antonin Scalia, *id.* at 595, and a philosophical departure by Justice Clarence Thomas. *Id.* at 609.

impact on the commerce of the entire Nation, the interstate commercial activities of nonprofit entities as a class are unquestionably significant.[12]

ArtI.S8.C3.7.11.7 Benefit Prong of Complete Auto Test for Taxes on Interstate Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

In *Complete Auto Transit, Inc. v. Brady*,[1] the Court held that a state tax on interstate commerce will be sustained "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[2] The fourth prong of the *Complete Auto* test, which this essay concerns, goes to whether the tax is fairly related to the services that the State provides.[3]

Although, in all the modern cases, the Court has stated that a necessary factor to sustain state taxes having an interstate impact is that the tax be fairly related to benefits provided by the taxing state, the Court has not addressed how to weigh the amount of the tax or the value of the benefits bestowed. The test rather is whether, as a matter of the nexus factor, the business has the requisite nexus with the state; if it does, then the tax meets the fourth factor simply because the business has enjoyed the opportunities and protections that the state has afforded it.[4]

ArtI.S8.C3.8 Foreign

ArtI.S8.C3.8.1 Overview of Foreign Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

There are certain dicta urging or suggesting that Congress's power to regulate interstate commerce restrictively is less than its analogous power over foreign commerce, the argument being that whereas the latter is a branch of the Nation's unlimited power over foreign relations, the former was conferred upon the National Government primarily in order to

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[12] 520 U.S. at 586.

[1] 430 U.S. 274 (1977).

[2] *Id.* at 279. "In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981) (quoting Mobil Oil Corp. v. Comm'r of Taxes, 445 U.S. 425, 443 (1980)).

[3] ArtI.S8.C3.7.11.4 Nexus Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.5 Apportionment Prong of Complete Auto Test for Taxes on Interstate Commerce; ArtI.S8.C3.7.11.6 Discrimination Prong of Complete Auto Test for Taxes on Interstate Commerce.

[4] Commonwealth Edison Co. v. Montana, 453 U.S. 609, 620–29 (1981). Two state taxes imposing flat rates on truckers, because they did not vary directly with miles traveled or with some other proxy for value obtained from the state, were found to violate this standard in *American Trucking Ass'ns, Inc. v. Scheiner,* 483 U.S. 266, 291 (1987). *But see* American Trucking Ass'ns v. Michigan Pub. Serv. Comm'n, 545 U.S. 429 (2005), upholding imposition of a flat annual fee on all trucks engaged in intrastate hauling (including trucks engaged in interstate hauling that "top off" loads with intrastate pickups and deliveries) and concluding that levying the fee on a per-truck rather than per-mile basis was permissible in view of the objectives of defraying costs of administering various size, weight, safety, and insurance requirements.

protect freedom of commerce from state interference. The four dissenting Justices in the 1903 *Lottery Case* endorsed this view in the following words: "[T]he power to regulate commerce with foreign nations and the power to regulate interstate commerce, are to be taken *diverso intuitu*, for the latter was intended to secure equality and freedom in commercial intercourse as between the States, not to permit the creation of impediments to such intercourse; while the former clothed Congress with that power over international commerce, pertaining to a sovereign nation in its intercourse with foreign nations, and subject, generally speaking, to no implied or reserved power in the States. The laws which would be necessary and proper in the one case, would not be necessary or proper in the other."[1]

Twelve years later, Chief Justice Byron White, speaking for the Court, expressed the same view: "In the argument reference is made to decisions of this court dealing with the subject of the power of Congress to regulate interstate commerce, but the very postulate upon which the authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this court rests is the broad distinction which exists between the two powers and therefore the cases cited and many more which might be cited announcing the principles which they uphold have obviously no relation to the question in hand."[2]

But dicta to the contrary are much more numerous and span a far longer period of time. Thus Chief Justice Roger Taney wrote in 1847: "The power to regulate commerce among the several States is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it."[3] And nearly fifty years later, Justice Stephen Field, speaking for the Court, said: "The power to regulate commerce among the several States was granted to Congress in terms as absolute as is the power to regulate commerce with foreign nations."[4] Today it is firmly established that the power to regulate commerce, whether with foreign nations or among the several states, comprises the power to restrain or prohibit it at all times for the welfare of the public, provided only that the specific limitations imposed upon Congress's powers, as by the Due Process Clause of the Fifth Amendment, are not transgressed.[5]

ArtI.S8.C3.8.2 Instruments of Commerce

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

The applicability of Congress's power to the agents and instruments of commerce is implied in Chief Justice John Marshall's opinion in *Gibbons v. Ogden*,[1] where the waters of the State of New York in their quality as highways of interstate and foreign transportation were held to be governed by the overriding power of Congress. Likewise, the same opinion recognizes that in "the progress of things," new and other instruments of commerce will make their appearance. When the Licensing Act of 1793 was passed, the only craft to which it could apply

[1] Lottery Case (Champion v. Ames), 188 U.S. 321, 373 (1903).

[2] Brolan v. United States, 236 U.S. 216, 222 (1915). The most recent dicta to this effect appears in *Japan Line v. County of Los Angeles,* 441 U.S. 434, 448–51 (1979), a "dormant" commerce clause case involving state taxation with an impact on foreign commerce. In context, the distinction seems unexceptionable, but the language extends beyond context.

[3] License Cases, 46 U.S. (5 How.) 504, 578 (1847).

[4] Pittsburg & Southern Coal Co. v. Bates, 156 U.S. 577, 587 (1895).

[5] United States v. Carolene Products Co., 304 U.S. 144, 147–148 (1938).

[1] 22 U.S. (9 Wheat.) 1, 217, 221 (1824).

were sailing vessels, but it and the power by which it was enacted were, Marshall asserted, indifferent to the "principle" by which vessels were moved. Its provisions therefore reached steam vessels as well. A little over half a century later the principle embodied in this holding was given its classic expression in the opinion of Chief Justice Morrison Waite in the case of the *Pensacola Telegraph Co. v. Western Union Telegraph Co.*,[2] a case closely paralleling *Gibbons v. Ogden* in other respects also. "The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were intrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation."[3]

The Radio Act of 1927[4] whereby "all forms of interstate and foreign radio transmissions within the United States, its Territories and possessions" were brought under national control, affords another illustration. Because of the doctrine thus stated, the measure met no serious constitutional challenge either on the floors of Congress or in the Courts.[5]

ArtI.S8.C3.9 Indian Tribes

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

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Jurisdiction over matters in "Indian Country"[1] "is governed by a complex patchwork of federal, state, and tribal law."[2] Since *Worcester v. Georgia* in 1832,[3] the Supreme Court has recognized that Native American "tribes are unique aggregations possessing attributes of

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[2] 96 U.S. 1 (1878). *See also* Western Union Telegraph Co. v. Texas, 105 U.S. 460 (1882).

[3] 96 U.S. at 9. "Commerce embraces appliances necessarily employed in carrying on transportation by land and water." Railroad v. Fuller, 84 U.S. (17 Wall.) 560, 568 (1873).

[4] Act of March 28, 1927, 45 Stat. 373, superseded by the Communications Act of 1934, 48 Stat. 1064, 47 U.S.C. §§ 151 *et seq*.

[5] "No question is presented as to the power of the Congress, in its regulation of interstate commerce, to regulate radio communication." Chief Justice Charles Evans Hughes speaking for the Court in *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.,* 289 U.S. 266, 279 (1933). *See also* Fisher's Blend Station v. Tax Comm'n, 297 U.S. 650, 654–55 (1936).

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

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

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

sovereignty over both their members and their territories."[4] They are no longer "possessed of the full attributes of sovereignty,"[5] however, having relinquished some part of it by "[t]heir incorporation within the territory of the United States and their acceptance of its protection."[6] Accordingly, "[t]he sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance."[7]

While previously "the subject of some confusion," the source of federal authority over tribal matters is generally recognized to "derive[ ] from federal responsibility for regulating commerce with Indian tribes and for treaty making."[8] The Constitution's so-called "Indian Commerce Clause" explicitly authorizes Congress to regulate commerce with the tribes.[9] Congress's authority to regulate commercial activity in "Indian Country" is plenary,[10] exclusive,[11] and broad,[12] and persists even though such activity may occur within a state's territorial boundaries.[13]

Using its Indian Commerce Clause authority, Congress may determine with whom and in what manner the tribes engage in commercial activity.[14] Major areas where Congress has exercised its power to regulate include: tribal land; tribal gaming; hunting, fishing, and wildlife; and natural resources, such as minerals, oil and gas, and timber. Congress has also

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

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

[6] *Wheeler*, 435 U.S. at 323.

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

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

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

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

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

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

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

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

attempted to promote tribal political and economic development[15] through legislation such as the Indian Reorganization Act of 1934[16] and the Native American Business Development, Trade Promotion, and Tourism Act.[17]

The Supreme Court has increasingly recognized Congress's power under the Indian Commerce Clause as a source of authority to regulate tribal rights and obligations beyond matters of mere commerce.[18] Although the power of Congress over tribal affairs is broad, it is not limitless.[19] While "the United States has power to control and manage the affairs of its Indian wards in good faith for their welfare, that power is subject to constitutional limitations."[20] The Court has articulated a standard of review that defers to legislative judgment "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress's unique obligation toward the Indians."[21] A more searching review is warranted when it is alleged that the Federal Government's behavior toward a tribe contravenes its obligations, or when the government has taken property which it guaranteed to the tribe without compensating the tribe for the land's full value.[22]

[15] 25 U.S.C. §§ 1451 et seq.

[16] *Id.* §§ 461 et seq.

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

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

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

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

[21] Morton v. Mancari, 417 U.S. 535, 555 (1974). The Court applied this standard to uphold a statutory classification that favored employment of "qualified Indians" at the Bureau of Indian Affairs. In *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), the same standard was used to sustain a classification that favored, although inadvertently, one tribe over other tribes. While tribes are unconstrained by federal or state constitutional provisions, Congress has legislated a "bill of rights" statute covering them. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

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

ArtI.S8.C3.9.2 Restrictions on State Powers, Indian Tribes, and Commerce Clause

Article I, Section 8, Clause 3:

> *[The Congress shall have Power . . .] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; . . .*

Although in 1871, Congress forbade making further treaties with the tribes,[1] cases disputing the application of old treaties, and especially their effects upon attempted *state* regulation of on-reservation activities, continue to appear on the Supreme Court's docket.[2] Given the broad federal power to legislate on tribal affairs, the Court has generally used a preemption-like doctrine as the analytical framework with which to judge the permissibility of assertions of state jurisdiction over tribes:

> [T]he traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis that governs this inquiry. As a result, ambiguities in federal law should be construed generously, and federal pre-emption is not limited to those situations where Congress has explicitly announced an intention to pre-empt state activity.[3]

Accordingly, state regulation of tribal activities is preempted by federal law if the state scheme is incompatible with federal and tribal interests, unless the state's interests are substantial enough to justify the assertion of its authority.[4] If a detailed, federal regulatory framework exists and would be compromised by incompatible state regulation, the state action may be preempted by federal law.[5] Tribal gaming, for instance, is subject to a detailed federal regulatory scheme that preempts state law for certain types of gaming on tribal land, but preserves state regulation of tribal gaming on non-tribal land.[6] Notably, just as federal statutes are generally construed to the benefit of Native Americans, the preemption doctrine will *not* be applied strictly to prevent states from aiding tribes.[7]

The Supreme Court has also clarified that "States have no authority to reduce federal reservations lying within their borders."[8] In a leading case involving settlement of Native land claims, the Court ruled in *County of Oneida v. Oneida Indian Nation*[9] that a tribe could obtain damages for wrongful possession of land conveyed in 1795 without federal approval, as

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[1] Act of March 3, 1871, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71).

[2] *E.g.*, Puyallup Tribe v. Wash. Game Dep't, 433 U.S. 165 (1977); Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979); McGirt v. Oklahoma, No. 18-9526 (U.S. July 9, 2020). With regard to tribal regulation of on-reservation activities of non-Indians, see generally Montana v. United States, 450 U.S. 544 (1981) (articulating the so-called "*Montana* Doctrine").

[3] Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 838 (1982). *See also* New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[4] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980).

[5] Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, 476 U.S. 877 (1986).

[6] Indian Gaming Regulatory Act (IGRA), Pub. L. No. 100-497, 102 Stat. 2467 (1988) (codified at 25 U.S.C. §§ 2701–2721; 18 U.S.C. §§ 1166–1168).

[7] Three Affiliated Tribes of the Fort Berthold Rsrv., v. Wold Eng'g, P.C., 467 U.S. 138 (1984) (upholding state-court jurisdiction to hear claims of Native Americans against non-Natives involving transactions that occurred in Indian Country). Attempts by states to retrocede jurisdiction favorable to tribes, however, may be held to be preempted. *Three Affiliated Tribes of the Fort Berthold Rsrv.*, 476 U.S. at 877.

[8] McGirt v. Oklahoma, No. 18-9526, slip. op. at 7 (July 9, 2020) (emphasis added).

[9] Oneida Cnty. v. Oneida Indian Nation of New York State, 470 U.S. 226 (1985).

required by the Nonintercourse Act.[10] The Act reflected the accepted principle that extinguishment of title to Native American land requires the United States' consent. The Court reiterated the rule that enactments are construed liberally in favor of Native Americans; Congress may abrogate Native treaty rights or extinguish aboriginal land title only if it does so clearly and unambiguously. Consequently, federal approval of land-conveyance treaties containing references to earlier conveyances that violated the Nonintercourse Act do not constitute ratification of the invalid conveyances.[11]

In addition to federal preemption, the impact on tribal sovereignty is a determinant of relative state and tribal regulatory authority.[12] A tribe has the power to regulate its members and, unless so provided by Congress, a state may not regulate in a manner that would infringe upon this tribal authority.[13] In other words, the "semi-autonomous status" of tribes is an "independent but related" barrier to the exercise of state authority over commercial activity on a reservation.[14] If state regulation of activities on tribal lands would interfere with the tribe's sovereignty and self-governance, the state is generally divested of jurisdiction under federal law.[15] Substantial tribal interests in on-reservation activities could outweigh the state's interests in the off-reservation effects of on-reservation activities.[16] However,a tribe may not offer on-reservation activities to avoid state off-reservation law.[17]

In sum, there are two independent barriers to *state* regulation of tribal reservations and members, either of which can independently bar the application of a state law: (1) preemption by federal law and (2) tribal sovereignty.[18] Accordingly, the Court's preemption inquiry in this context requires an examination of applicable federal law as well as the nature of state, federal, and tribal interests to determine whether the exercise of state authority is permissible.[19] The preemption inquiry considers traditional notions of tribal sovereignty and the federal goal of tribal self-governance, including tribal self-sufficiency and economic development.[20]

Generally, however, Native Americans on reservations are not subject to state law unless Congress has expressly legislated otherwise,[21] because the federal interest in encouraging tribal self-government is strongest on the reservation, while the state's regulatory interest is

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[10] Act of Mar. 1, 1793, Pub. L. No. 2-19, § 8, 1 Stat. 329, 330.

[11] *Oneida Indian Nation of New York State*, 470 U.S. at 246–48.

[12] *E.g.*, New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

[13] *Three Affiliated Tribes of Fort Berthold Rsrv.*, 476 U.S. at 877.

[14] White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142–43 (1980); Ramah Navajo Sch. Bd., Inc. v. Bureau of Revenue of N.M., 458 U.S. 832, 837–38 (1982). The *Ramah* Court stated: "The two barriers are independent because either, standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation or by tribal members." *Id.* at 837 (quoting *White Mountain Apache Tribe*, 448 U.S. at 143).

[15] Iowa Mut. Ins. Co. v. LaPlante, 480 U.S. 9 (1987). Notably, this protective rule is inapplicable to state regulation of liquor because there is no tradition of tribal sovereignty with respect to that subject. Rice v. Rehner, 463 U.S. 713 (1983). Similarly, the Supreme Court has repeatedly held that the Indian Commerce Clause "affords Congress the power to prohibit or regulate the sale of alcoholic beverages to tribal Indians, wherever situated, and to prohibit or regulate the introduction of alcoholic beverages into Indian country." United States v. Mazurie, 419 U.S. 544, 554 (1975) (citing United States v. Holliday, 3 Wall. 407, 417–18 (1866); United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194–95 (1876); *Ex parte* Webb, 225 U.S. 663, 683–84 (1912); Perrin v. United States, 232 U.S. 478, 482 (1914); Johnson v. Gearlds, 234 U.S. 422, 438–39 (1914); United States v. Nice, 241 U.S. 591, 597 (1916)).

[16] California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).

[17] Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134 (1980).

[18] *Cabazon Band of Mission Indians*, 480 U.S. at 202; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); *White Mountain Apache Tribe*, 448 U.S. at 136.

[19] Three Affiliated Tribes of Fort Berthold Rsrv. v. Wold Eng'g, 476 U.S. 877 (1986).

[20] *Cabazon Band of Mission Indians*, 480 U.S. at 202.

[21] *Id.*

likely to be low.[22] On the other hand, beyond reservation boundaries, Native Americans are subject to generally applicable state laws as long as they are not discriminatory or preempted by federal law.[23] And when state interests outside the reservation are implicated on the reservation, such as in the context of a state's police powers, states may regulate the activities of tribe members on tribal land under certain circumstances.[24]

With regard to regulation of on-reservation activities of non-Natives, in *Montana v. United States*,[25] the Supreme Court articulated the so-called *Montana* Doctrine under which a tribe may not "exercise criminal jurisdiction over non-Indians" with two notable exceptions.[26] First, "[a] tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[27] Second, a tribe may address "the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe."[28] Applying the *Montana* Doctrine's second exception, in *United States v. Cooley*, the Court held that a "tribal officer possesses the authority . . . to detain temporarily and to search a non-Indian on a public right-of-way that runs through an Indian reservation."[29]

As suggested by the first exception to the *Montana* Doctrine, among the fundamental attributes of sovereignty a tribe possesses, unless divested by federal law, is the power to tax non-Natives entering the reservation to engage in economic activities.[30] Over time, the Court has recognized additional inherent tribal sovereign powers.[31]

The scope of *state* taxing powers—the conflict of "the plenary power of the States over residents within their borders with the semi-autonomous status of Indians living on tribal reservations"[32]—has been frequently litigated. Absent cession of jurisdiction or other congressional consent, states possess no power to tax reservation lands or tribal income from activities carried on within a reservation's boundaries.[33] Off-reservation Native activities

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[22] *White Mountain Apache Tribe*, 448 U.S. at 136.

[23] Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014); *White Mountain Apache Tribe*, 448 U.S. at 136; Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973).

[24] Nevada v. Hicks, 533 U.S. 353 (2001).

[25] 450 U.S. 544 (1981).

[26] *Id.* at 565. *See also* United States v. Bryant, 579 U.S. 140 (2016), *as revised* (July 7, 2016) ("Most States lack jurisdiction over crimes committed in Indian country against Indian victims." (citing United States v. John, 437 U.S. 634, 651 (1978))).

[27] *Montana*, 450 U.S. at 565.

[28] *Id.* at 566.

[29] No. 19-1414, slip op. at 1 (U.S. June 1, 2021).

[30] *Montana*, 450 U.S at 565; *see also* Washington v. Confederated Colville Tribes, 447 U.S. 134 (1980); United States v. Jicarilla Apache Nation, 455 U.S. 130 (2011).

[31] *See, e.g.*, United States v. Wheeler, 435 U.S. 313 (1978) (recognizing Tribe's inherent sovereign power to punish tribal offenders); California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987) (finding state regulation of on-reservation bingo "would impermissibly infringe on tribal government"). *But see* Brendale v. Confederated Tribes & Bands of the Yakima Indian Nation, 492 U.S. 408 (1989) (holding extensive ownership of land within "open areas" of reservation by non-members of tribe precludes application of tribal zoning within such areas); Hagen v. Utah, 510 U.S. 399 (1994).

[32] McClanahan v. Ariz. Tax Comm'n, 411 U.S. 164, 165 (1973).

[33] Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); *McClanahan*, 411 U.S. at 164; Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976); Bryan v. Itasca Cnty., 426 U.S. 373 (1976); *Confederated Colville Tribes*, 447 U.S. at 134; Montana v. Blackfeet Tribe, 471 U.S. 759 (1985). *See also* Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991). An easing of the Court's apparent reluctance to find congressional cession is reflected in more recent cases. *See* Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

require an express federal exemption to deny state taxing power.[34] State taxation of non-Natives doing business with Natives on the reservation involves a close analysis of the federal statutory framework, although the operating premise was for many years to deny state taxation power because of its burdens upon the development of tribal self-sufficiency and interference with the tribes' ability to exercise their sovereign functions.[35]

The Supreme Court appears to have moved away from this operating premise to some extent. For example, in *Cotton Petroleum Corp. v. New Mexico*,[36] the Court upheld a state oil and gas severance tax applied to on-reservation operations by non-Natives, which were already taxed by the Tribe,[37] finding the impairment of tribal sovereignty was "too indirect and too insubstantial" to warrant preemption. The Court found the fact that the state provided significant services to the oil and gas lessees justified state taxation, while distinguishing earlier cases in which the state "asserted no legitimate regulatory interest that might justify the tax."[38] In a later case where the Court confronted arguments that the imposition of particular state taxes on reservation property was inconsistent with self-determination and self-governance, the Court denominated these as "policy" arguments properly presented to Congress rather than to the Court.[39]

Clause 4—Uniform Laws

ArtI.S8.C4.1 Naturalization

ArtI.S8.C4.1.1 Overview of Naturalization Clause

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Article I, Section 8, Clause 4 of the Constitution provides Congress with the "power . . . To establish an uniform Rule of Naturalization . . .throughout the United States."[1] The Supreme Court has described naturalization as "the act of adopting a foreigner, and clothing him with the privileges of a native citizen."[2] Pursuant to this authority, Congress may legislate terms and conditions by which a foreign-born national (alien) may become a U.S. citizen.[3] Moreover,

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[34] *Mescalero Apache Tribe*, 411 U.S. at 148–49. *Cf.* Wagnon v. Prairie Band Potawatomi Nation, 546 U.S. 95, 115 (2005) (holding that a Kansas motor fuel tax imposed on non-Indian fuel distributors who subsequently deliver the fuel to a gas station owned by and located on a reservation is "a nondiscriminatory tax imposed on an off-reservation transaction between non-Indians" and therefore "the tax is valid and poses no affront to the Nation's sovereignty").

[35] White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Cent. Mach. Co. v. Ariz. State Tax Comm'n, 448 U.S. 160 (1980); Ramah Navajo School Board v. Bureau of Revenue of N.M., 458 U.S. 832 (1982).

[36] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163 (1989).

[37] Held permissible in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982).

[38] Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 185 (1989) (distinguishing *White Mountain Apache Tribe*, 448 U.S. at 136, and *Ramah Navajo Sch. Bd., Inc.*, 458 U.S. at 832).

[39] Cnty. of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 265 (1992). For other tax controversies, see Okla. Tax Comm'n v. Sac & Fox Nation, 508 U.S. 114 (1993); Dep't of Tax'n & Fin. v. Milhelm Attea & Bros., 512 U.S. 61 (1994); Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995).

[1] U.S. Const. art. I, § 8, cl. 4.

[2] Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 162 (1892); *see also* Osborn v. President of Bank of U.S., 22 U.S. (9 Wheat.) 738, 827 (1824) (a naturalized citizen "becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the [C]onstitution, on the footing of a native"), *superseded by statute*, 28 U.S.C. § 1349.

[3] *See* Schneider v. Rusk, 377 U.S. 163, 165 (1964) (noting that the rights of a naturalized citizen derive from the requirements set by Congress); Takahashi v. Fish & Game Comm., 334 U.S. 410, 419 (1948) ("The Federal Government has broad constitutional powers in determining what aliens shall be admitted to the United States, the period they

Congress's power over naturalization is exclusive; states may not impose their own terms and conditions by which aliens may become U.S. citizens.[4] Based on this broad power, Congress has enacted a series of laws governing the naturalization of aliens in the United States since the end of the eighteenth century.[5] These naturalization laws have generally applied to three main categories of aliens: (1) those who have resided in the United States for certain periods of time and applied for naturalization; (2) those born abroad to U.S. citizen parents; and (3) those who derived citizenship after their parents naturalized in the United States.[6]

Congress's power under the Naturalization Clause is not limited to conferring citizenship. The Supreme Court has recognized the power as also giving Congress the ability to revoke citizenship improperly obtained through fraud or other unlawful means.[7] Additionally, the Court has recognized that Congress has the power to expatriate an individual who, through some voluntary act, has relinquished his or her U.S. citizenship.[8]

In addition to conferring Congress with power to determine when foreign nationals may obtain U.S. citizenship, the Naturalization Clause is sometimes viewed as contributing to Congress's power over immigration, including its power to set rules for when aliens may enter or remain in the United States.[9]

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may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization."). *See also* Scott v. Sandford, 60 U.S. (19 How.) 393, 417 (1857) (recognizing that the naturalization power strictly applies to "persons born in a foreign country, under a foreign government"), *superseded by constitutional amendment*, U.S. Const. amend. XIV.

[4] *See Takahashi*, 334 U.S. at 419 ("Under the Constitution the states are granted no such powers; they can neither add to nor take from the conditions lawfully imposed by Congress upon admission, naturalization and residence of aliens in the United States or the several states."); United States v. Wong Kim Ark, 169 U.S. 649, 701 (1898) ("The power, granted to [C]ongress by the [C]onstitution, 'to establish an uniform rule of naturalization,' was long ago adjudged by this court to be vested exclusively in [C]ongress."); Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817) ("That the power of naturalization is exclusively in [C]ongress does not seem to be, and certainly ought not to be, controverted").

[5] *See e.g.,* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795) (providing that "free white person[s]" who resided in the United States for at least two years could be granted citizenship if they showed good moral character and swore allegiance to the Constitution); Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414, 414 (repealed 1802) (requiring a declaration of intent to become a citizen at least three years in advance of naturalization, and extending the minimum residence requirement to five years); Naturalization Law of 1802, ch. 28, 2 Stat. 153 (requiring applicants to maintain five years of residence in the United States, and to submit a declaration of intent to become citizens at least three years in advance of naturalization); Naturalization Act of 1855, ch. 71, 10 Stat. 604 (extending citizenship to foreign-born children of U.S. citizens and wives of U.S. citizens); Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256 (extending citizenship to "aliens of African nativity and to persons of African descent"); Naturalization Act of 1906, ch. 3592, 34 Stat. 596 (providing for "a uniform rule for the naturalization of aliens throughout the United States"); Cable Act, ch. 411, § 2, 42 Stat. 1021, 1022 (1922) (requiring women married to U.S. citizens to fulfill naturalization requirements independently); Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 334, 66 Stat. 163, 254–55 (setting forth comprehensive requirements for naturalization of aliens).

[6] *Wong Kim Ark*, 169 U.S. at 672. *See also* Constitutionality of Legis. to Confer Citizenship Upon Albert Einstein, 1 Op. O.L.C. 417 (1934) (describing different ways in which Congress has conferred citizenship).

[7] *See e.g.,* Fedorenko v. United States, 449 U.S. 490, 506 (1981); Knauer v. United States, 328 U.S. 654, 672 (1946); Johannessen v. United States, 225 U.S. 227, 241 (1912).

[8] *See e.g.,* Vance v. Terrazas, 444 U.S. 252, 261, 270 (1980); Afroyim v. Rusk, 387 U.S. 253, 262, 267–68 (1967).

[9] For example, in *Arizona v. United States*, the Court declared that the Federal Government's "broad, undoubted power" over immigration was partially based "on the national government's constitutional power to 'establish an uniform Rule of Naturalization,' and its inherent power as sovereign to control and conduct relations with foreign nations." 567 U.S. 387, 394–95 (2012) (quoting U.S. Const. art. I, § 8, cl. 4); *but see id.* at 422 (Scalia, J., concurring in part and dissenting in part) ("I accept [immigration regulation] as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship) but because it is an inherent attribute of sovereignty no less for the United States than for the States."). Similarly, in *Harisiades v. Shaughnessy*, the Court observed that "[t]he power of Congress to exclude, admit, or deport aliens flows from sovereignty itself and from the power 'To establish an uniform Rule of Naturalization.'" 342 U.S. 580, 599 (1952) (quoting U.S. Const. art. I, § 8, cl. 4); *see also* INS v. Chadha, 462 U.S. 919, 940 (1983) ("The plenary authority of Congress over aliens under Art. I, § 8, cl. 4 is not open to question"); Toll v. Moreno, 458 U.S. 1, 10 (1982) ("Federal authority to regulate the status of aliens derives from various sources, including the Federal Government's power '[t]o establish [a] uniform Rule of Naturalization'

ArtI.S8.C4.1.1
Overview of Naturalization Clause

Congress's implied power over immigration is explained in the discussion of the Necessary and Proper Clause (Article I, Section 8, Clause 18 of the Constitution).[10]

ArtI.S8.C4.1.2 Historical Background

ArtI.S8.C4.1.2.1 British and American Colonial Naturalization

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

The American conception of citizenship is informed by the English common law doctrine of *jus soli* ("right of soil"), in which a person's nationality at birth is determined by the territory where that person is born.[1] Under English common law, any person born in England or any territory within "the realm of England," including its American colonies, was considered a subject of the Crown and entitled to certain benefits of "subjecthood" unavailable to others.[2] A foreign national born outside England and its dominions could only become a subject through private legislation conferring that status.[3] Typically, this was an expensive process for the intended beneficiary of the bill, and in practice, private bills, which were subject to fees, were

. . . .") (quoting U.S. Const. art. I, § 8, cl. 4); Mathews v. Diaz, 426 U.S. 67, 79–80 (1976) ("In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens."). Apart from the Naturalization Clause, the Supreme Court has cited Congress's foreign commerce power as a basis for its immigration power. *See Toll*, 458 U.S. at 10 (observing that Congress's immigration power also derives from "its power '[t]o regulate Commerce with foreign Nations,' and its broad authority over foreign affairs") (citing U.S. Const. art. I, § 8, cl. 3); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290 (1904) (recognizing that an immigration statute was based in part "on the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States"); Edye v. Robertson, 112 U.S. 580, 600 (1884) ("It is enough to say that, Congress having the power to pass a law regulating immigration as a part of the commerce of this country with foreign nations, we see nothing in the statute by which it has here exercised that power forbidden by any other part of the Constitution.").

[10] *See* ArtI.S8.C18.8.1 Overview of Congress's Immigration Powers.

[1] *See* Rogers v. Bellei, 401 U.S. 815, 828 (1971) ("We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the jus soli, that is, that the place of birth governs citizenship status except as modified by statute."); Schneider v. Rusk, 377 U.S. 163, 170 (1964) (Clark, J., dissenting) ("Our concept of citizenship was inherited from England and, accordingly, was based on the principle that rights conferred by naturalization were subject to the conditions reserved in the grant."); United States v. Wong Kim Ark, 169 U.S. 649, 654 (1898) ("The Constitution nowhere defines the meaning of. . .[the word "citizen"], either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that 'all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States.' In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution."); Fitisemanu v. United States, 1 F.4th 862, 867 (10th Cir. 2021) ("Early American attitudes toward what we now call citizenship developed in the context of English law regarding the relationship between monarch and subject.").

[2] *See* Calvin's Case (1608) 77 Eng. Rep. 377, 407, 7 Co. Rep. 1 b; *Wong Kim Ark*, 169 U.S. at 655 ("The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called 'ligealty,' 'obedience,' 'faith,' or 'power'—of the king. The principle embraced all persons born within the king's allegiance, and subject to his protection. Such allegiance and protection were mutual,—as expressed in the maxim, 'Protectio trahit subjectionem, et subjectio protectionem,'—and were not restricted to natural-born subjects and naturalized subjects, or to those who had taken an oath of allegiance; but were predicable of aliens in amity, so long as they were within the kingdom. Children, born in England, of such aliens, were therefore natural-born subjects."); Taunya Lovell Banks, *Dangerous Woman: Elizabeth Key's Freedom Suit—Subjecthood and Racialized Identity in Seventeenth Century Colonial Virginia*, 41 Akron L. Rev. 799, 806 (2008) ("The rule in Calvin's Case, anyone born within the territory of the sovereign is a subject of the English monarch, became the common law rule").

[3] *See* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 Va. L. Rev. 359, 379–80 (2010) (observing that, "[f]or much of [the] seventeenth century, private acts of Parliament offered the principal means by which aliens sought naturalization."). However, children born of English parents outside the country were considered English subjects. *See* Banks, *supra* note 2, at 806.

only available to those with substantial wealth.[4] Otherwise, English law afforded no mechanism by which a foreign national could naturalize and become a subject.[5] Even so, some of the American colonies developed their own naturalization policies that enabled foreign nationals to enjoy some of the rights and protections traditionally afforded to English subjects.[6]

During the eighteenth century and prior to American independence, the British Parliament passed laws that allowed certain foreign nationals to naturalize and become subjects if they met specific requirements under those laws.[7] For instance, a 1709 law allowed the naturalization of foreign Protestants who took an oath of allegiance and paid a small fee.[8] More significantly for the American colonies, in 1740, the British Parliament passed a law that uniformly provided for the naturalization of any foreign national residing in a British colony for at least seven years, effectively superseding the naturalization policies of the individual colonies.[9] In 1773, a law was passed that allowed foreign-born Protestants who had served two years "in any of the royal American regiments" to be naturalized subject to limitations on office-holding in England.[10] During that same year, England, in an effort to maintain control over naturalization policy, directed governors in the American colonies not to authorize naturalization bills passed by the legislatures in those colonies.[11] Thus, by the time of the American Revolution, England had established a uniform naturalization policy that foreshadowed the naturalization laws of the United States in the years to come.

[4] *See* Pfander & Wardon, *supra* note 3, at 379 ("The private bill process had a number of serious problems, especially for those of modest means who were hoping to acquire land in the new world.").

[5] But in some cases, an alien could become a "denizen," a status conferred solely by the Crown which provided certain rights akin to those enjoyed by British subjects, including the right to purchase and own lands (but not necessarily the right to transfer ownership of the land). *See* Pfander & Wardon, *supra* note 3, at 378–79; Polly J. Price, *Natural Law and Birthright Citizenship in Calvin's Case (1608)*, 9 Yale J.L. & Human. 73, 86–87 (1997). Denizen status, which was conferred entirely at the monarch's discretion, could be withdrawn at any time. *See* A.H. Carpenter, *Naturalization in England and the American Colonies*, 9 Am. Hist. Rev. 288, 290 (1904) (describing a "denizen" as a class between natural-born subjects and foreign nationals).

[6] *See* Carpenter, *supra* note 5, at 296–97 (describing colonial naturalization laws that afforded certain rights, such as the right to acquire lands and vote in elections, which did not extend beyond a particular province's borders). For example, South Carolina's naturalization law provided that all aliens residing in South Carolina had the same rights and privileges as any person born to English parents. Carpenter, *supra* note 5, at 298. Other provinces, like Pennsylvania, Delaware, and New Jersey, provided for naturalization by private acts of the legislatures. Carpenter, *supra* note 5, at 300–01. In addition, New York allowed foreign nationals residing there who were Christians to naturalize upon taking an oath of allegiance, and the colony also provided for naturalization through private bills. Carpenter, *supra* note 5, at 301–02.

[7] *See* Pfander & Wardon, *supra* note 3, at 380–82.

[8] *See* Carpenter, *supra* note 5, at 292–93.

[9] Carpenter, *supra* note 5, at 293. While this law conferred subjecthood on foreign nationals, "[l]imitations were placed upon office-holding in England, and no person under this act could be admitted to the Privy Council or either house of Parliament, nor could such a one hold any office, civil or military, within the kingdom of Great Britain or Ireland. Otherwise, English rights and privileges were freely and fully given." Carpenter, *supra* note 5, at 293–94.

[10] Carpenter, *supra* note 5, at 294.

[11] Carpenter, *supra* note 5, at 294.

ArtI.S8.C4.1.2.2 Constitutional Convention and Naturalization

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Following the American Revolution, individual states established their own policies on the naturalization of foreign-born nationals.[1] While some like Pennsylvania had fairly liberal naturalization requirements,[2] others like Virginia had more restrictive laws that limited naturalization to aliens who resided in the state for longer periods, who were "free white persons," or who were not otherwise subject to caps on citizenship admissions.[3] Other states, including South Carolina, only conferred citizenship through private legislation rather than through any naturalization law.[4]

Despite these differences, the Articles of Confederation, ratified in 1781, provided that "the free inhabitants" of each state had the right to travel freely to any other state, and were "entitled to all privileges and immunities of free citizens in the several states."[5] Thus, a foreign national who became a citizen in one state could obtain citizenship rights in another state simply by relocating and establishing residence in that state.[6] In essence, the combination of interstate travel and competing state citizenship laws established a form of national citizenship that signaled the future establishment of a constitutional standard for obtaining U.S. citizenship.[7]

The lack of consistency between state citizenship laws led some delegates to the Constitutional Convention to propose a uniform naturalization policy during the debates over the United States Constitution. Charles Pinckney, who served as a delegate from South Carolina, noted that the states had widely divergent citizenship laws, and argued that, "[t]o render this power generally useful it must be placed in the Union, where alone it can be equally exercised."[8] Alexander Hamilton, who served as a delegate from New York, wrote in the *Federalist No. 32* that naturalization policy should be an exclusive federal power "because if each State had power to prescribe a distinct rule there could not be [a] uniform rule."[9]

In addition, Virginia delegate James Madison commented in the *Federalist No. 42* that "[t]he dissimilarity in the rules [of] naturalization, has long been remarked as a fault in our

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[1] *See* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 Va. L. Rev. 359, 383 (2010) (noting that "naturalization policy fell to the states and they responded with a profusion of approaches meant to attract new immigrants from Europe"); Smith v. Turner, 48 U.S. (7 How.) 283, 440 (1849) (Grier, J., concurring) ("During the Confederation, the States passed naturalization laws for themselves, respectively, in which there was great want of uniformity . . . .").

[2] For example, under Pennsylvania law, foreign nationals of "good character" could acquire the rights of citizenship within two years of their arrival in the state. *See* Pfander & Wardon, *supra* note 1, at 383.

[3] Pfander & Wardon, *supra* note 1, at 383 (describing naturalization laws of southern states).

[4] Pfander & Wardon, *supra* note 1, at 383 (describing the policies of South Carolina and the New England states).

[5] Articles of Confederation of 1781, art. IV, para. 1.

[6] Arizona v. United States, 567 U.S. 387, 418 (2012) (Scalia, J., concurring in part and dissenting in part) ("This meant that an unwelcome alien could obtain all the rights of a citizen of one State simply by first becoming an *inhabitant* of another."); *see also* Pfander & Wardon, *supra* note 1, at 384 ("It effectively permitted an alien to seek naturalization in a state with permissive naturalization practices and then move to a state with tighter restrictions, and still be entitled to all the incumbent rights of naturalized citizens in the second state."); Charles Pinckney, Observations on the Plan of Government Submitted to The Federal Convention, in Philadelphia, on the 28th of May, 1787, *reprinted in* 2 The Records of the Federal Convention of 1787, at 120 (Max Farrand ed., 1911) ("At present the citizens of one State, are entitled to the privileges of citizens in every State. Hence it follows, that a foreigner, as soon as he is admitted to the rights of citizenship in one, becomes entitled to them in all.").

[7] *See* Pfander & Wardon, *supra* note 1, at 385.

[8] *See* Pinckney, *supra* note 6.

[9] The Federalist No. 32 (Alexander Hamilton).

system, and as laying a foundation for intricate and delicate questions."[10] He noted, for example, that an alien who acquired citizenship in a state with lenient naturalization requirements (such as a short period of residence) could obtain citizenship rights in another state even if he did not meet the more restrictive naturalization policies of that state, given the "privileges and immunities of free citizens" conferred by the Articles of Confederation.[11] Consequently, Madison warned, "the law of one State [would be] preposterously rendered paramount to the law of another, within the jurisdiction of the other."[12]

Ultimately, there was a consensus at the Convention that there should be a federal naturalization power in the Constitution.[13] Originally, the proposed language of the text relating to naturalization simply authorized Congress "to regulate naturalization."[14] Then, a revised draft appeared in the New Jersey Plan, which had been introduced by delegate William Paterson, and declared that "the rule for naturalization ought to be the same in every State."[15] Following some further modification, the Convention adopted the final draft of the Naturalization Clause, which authorized Congress "[t]o establish an uniform rule of naturalization. . . throughout the United States."[16]

ArtI.S8.C4.1.2.3 Early U.S. Naturalization Laws

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Congress established its first uniform rule of naturalization through the Naturalization Act of 1790. The Act provided that any "free white person" who resided "within the limits and under the jurisdiction of the United States" for at least two years could be granted citizenship if he or she showed "good character" and swore allegiance to the Constitution.[1] The law also provided that the children of naturalized citizens under the age of twenty-one at the time of their parents' naturalization and who were residing in the United States would be considered U.S. citizens.[2] The children of U.S. citizens who were born outside the United States were deemed U.S. citizens unless their fathers had never resided in the United States.[3] Additionally, Congress delegated to the courts the power to administer the naturalization process.[4]

In 1795 Congress amended the naturalization law by requiring an applicant to submit a declaration of intent to become a citizen at least three years before naturalization, and

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[10] The Federalist No. 42 (James Madison).

[11] *Id.*

[12] *Id.*

[13] *See* Pfander & Wardon, *supra* note 1, at 385 ("Widespread acceptance of the argument for a national standard made the transfer of naturalization power to the new federal government one of the least controversial features of the new Constitution.").

[14] *See* Pfander & Wardon, *supra* note 1, at 389.

[15] James Madison, Notes of the Constitutional Federal Convention, *reprinted in* 1 The Records of the Federal Convention of 1787, at 245 (Max Farrand ed., 1911).

[16] *See* U.S. Const. art. I, § 8, cl. 4; Pfander & Wardon, *supra* note 1 at 386, 389 (describing process by which language of naturalization clause was adopted).

[1] *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795).

[2] *Id.*

[3] *Id.*

[4] *Id. See also* Frederick Van Dyne, A Treatise on the Law of Naturalization of the United States 9 (1907) ("In the United States naturalization is a judicial function, having been committed by Congress to the courts.").

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extending the minimum residence requirement to five years.[5] Then, in 1798, Congress passed the Alien and Sedition Acts, which, among other things, lengthened the period in which to declare an intent to become a citizen to five years, lengthened the minimum residence requirement to fourteen years, and barred the naturalization of any alien from a country at war with the United States.[6] In 1802, Congress repealed the previous laws and restored both the five-year residence requirement and the three-year declaration of intent period.[7]

In the ensuing years, Congress continued to establish naturalization policies with varying conditions and restrictions.[8] Despite these differences, naturalization laws uniformly required that an applicant prove residence in the United States for a specific time period before acquiring citizenship.[9]

[5] Naturalization Act of 1795, ch. 20, § 1, 1 Stat. 414, 414 (repealed 1802).

[6] Naturalization Act of 1798, ch. 54, § 1, 1 Stat. 566, 566–67 (repealed 1802); *see also* Alien Friends Act, ch. 58, § 1, 1 Stat. 570, 570–71 (1798) (authorizing the President to deport aliens who are "dangerous to the peace and safety of the United States," or who are reasonably suspected of being "concerned in any treasonable or secret machinations against the government"); Alien Enemy Act, ch. 66, § 1, 1 Stat. 577, 577 (1798) (providing that "all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies").

[7] *See* Naturalization Law of 1802, ch. 28, § 1, 2 Stat. 153, 153–54. In the 1802 law, Congress continued to limit eligibility for naturalization to "free white persons" who had good moral character. *Id.* The law also extended citizenship to children of naturalized citizens who were under twenty-one at the time of their parents' naturalization and who were residing in the United States, as well as children of U.S. citizens who were born outside the United States (unless their fathers had never resided in the United States). *Id.* § 4. Congress eventually extended naturalization eligibility to "aliens of African nativity and to persons of African descent" in 1870. Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256.

[8] *See e.g.*, Naturalization Act of 1804, ch. 47, 2 Stat. 292 (providing that any alien who was a "free white person" residing in the United States between June 18, 1798, and April 14, 1802, and who continued to reside in the United States, could become a citizen without timely filing a declaration of intent; and that the widow and children of any alien who filed a declaration of intent and subsequently passed away prior to naturalization would be considered U.S. citizens); Act of Mar. 22, 1816, ch. 32, § 1, 3 Stat. 258, 258–59 (requiring every applicant for naturalization who arrived in the United States since June 18, 1812, to produce a "certificate of report and registry" as evidence of the time of his arrival in the United States, as well as a certificate of his duly filed declaration of intention); Naturalization Act of 1824, ch. 186, § 1, 4 Stat. 69, 69 (providing that any alien minor who was a "free white person" and who lived in the United States for the three years before turning twenty-one, and who continued to reside in the United States, could become a citizen without timely filing a declaration of intent if he had reached the age of twenty-one and had resided in the United States for five years at the time of filing his naturalization application); Act of May 24, 1828, ch. 116, § 2, 4 Stat. 310, 310–11 (providing that any alien who was a "free white person" residing in the United States between April 14, 1802 and June 18, 1812, and who continued to reside in the United States, could naturalize without timely filing a declaration of intent, provided that he could show that he was residing in the United States before June 18, 1812, and that he maintained continuous residence in the United States since then; and requiring applicant to prove residence in the United States for at least five years immediately preceding application through "the oath or affirmation of citizens of the United States"); Naturalization Act of 1855, ch. 71, 10 Stat. 604 (extending naturalization to wives of U.S. citizens); Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254, 256 (extending naturalization eligibility to "aliens of African nativity and to persons of African descent").

[9] *See* United States v. Wong Kim Ark, 169 U.S. 649, 686–87 (1898) ("From the first organization of the national government under the [C]onstitution, the naturalization acts of the United States, in providing for the admission of aliens to citizenship by judicial proceedings, uniformly required every applicant to have resided for a certain time 'within the limits and under the jurisdiction of the United States,' and thus applied the words 'under the jurisdiction of the United States' to aliens residing here before they had taken an oath to support the [C]onstitution of the United States, or had renounced allegiance to a foreign government.").

ArtI.S8.C4.1.2.4 Naturalization as an Exclusive Power of Congress

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

While the first Congress enacted federal laws governing naturalization, the Supreme Court initially appeared to recognize that states retained naturalization powers. For instance, in one early case, *Collet v. Collet*, the Court in 1792 declared that the states continued to have "concurrent authority" over naturalization, but could not exercise that authority in a manner that conflicted with federal naturalization laws.[1] In *United States v. Villato*, the Court in 1797 ruled that a Spanish national, Francis Villato, was not a U.S. citizen even though he had taken an oath of citizenship under Pennsylvania law.[2] Without deciding whether states maintained naturalization powers, the Court simply determined that the Pennsylvania law under which Villato sought to naturalize had been effectively repealed by an amendment to the state's constitution.[3] Accordingly, the Court held, Villato never became a U.S. citizen and could not be criminally charged with treason.[4]

Despite the Supreme Court's early recognition of state power over naturalization, the Court ultimately determined that the naturalization power rested solely within Congress. For example, in *Chirac v. Lessee of Chirac*, Chief Justice John Marshall in 1817 declared "[t]hat the power of naturalization is exclusively in [C]ongress does not seem to be, and certainly ought not to be, controverted."[5] Therefore, in that case, a French national did not have the ability to own land (a privilege generally extended only to U.S. citizens at the time) based on the fact that he had taken an oath of citizenship under Maryland law because "[C]ongress alone has the power of prescribing uniform rules of naturalization."[6] Nonetheless, the Court held that a 1778 treaty between the United States and France permitted French nationals to purchase and own lands in the United States.[7]

ArtI.S8.C4.1.2.5 Collective Naturalization (1800–1900)

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

While Congress, by the early nineteenth century, had established the general framework for a foreign subject who came to the United States to acquire citizenship, the expansion of the United States into new areas prompted the Federal Government, through statute or treaty, to provide for collective naturalization of the inhabitants of those newly acquired territories.[1] The

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[1] 2 U.S. (2 Dall.) 294, 296 (1792) (quoting U.S. Const. art. I, § 8, cl. 4).

[2] 2 U.S. (2 Dall.) 370, 373 (1797).

[3] *Id.*

[4] *Id.*

[5] Chirac v. Lessee of Chirac, 15 U.S. (2 Wheat.) 259, 269 (1817).

[6] *Id.* at 269. According to Chief Justice John Marshall, the Maryland naturalization law was "virtually repealed by the [C]onstitution of the United States, and the act of naturalization enacted by [C]ongress." *Id.*

[7] *Id.* at 270–71. *See also* Matthew's Lessee v. Rae, 16 F. Cas. (3 Cranch) 1112 (C.C.D.D.C. 1829) (No. 9,284) (ruling that an alien who complied with state naturalization laws after Congress had passed a naturalization law was not a U.S. citizen because "the state naturalization laws [were] superseded, and annulled by the act of [C]ongress, whose jurisdiction upon that subject is, under the [C]onstitution of the United States, exclusive. . . .").

[1] For example, a 1794 treaty with Great Britain provided that British subjects who remained in the United States and did not declare their intention to remain British subjects were deemed to be U.S. citizens. Treaty of Amity,

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Collective Naturalization (1800–1900)

United States' acquisition of the Louisiana territory and Florida in the early 1800s raised the question of whether the Federal Government could collectively naturalize designated groups of persons through statute or treaty.[2]

In *American Insurance Co. v. 356 Bales of Cotton*, an 1828 case involving a challenge to the legality of admiralty proceedings in a Florida territorial court, the Supreme Court recognized the collective naturalization of Florida inhabitants under an 1819 treaty between the United States and Spain that ceded the territory of Florida to the United States.[3] The Court explained that "the ceded territory becomes a part of the nation to which it is annexed," and that, upon such transfer, the inhabitants of the territory sever ties with their former country and establish a political allegiance with the government that has acquired their territory.[4] The Court declared that "[t]his treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States."[5]

The notion of collective naturalization through federal statute or treaty continued to play a role throughout the nineteenth century, particularly as the United States engaged in its westward expansion. For example, in 1845, Congress passed a resolution admitting the Republic of Texas into the union "on an equal footing with the original States,"[6] and all the citizens of the former republic became citizens of the United States.[7] In 1848, the United States signed a treaty with Mexico that officially ended the Mexican-American War, and, under

Commerce and Navigation, Between His Britannic Majesty and the United States of America, by their President, with the Advice and Consent of their Senate, Gr. Brit.-U.S., art. 2, Nov. 19, 1794, 8 Stat. 116. Under the 1803 Treaty of Paris, the United States acquired the Louisiana territory from France, and the treaty provided that "[t]he inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible according to the principles of the Federal Constitution, to the enjoyment of all the rights, advantages, and immunities of citizens of the United States." Treaty Between the United States of America and the French Republic, Fr.-U.S., art. 3, Apr. 30, 1803, 8 Stat. 200. An 1819 treaty with Spain that allowed the United States to acquire Florida similarly stated that the inhabitants of Florida were to be "admitted to the enjoyment of all the privileges, rights, and immunities, of the citizens of the United States." Treaty of Amity, Settlement, and Limits, Between the United States of America and his Catholic Majesty, Spain-U.S., art. 6, Feb. 22, 1819, 8 Stat. 252.

[2] *See* Am. Ins. Co. v. 356 Bales of Cotton, 26 U.S. 511, 525 (1828) ("In what relation then do, the inhabitants of an acquired territory, stand to the United States? Are they citizens, or subjects? This is a grave question, and merits the serious consideration of the Court.").

[3] *Id.* at 542.

[4] *Id.*

[5] *Id.*; *see also* Boyd v. Nebraska *ex rel.* Thayer, 143 U.S. 135, 162 (1892) ("Congress, in the exercise of the power to establish a uniform rule of naturalization, has enacted general laws under which individuals may be naturalized, but the instances of collective naturalization, by treaty or by statute, are numerous."). Additionally, during the War of 1812 and shortly after the admission of Louisiana into the Union, a federal district court considered whether individuals who were born in Great Britain and had resided in the territory of Orleans when it became the state of Louisiana could be detained as "alien enemies" or whether they were instead citizens of the United States. United States v. Laverty, 26 F. Cas. (3 Mart.) 875, 875–76 (D. La. 1812) (No. 15,569a). The U.S. Government argued that the only way to become a U.S. citizen was by fulfilling the uniform requirements for naturalization as Congress provided. *Id.* at 875–77 ("It is contended by the attorney of the United States that congress alone have power to pass laws on the subject of the naturalization of foreigners, and that, by the constitution, if is declared that the rule for their admission must be uniform."). The court disagreed, ruling that all "bona fide inhabitants" of the territory of Orleans became U.S. citizens upon the admission of Louisiana as a state. *Id.* at 877. The court reasoned that, although Congress has the power to establish a uniform rule of naturalization for individuals seeking citizenship, Congress's power to admit new states into the union enabled the government "to admit at once great bodies of men, or new states, into the federal Union." *Id.* at 876–77. *See also* Desbois' Case, 2 Mart. (La.) 185 (1812) (holding that French national who had resided in the territory of Orleans since 1806 could be considered a U.S. citizen upon the admission of Louisiana into the union); U.S. Const. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . . ."); U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .").

[6] J. Res. 1, 29th Cong., 9 Stat. 108 (1845).

[7] *Boyd*, 143 U.S. at 169; *see also* Contzen v. United States, 179 U.S. 191, 193 (1900) ("It is not disputed that citizenship may spring from collective naturalization by treaty or statute, nor that by the annexation of Texas and its admission into the Union all the citizens of the former Republic became, without any express declaration, citizens of the United States.").

that treaty, Mexican nationals who remained in the territory ceded to the United States (e.g., modern-day Arizona, New Mexico, and California) could become citizens of the United States.[8] Additionally, in 1900, Congress established the territory of Hawai'i and conferred citizenship on its residents.[9]

Through legislation, Congress also provided for the collective naturalization of specific groups of people who were present in the United States or its territories. For instance, in 1887, Congress passed the Dawes Act, which authorized the President to allot tribal land to individual American Indians, and conferred citizenship on American Indians who accepted individual land grants.[10] A few decades later, in 1924, Congress passed the Indian Citizenship Act, which declared that all American Indians born within the territorial limits of the United States were U.S. citizens.[11] Additionally, in 1917, Congress passed the Jones Act, which provided that all citizens of Puerto Rico, which had become a United States territory in 1898, would become U.S. citizens.[12]

In short, naturalization is not strictly limited to conferring citizenship on individual foreign nationals. Congress also has the power to grant citizenship collectively to designated groups of persons through legislation, such as the naturalization of all residents of an acquired territory or state, or through a treaty provision.[13]

ArtI.S8.C4.1.3 Post-1900 Naturalization Doctrine Generally

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

The Supreme Court repeatedly affirmed Congress's broad and exclusive power over naturalization into the twentieth century and the modern era. In *United States v. Ginsberg*, the Court in 1917 declared that "[a]n alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress," and that "[c]ourts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."[1] Similarly, in *Schneiderman v. United States*, the Court in 1943 recognized that "[t]he Constitution authorizes Congress 'to establish an uniform Rule of Naturalization,' and we may assume that naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit."[2] Decades later, in *Fedorenko v. United States*, the Court in 1981 maintained that "[t]his judicial

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[8] Treaty of Guadalupe Hidalgo, Mex.-U.S., art. 8, Feb. 2, 1848, 9 Stat. 922; *see Boyd*, 143 U.S at 162 ("Manifestly the nationality of the inhabitants of territory acquired by conquest or cession becomes that of the government under whose dominion they pass, subject to the right of election on their part to retain their former nationality by removal, or otherwise, as may be provided.").

[9] Hawaiian Organic Act, ch. 339, § 4, 31 Stat. 141, 141 (1900).

[10] Dawes Act of 1887, ch. 119, § 6, 24 Stat. 388, 390.

[11] Indian Citizenship Act, ch. 233, 43 Stat. 253 (1924).

[12] Jones Act, ch. 145, § 5, 39 Stat. 951, 953 (1917).

[13] *Boyd*, 143 U.S. at 170; Contzen v. United States, 179 U.S. 191, 193 (1900); U.S. Const. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . . ."); U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."). *See also Boyd*, 143 U.S. at 170 ("Congress having the power to deal with the people of the territories in view of the future states to be formed from them, there can be no doubt that in the admission of a state a collective naturalization may be effected in accordance with the intention of congress and the people applying for admission.").

[1] 243 U.S. 472, 474 (1917).

[2] 320 U.S. 118, 131 (1943).

insistence on strict compliance with the statutory conditions precedent to naturalization is simply an acknowledgment of the fact that Congress alone has the constitutional authority to prescribe rules for naturalization."[3] In its 2001 decision in *Nguyen v. INS*, the Court acknowledged "the wide deference afforded to Congress in the exercise of its immigration and naturalization power."[4]

Exercising this broad power, Congress continued to enact legislation governing the naturalization of aliens. Like early U.S. naturalization laws, these laws similarly required naturalization applicants to establish continuous residence in the United States and good moral character during specified periods, among other requirements.[5] The Immigration and Nationality Act (INA) of 1952, as amended, establishes the modern framework governing the naturalization of aliens in the United States.[6]

ArtI.S8.C4.1.4 Children

ArtI.S8.C4.1.4.1 Citizenship and Children Born Abroad

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Apart from the general requirements for the naturalization of aliens in the United States, and the collective naturalization of certain classes of aliens, Congress has also addressed the naturalization of children born abroad to U.S. citizen parents. The concept of naturalization of foreign-born children may be traced to early English laws that allowed children born abroad to English subjects to inherit the rights of their parents.[1] The Supreme Court has recognized that this concept of "nationality by descent" is rooted in statute rather than common law.[2] According to the Court, "[p]ersons not born in the United States acquire citizenship by birth only as provided by Acts of Congress."[3]

From the outset, Congress has conferred citizenship on children born outside the United States to U.S. citizen parents. Under the original Naturalization Act of 1790, children of U.S. citizens born outside the United States were considered U.S. citizens unless their fathers had never resided in the United States.[4] For the next two centuries, Congress continued to pass legislation providing for the naturalization of children born abroad to U.S. citizens if specified

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[3] 449 U.S. 490, 506–07 (1981) (quoting Johnson v. Eisentrager, 339 U.S. 763, 791 (1950) (Black, J., dissenting)).

[4] 533 U.S. 53, 72–73 (2001); *see also* Miller v. Albright, 523 U.S. 420, 455 (1998) ("Judicial power over immigration and naturalization is extremely limited.").

[5] *See e.g.,* Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596, 596–98; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 316–319, 66 Stat. 163, 242–45 (codified at 8 U.S.C. §§ 1427–30); Immigration Act of 1990, Pub. L. No. 101-649, § 402, 104 Stat. 4978, 5038.

[6] Immigration and Nationality Act of 1952, Pub. L. No. 82-414, §§ 316–319, 66 Stat. 163, 244 (codified at 8 U.S.C. §§ 1427–30, 1439–40). The INA also codified a number of provisions that allowed for the collective naturalization of certain classes of aliens in U.S. territories or outlying possessions if they met specified requirements. *See id.* §§ 302 (persons born in Puerto Rico) (codified at 8 U.S.C. § 1402), 303 (persons born in the Canal Zone or the Republic of Panama) (codified at 8 U.S.C. § 1403), 304 (persons born in Alaska) (codified at 8 U.S.C. § 1404), 305 (persons born in Hawai'i) (codified at 8 U.S.C. § 1405), 306 (persons born and living in the U.S. Virgin Islands) (codified at 8 U.S.C. § 1406), 307 (persons born and living in Guam) (8 U.S.C. § 1407).

[1] *See* United States v. Wong Kim Ark, 169 U.S. 649, 658, 668–72 (1898) (examining early English statutes).

[2] *Id.* at 670–71.

[3] Miller v. Albright, 523 U.S. 420, 424 (1998) (citing *Wong Kim Ark*, 169 U.S. at 703).

[4] *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103, 103–04 (repealed 1795).

requirements were met.[5] These requirements included, among others, establishing a parent's residence in the United States before the child's birth; and, with respect to some earlier laws, proving the child's continuous residence in the United States for specified periods if one of the parents was not a U.S. citizen.[6]

ArtI.S8.C4.1.4.2 Naturalization and Rogers v. Bellei

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In the 1971 case of *Rogers v. Bellei*, the Supreme Court considered a constitutional challenge to a requirement under the Immigration and Nationality Act (INA) that a child born abroad to a U.S. citizen parent and an alien parent maintain citizenship by residing in the United States continuously for five years between the ages of fourteen and twenty-eight.[1] The plaintiff, Aldo Mario Bellei, was born in Italy to an Italian father and a U.S. citizen mother in 1939.[2] Despite his birth abroad, Bellei acquired his U.S. citizenship under the Equal Nationality Act of 1934 (the law in effect at the time of his birth) because his U.S. citizen mother had established her residence in the United States before Bellei's birth.[3] Bellei, who lived most of his life in Italy and periodically visited the United States, eventually lost his U.S. citizenship in 1962 because he failed to satisfy the INA's continuous residence requirement.[4]

Bellei argued that the INA's residency condition violated his constitutional rights.[5] A federal district court agreed, ruling that the requirement was unconstitutional in light of the Supreme Court's decisions in *Schneider v. Rusk* and *Afroyim v. Rusk*.[6] In *Schneider*, the Supreme Court had held that a separate INA provision revoking the citizenship of a naturalized U.S. citizen who subsequently resided in her former country of nationality for three years violated due process under the Fifth Amendment because there was no similar restriction against foreign residence for native-born U.S. citizens.[7] In *Afroyim*, the Court invalidated an INA provision that terminated the citizenship of a naturalized U.S. citizen who voted in a foreign election, holding that, under the Fourteenth Amendment, a U.S. citizen has a constitutional right to remain a citizen unless he voluntarily relinquishes citizenship.[8]

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[5] *See e.g.,* Naturalization Act of 1795, ch. 20, § 3, 1 Stat. 414, 415 (repealed 1802); Naturalization Law of 1802, ch. 28, § 4, 2 Stat. 153, 155; Naturalization Act of 1855, ch 71, 10 Stat. 604; Act of Mar. 2, 1907, ch. 2534, § 6, 34 Stat. 1228, 1229; Equal Nationality Act, ch. 344, sec. 1, § 1993, 48 Stat. 797, 797 (1934); Nationality Act of 1940, ch. 876, § 201, 54 Stat. 1137, 1138–39; Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 301, 66 Stat. 163, 235–36 (codified at 8 U.S.C. § 1401); Act of Nov. 6, 1966, Pub. L. No. 89-770, 80 Stat. 1322; Act of Oct. 27, 1972, Pub. L. No. 92-584, §§ 1, 3, 86 Stat. 1289, 1289; Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 12, 100 Stat. 3655, 3657; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, sec. 102, § 322, 108 Stat. 4305, 4306–07. *See also Wong Kim Ark*, 169 U.S. at 672 (discussing early laws that conferred citizenship upon foreign-born children of U.S. citizens).

[6] *See e.g.,* Equal Nationality Act, sec. 1, § 1993; Nationality Act of 1940, § 201(c), (g); Immigration and Nationality Act § 301(a)(3), (a)(7), (b) (codified at 8 U.S.C. § 1401(c), (g)). The INA, as amended, contains the current governing provisions for the naturalization of children born abroad to U.S. citizens.

[1] 401 U.S. 815, 816 (1971).

[2] *Id.* at 817.

[3] *Id.* at 818, 826.

[4] *Id.* at 818–20.

[5] *Id.* at 820.

[6] *Id.*

[7] Schneider v. Rusk, 377 U.S. 163, 168–69 (1964).

[8] Afroyim v. Rusk, 387 U.S. 253, 267–68 (1967).

The Supreme Court held that applying the INA's residency condition to Bellei did not violate the Fourteenth Amendment's Citizenship Clause, which provides that "[a]ll persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."[9] The Court determined that the protections against involuntary expatriation under the Fourteenth Amendment applied only to those who were "born or naturalized in the United States."[10] The Court noted that Bellei, who had lived in Italy most of his life, was not born or naturalized in the United States, and had not been subject to the jurisdiction of the United States.[11] The Court distinguished these facts from *Schneider* and *Afroyim*, where the plaintiffs had naturalized and resided in the United States.[12] The Court declared that the Fourteenth Amendment "obviously did not apply to any acquisition of citizenship by being born abroad of an American parent."[13] Thus, the Court explained, it was "necessarily left" to Congress, under its power "to establish an uniform rule of naturalization," to determine when a person born abroad to U.S. citizen parents may become a citizen.[14]

Given "[t]he reach of congressional power in this area," and the Court's prior recognition of that power, the Supreme Court held that imposing the INA's residency condition on Bellei was not "irrational, arbitrary, or unfair."[15] The Court stated that "Congress has an appropriate concern with problems attendant on dual nationality," particularly when a child's non-U.S. citizen father chooses to raise his family in his home country rather than the United States.[16] In those circumstances, the Court noted, "[t]he child is reared, at best, in an atmosphere of divided loyalty."[17] In light of these concerns, the Court determined that Congress may require a person born abroad to establish a sufficient connection to the United States to enjoy the benefits of citizenship.[18] The Court concluded that it was reasonable for Congress to impose a conditional period of residence for aliens born abroad to U.S. citizen parents, and that the INA provision containing this requirement was constitutional.[19]

The Supreme Court's decision in *Bellei* underscores that Congress has broad power over naturalization, and that it may set forth the terms and conditions in which an alien may become a U.S. citizen as long as those terms are not "unreasonable, arbitrary, or unlawful."[20]

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[9] *Bellei*, 401 U.S. at 827; *see also* U.S. Const. amend. XIV, § 1.

[10] *Bellei*, 401 U.S. at 827.

[11] *Id.*

[12] *Id.*

[13] *Id.* at 830; *see also* United States v. Wong Kim Ark, 169 U.S. 649, 688 (1898) ("This sentence of the Fourteenth Amendment is declaratory of existing rights, and affirmative of existing law, as to each of the qualifications therein expressed,—'born in the United States,' and 'subject to the jurisdiction thereof'; in short, as to everything relating to the acquisition of citizenship by facts occurring within the limits of the United States. But it has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the constitution to establish a uniform rule of naturalization.").

[14] *Bellei*, 401 U.S. at 829–30.

[15] *Id.* at 828, 833.

[16] *Id.* at 831–32.

[17] *Id.* at 832.

[18] *Id.* at 832–33.

[19] *Id.* at 833–34, 836. Furthermore, observing that Congress already imposes a "condition precedent" requiring the U.S. citizen parent to have been in the United States for at least ten years prior to the birth of the child, the Court determined that "it does not make good constitutional sense, or comport with logic, to say, on the one hand, that Congress may impose a condition precedent, with no constitutional complication, and yet be powerless to impose precisely the same condition subsequent" on the child seeking citizenship. *Id.* at 834.

[20] *Id.* at 831; *see also* United States v. Wong Kim Ark, 169 U.S. 649, 702 (1898) ("Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law."). Ultimately, with respect to children

ArtI.S8.C4.1.4.3 Naturalization and Sessions v. Morales-Santana

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

More recently, in *Sessions v. Morales-Santana*, the Supreme Court in 2017 considered a legal challenge to Immigration and Nationality Act (INA) provisions that set forth the manner in which a child born abroad to a U.S. citizen parent and an alien parent could acquire citizenship.[1] These provisions generally required the U.S. citizen parent to have accrued at least five years of physical presence in the United States prior to the child's birth.[2] The INA extended this rule to children born out of wedlock to a U.S. citizen parent and an alien parent.[3] If a child was born abroad to an unwed U.S. citizen father and an alien mother, the father could transmit citizenship to the child if he had accrued five years of physical presence in the United States before the child's birth.[4] The INA, however, created an exception for unwed U.S. citizen mothers, who could transmit citizenship to the child so long as they had accrued just one year of physical presence in the United States.[5]

Luis Ramon Morales-Santana was born in the Dominican Republic to an unwed U.S. citizen father and an alien mother, but he could not acquire citizenship from his father because his father had not yet accrued five years of physical presence in the United States at the time of Morales-Santana's birth.[6] Noting that the INA allowed unwed U.S. citizen mothers to transmit citizenship so long as the mother had accrued one year of physical presence, Morales-Santana argued that the gender-based distinction between unwed U.S. citizen fathers and mothers violated his U.S. citizen father's right to equal protection.[7]

The Supreme Court agreed, ruling that the government failed to show an "exceedingly persuasive justification" for the gender-based distinction between unwed mothers and fathers.[8] According to the Court, the distinction was based on "overbroad generalizations" about the respective roles of husbands and wives.[9] Specifically, the Court observed, the statute rested on the long-held notion that, for unmarried parents, the mother is considered to be the child's natural and sole guardian because she is more qualified than the father to take responsibility for the child.[10] The Court rejected the government's contentions that the gender-based distinction ensured that children born abroad have sufficiently strong connections to the United States and reduced the risk of statelessness (i.e., lacking a country of citizenship) for foreign-born children.[11]

The Supreme Court thus held that the one-year physical presence provision for unwed U.S. citizen mothers was unconstitutional, and invited Congress to "settle on a uniform prescription

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born abroad to a U.S. citizen parent and an alien parent, Congress in 1978 removed the residence requirement for children that had been challenged in *Bellei*. Act of Oct. 10, 1978, Pub. L. No. 95-432, § 1, 92 Stat. 1046.

[1] No. 15-1191, slip op. at 1 (U.S. June 12, 2017).

[2] 8 U.S.C. § 1401(g).

[3] *Id.* § 1409(a).

[4] *Id.* §§ 1401(g), 1409(a).

[5] *Id.* § 1409(c).

[6] *Morales-Santana*, slip op. at 5–6.

[7] *Id.* at 6.

[8] *Id.* at 9, 22–23.

[9] *Id.* at 7, 11–12.

[10] *Id.* at 10–12.

[11] *Id.* at 15–23.

that neither favors nor disadvantages any person on the basis of gender."[12] In the meantime, the Court determined, the standard five-year physical presence requirement should apply to both unwed U.S. citizen mothers and fathers of children born abroad.[13]

The Supreme Court's *Morales-Santana* decision shows that, while Congress has broad power over naturalization, the terms and conditions that Congress sets forth for obtaining citizenship may be subject to constraints imposed elsewhere in the Constitution.

ArtI.S8.C4.1.5 Denaturalization

ArtI.S8.C4.1.5.1 Denaturalization (Revoking Citizenship) Generally

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

The concept of naturalization typically concerns the grant of citizenship to a person who has lived in the United States for a specified time period and meets certain other requirements; to groups of people in newly-acquired territories who acquire citizenship by statute or treaty; and to children born outside the United States who become U.S. citizens upon birth to a U.S. citizen parent, or who derive their citizenship upon their parents' naturalization in the United States. Congress has also addressed the concept of *denaturalization*, which refers to the revocation of citizenship from a naturalized U.S. citizen.

Congress's power over denaturalization derives from its power "[t]o establish an uniform rule of naturalization," and from its power "to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof."[1] In describing the theory of denaturalization, the Supreme Court has stated that "[a]n alien has no moral nor constitutional right to retain the privileges of citizenship if, by false evidence or the like, an imposition has been practiced upon the court, without which the certificate of

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[12] *Id.* at 27–28.

[13] *Id.* at 28. By contrast, in *Nguyen v. INS*, the Court in 2001 rejected an equal protection challenge to a separate INA provision that requires unwed U.S. citizen fathers of children born abroad to establish paternity in order to transmit their U.S citizenship to those children, without imposing similar requirements on unwed U.S. citizen mothers. *Nguyen v. INS*, 533 U.S. 53, 58–59 (2001). Unlike in *Morales-Santana*, the Court determined that the gender distinction served two important governmental objectives: (1) assuring that a biological parent-child relationship exists (a fact, the Court observed, that is already verifiable from the birth itself in the case of a mother), and (2) ensuring that the child and the U.S. citizen parent have an opportunity to develop a real, meaningful relationship (which, in the Court's view, "inheres in the very event of birth" in the case of a U.S. citizen mother). *Id.* at 62, 64–65. In *Morales-Santana*, the Court distinguished *Nguyen*, noting that, unlike the paternity requirement at issue in that case, "the physical-presence requirements now before us relate solely to the duration of the parent's prebirth residency in the United States, not the parent's filial tie to the child. As the Court of Appeals observed in this case, a man needs no more time in the United States than a woman 'in order to have assimilated citizenship-related values to transmit to [his] child.' And unlike *Nguyen*'s parental-acknowledgement requirement, § 1409(a)'s age-calibrated physical-presence requirements cannot fairly be described as 'minimal.'" *Morales-Santana*, slip op. at 16 (quoting *Nguyen*, 533 U.S. at 70; Morales-Santana v. Lynch, 804 F.3d 521, 531 (2d Cir. 2015), *rev'd in part sub. nom.* Sessions v. Morales-Santana, No. 15-1191 (U.S. June 12, 2017). The Supreme Court had also considered the constitutionality of the gender-based distinction at issue in *Nguyen* in Miller v. Albright. 523 U.S. 420 (1998). There, however, a majority of the Court did not decide that question. Although four justices rejected the challenge to the gender-based distinction, only two reached the merits, ruling that there was no equal protection violation. *Id.* at 445. In a separate opinion, two other justices concluded that the Court could not confer citizenship as a remedy even if the statute violated equal protection. *Id.* at 459. In another opinion, three justices argued there was an equal protection violation. *Id.* at 481–82. Additionally, in another separate opinion, two justices determined that the petitioner in the case lacked standing to raise the equal protection rights of his father. *Id.* at 452.

[1] Knauer v. United States, 328 U.S. 654, 673 (1946); *see also* U.S. Const. art. I, § 8, cl. 18 ("Necessary and Proper Clause").

citizenship could not and would not have been issued."[2] Thus, "there must be strict compliance with all the congressionally imposed prerequisites to the acquisition of citizenship. Failure to comply with any of these conditions renders the certificate of citizenship 'illegally procured,' and naturalization that is unlawfully procured can be set aside."[3]

The Naturalization Act of 1906 was the first law to provide for denaturalization.[4] It authorized judicial proceedings against a naturalized U.S. citizen "for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured."[5] The Act provided that if a naturalized U.S. citizen returned to his native country or went to another foreign country and established a permanent residence there within five years of being admitted as a U.S. citizen, such facts were "*prima facie* evidence" that he or she lacked the intention to become a permanent citizen of the United States at the time of filing the naturalization application.[6] Absent "countervailing evidence," the naturalized citizen's permanent residence in the foreign country would "be sufficient in the proper proceeding to authorize the cancelation of his certificate of citizenship as fraudulent, . . ."[7]

ArtI.S8.C4.1.5.2 Early Denaturalization Jurisprudence

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In a 1913 case, *Luria v. United States*, a naturalized U.S. citizen, George Luria, challenged a court order setting aside, as fraudulently and illegally procured, his certificate of citizenship under the denaturalization provisions of the 1906 Act.[1] The U.S. Government claimed that Luria, who was born in Russia, had established permanent residence in South Africa shortly after obtaining his certificate of citizenship in the United States and thus lacked the intention of becoming a permanent U.S. citizen when he naturalized.[2] Luria argued that, although the Naturalization Act of 1906 authorized the denaturalization of someone who established a permanent residence in a foreign country, this restriction should not have applied to him because he had naturalized under a prior law that did not require applicants to produce a declaration of their intention to reside in the United States.[3]

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[2] Johannessen v. United States, 225 U.S. 227, 241 (1912). *See also* United States v. Spohrer, 175 F. 440, 446 (D.N.J. 1910) ("That the government, especially when thereunto authorized by Congress, has the right to recall whatever of property has been taken from it by fraud, is, in my judgment, well settled, and, if that be true of property, then by analogy and with greater reason it would seem to be true where it has conferred a privilege in answer to the prayer of an ex parte petitioner. A recall of this character injures no one but the fraud doer, and his discomfiture is entitled to but slight consideration.").

[3] Fedorenko v. United States, 449 U.S. 490, 506 (1981).

[4] *See* Aram A. Gavoor & Daniel Miktus, *Snap: How the Moral Elasticity of the Denaturalization Statute Goes too Far*, 23 Wm. & Mary Bill Rts. J. 637, 648 (2015) ("As early as 1844, members of the United States Senate inquired into how they could legislate a legal method for revoking citizenship. Over time, the President and others directed Congress's attention to the need for a legislative effort to create formalized denaturalization proceedings. The effort was intended to create a uniform system of naturalization and provide 'uniform fairness' to individuals seeking to naturalize.").

[5] Naturalization Act of 1906, ch. 3592, § 15, 34 Stat. 596, 601.

[6] *Id.*

[7] *Id.*

[1] 231 U.S. 9, 17 (1913).

[2] *Id.* at 17–18.

[3] *Id.* at 21–22.

The Supreme Court disagreed, explaining that, before 1906, naturalization laws still imposed certain duties and obligations on the applicant, such as a declaration of intention to become a U.S. citizen and renounce any allegiance to a foreign government, and proof that the applicant had resided in the United States for at least five years at the time of the application.[4] The Court determined that these prior laws "clearly implied" that they were not intended to apply to someone "whose purpose was to reside permanently in a foreign country, and to use his naturalization as a shield against the imposition of duties there, while by his absence he was avoiding his duties here."[5]

Luria also challenged the 1906 Act's denaturalization provision itself, arguing that it violated his right to due process by characterizing his permanent residence in a foreign country within five years of becoming a U.S. citizen as "*prima facie* evidence" of a lack of intention to become a permanent U.S. citizen.[6] The Court rejected Luria's argument, reasoning that the 1906 Act "goes no farther than to establish a rebuttable presumption which the possessor of the certificate is free to overcome" with evidence of his intention to reside permanently in the United States.[7] Recognizing a legislature's power to craft rules of evidence in civil and criminal cases, the Court determined that the rebuttable presumption created by the 1906 Act was reasonable and did not violate Luria's right to due process.[8]

The Court also rejected Luria's contention that the 1906 Act violated his right to equal protection by discriminating between the rights of naturalized U.S. citizens, who were subject to the foreign residence restriction, and native-born U.S. citizens, who were not subject to such restriction.[9] The Court explained that the Act "does not in anywise affect or disturb rights acquired through lawful naturalization, but only provides for the orderly cancellation, after full notice and hearing, of certificates of naturalization which have been procured fraudulently or illegally. It does not make any act fraudulent or illegal that was honest and legal when done, imposes no penalties, and at most provides for the annulment, by appropriate judicial proceedings, of merely colorable letters of citizenship, to which their possessors never were lawfully entitled."[10] The Court thus upheld Luria's order of denaturalization.[11]

In the following decades, federal immigration laws concerning denaturalization remained largely unchanged from the 1906 Act.[12] In 1952, however, the INA established a new framework governing denaturalization. The INA authorized the "revoking and setting aside"

[4] *Id.*

[5] *Id.* at 23–24.

[6] *Id.* at 25.

[7] *Id.*

[8] *Id.* at 24–27.

[9] *Id.*

[10] *Id.* at 24 (citing Johannessen v. United States, 225 U.S. 227 (1912)).

[11] *See also Johannessen*, 225 U.S. at 241–43 (upholding denaturalization of U.S. citizen who provided perjured testimony from witnesses that he had resided in the United States for at least five years); United States v. Ginsberg, 243 U.S. 472, 475 (1917) (upholding denaturalization of U.S. citizen who obtained citizenship based on "a manifest mistake by the judge" who adjudicated his petition); United States v. Ness, 245 U.S. 319, 327 (1917) (reversing dismissal of action to set aside U.S. citizen's certificate of naturalization on the grounds that he "illegally procured" naturalization without providing certificate of arrival in the United States).

[12] *See e.g.,* Nationality Act of 1940, ch. 876, § 338(a), (b), 54 Stat. 1137, 1158–60 (authorizing proceedings against a naturalized citizen for "revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured," and creating presumption that naturalized citizen's permanent residence in foreign country within five years after naturalization established "a lack of intention on the part of such person to become a permanent citizen of the United States at the time of filing such person's petition"). The Nationality Act of 1940, however, also provided that the revocation of a person's citizenship would not result in the loss of citizenship to his wife or minor child unless "the revocation and setting aside of the order [admitting the person to citizenship] was the result of actual fraud." *Id.* § 338(d).

of a naturalization certificate that had been "procured by concealment of a material fact or by willful misrepresentation."[13] The INA also listed certain categories of naturalized citizens who would be considered to have obtained citizenship through "concealment of a material fact or by willful misrepresentation," including a person who returned to his or her native country or any other foreign country within five years of naturalization, and established permanent residence in that country.[14] The INA further provided that any person who claimed U.S. citizenship through the naturalization of a parent or spouse would be deemed to lose citizenship if there was a revocation of the parent's or spouse's citizenship because "the order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation."[15]

ArtI.S8.C4.1.5.3 Limits to Congress's Denaturalization Power

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Despite Congress's broad power over denaturalization, the Supreme Court has recognized certain limitations to this power, particularly with respect to the evidentiary requirements to sustain a person's denaturalization such as the burden of proving that citizenship was unlawfully obtained, and the standard that governs whether a person seeking citizenship concealed a material fact relating to his or her eligibility for citizenship.[1] In imposing these limitations, the Court has recognized the "value and importance" of citizenship, and declared that the consequences of denaturalization are "more serious than a taking of one's property, or the imposition of a fine or other penalty."[2] Thus, according to the Court, "such a right once conferred should not be taken away without the clearest sort of justification and proof."[3]

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[13] *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 340(a), 66 Stat. 163, 260 (codified at 8 U.S.C. § 1451(a)). This provision was later amended to allow denaturalization proceedings where the order admitting the person to citizenship and the naturalization certificate "were *illegally procured or* were procured by concealment of a material fact or by willful misrepresentation." Act of Sept. 26, 1961, Pub. L. No. 87-301, § 18(a), 75 Stat. 650, 656 (emphasis added).

[14] Immigration and Nationality Act § 340(a) (persons who within ten years following naturalization refused to testify as witnesses in any proceeding before a congressional committee concerning "subversive activities," and had been convicted of contempt for such refusal), 340(c) (persons who within five years following naturalization became members of or affiliated with an organization, and such membership or affiliation would have barred them from naturalization), 340(d) (persons establishing a permanent residence in a foreign country) (codified at 8 U.S.C. § 1451(a), (c)). Congress eventually repealed the permanent foreign residence provision. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 104(b), 108 Stat. 4305, 4308.

[15] Immigration and Nationality Act § 340(f) (codified at 8 U.S.C. § 1451(d)). The INA provided, however, that the revocation of a person's citizenship under the Nationality Act of 1940 would not result in the loss of citizenship to that person's wife or minor child unless "the revocation and setting aside of the order [admitting the person to citizenship] was the result of actual fraud." *Id.* § 340(e).

[1] Kungys v. United States, 485 U.S. 759, 772 (1988); Chaunt v. United States, 364 U.S. 350, 355 (1960); Schneiderman v. United States, 320 U.S. 118, 122–25 (1943). For more discussion about the Supreme Court's jurisprudence concerning the evidentiary requirements and standard for proving unlawful procurement of citizenship, see ArtI.S8.C4.1.5.4 Unlawful Procurement of Citizenship and ArtI.S8.C4.1.5.5 Concealing Material Facts When Procuring Citizenship.

[2] *Schneiderman*, 320 U.S. at 122; *see also Chaunt*, 364 U.S. at 353 ("[I]n view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside . . . ."); Klapprott v. United States, 335 U.S. 601, 611 (1949) ("Denaturalization consequences may be more grave than consequences that flow from conviction for crimes."); Knauer v. United States, 328 U.S. 654, 659 (1946) ("For denaturalization, like deportation, may result in the loss 'of all that makes life worth living.'") (quoting Ng Fung Ho v. White, 259 U.S. 276, 284 (1922)).

[3] *Schneiderman*, 320 U.S. at 122.

ArtI.S8.C4.1.5.4 Unlawful Procurement of Citizenship

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In *Schneiderman v. United States*, the Supreme Court in 1943 considered a legal challenge by a U.S. citizen, William Schneiderman, to his denaturalization under the 1906 Act based on the charge that he had "illegally procured" his citizenship by failing to disclose his membership in the Communist Party.[1] The government had argued that Schneiderman's membership in the Communist Party disqualified him from naturalization because he was not "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."[2]

The Supreme Court held that, in a denaturalization proceeding, "the facts and the law should be construed as far as is reasonably possible in favor of the citizen," and that the government bears the burden of presenting "'clear, unequivocal, and convincing'" evidence that citizenship was unlawfully procured, rather than "'a bare preponderance of evidence which leaves the issue in doubt.'"[3] Applying this standard, the Court determined that Congress, in creating the "attachment to the Constitution" requirement for naturalization, had intended to deny naturalization to those who advocated the use of force or violence against the government, but not to those who simply subscribed to certain principles or beliefs, however unpopular or "distasteful."[4] The Court ruled that Schneiderman's membership in the Communist Party failed to clearly establish that he was not "attached to the principles of the Constitution" because there was no evidence that he advocated the use of violence against the government.[5]

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[1] 320 U.S. 118, 121–22 (1943).

[2] *Id.* at 129; *see* Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596, 598 (requiring naturalization applicant to show that "he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.").

[3] *Schneiderman*, 320 U.S. at 122–23, 125 (quoting United States v. Maxwell Land-Grant Co., 121 U.S. 325, 381 (1887)); *see also* Fedorenko v. United States, 449 U.S. 490, 505–06 (1981) ("Any less exacting standard would be inconsistent with the importance of the right that is at stake in a denaturalization proceeding.").

[4] *Schneiderman*, 320 U.S. at 136, 157–59. While recognizing that "naturalization is a privilege, to be given or withheld on such conditions as Congress sees fit," the Court warned that "we certainly will not presume in construing the naturalization and denaturalization acts that Congress meant to circumscribe liberty of political thought by general phrases in those statutes." *Id.* at 131–32. In particular, the Court explained that "[t]here is a material difference between agitation and exhortation calling for present violent action which creates a clear and present danger of public discord or other substantive evil, and mere doctrineal justification or prediction of the use of force under hypothetical conditions at some indefinite future time-prediction that is not calculated or intended to be presently acted upon, thus leaving opportunity for general discussion and the calm processes of thought and reason." *Id.* at 157–58.

[5] *Id.* at 134–36, 142, 146, 160–61. The Court held, moreover, that where there are two possible interpretations of a political organization's platform, one of which may preclude naturalization, a court may not simply impute the "reprehensible interpretation" to a member of the organization without further evidence. *Id.* at 158–59. *See also* Baumgartner v. United States, 322 U.S. 665, 677 (1944) (ruling that statements made by a naturalized U.S. citizen showing admiration for Nazi government did not clearly show that he lacked allegiance to the United States and had thus procured his citizenship through fraud, because such statements were made after he had naturalized and were nothing more than "the expression of silly or even sinister-sounding views which native-born citizens utter with impunity").

ArtI.S8.C4.1.5.5 Concealing Material Facts When Procuring Citizenship

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Apart from considering the government's burden of proof in denaturalization cases, the Supreme Court has also considered, under the Immigration and Nationality Act's (INA) denaturalization provision, the standard for assessing whether facts concealed by a naturalization applicant are "material."[1] In a 1960 case, *Chaunt v. United States*, a Hungarian national, Peter Chaunt, challenged the government's claim that he had fraudulently procured his naturalization by concealing and misrepresenting his record of arrests in the United States, and that his arrest record was a "material" fact under the denaturalization statute.[2] The Court suggested that, to meet the materiality threshold, the government had to show that either (1) the omitted facts "would have warranted the denial of citizenship," or (2) their disclosure "might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship."[3]

The Court determined that Chaunt's arrests, which related to minor offenses (e.g., distributing handbills in violation of a city ordinance) occurring more than five years before his naturalization application, did not affect his qualifications for citizenship.[4] The Court also rejected the government's contention that the disclosure of the arrests would have led to an investigation revealing Chaunt's communist affiliations, warranting the denial of citizenship on the ground that he lacked the requisite attachment to the Constitution.[5] The Court noted that Chaunt had disclosed in his naturalization application that he was a member of the International Worker's Order (reportedly linked to the Communist Party), and that it was thus questionable whether the disclosure of his arrest record would have led to an investigation of any communist affiliations.[6] The Court thus ruled that the government failed to prove by "clear, unequivocal, and convincing" evidence that Chaunt procured his citizenship by "concealment of a material fact."[7]

However, in *Fedorenko v. United States*, the Court in 1981 held that the failure of a Ukrainian national, Feodor Fedorenko, to disclose in his naturalization application that he had served as a concentration camp guard following his capture by German forces during World War II warranted his denaturalization.[8] The Court reasoned that Fedorenko's misrepresentations about his wartime activities were material because, had those facts been known to immigration officials, he would have been ineligible for initial admission into the United States.[9] Consequently, the Court determined, because Fedorenko obtained his

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[1] *See* 8 U.S.C. § 1451(a) (authorizing denaturalization if "order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation").

[2] 364 U.S. 350, 351 (1960).

[3] *Id.* at 355.

[4] *Id.* at 353–54.

[5] *Id.* at 354–55.

[6] *Id.*

[7] *Id.* at 350, 355.

[8] 449 U.S. 490, 518 (1981).

[9] *Id.* at 512–14.

immigration visa through fraud, he could not establish that he was *lawfully* admitted to the United States for permanent residence, as required for naturalization under the INA, and thus, his citizenship was "illegally procured."[10]

Further, the Court rejected Fedorenko's claim that a district court could, as an exercise of discretion, decline to enter a judgment of denaturalization against a person who procured his citizenship unlawfully.[11] The Court stated that "once a district court determines that the Government has met its burden of proving that a naturalized citizen obtained citizenship illegally or by willful misrepresentation, it has no discretion to excuse the conduct."[12]

Eventually, in its 1988 decision in *Kungys v. United States*, the Supreme Court clarified the test for determining whether a concealment or misrepresentation is "material" under the INA's denaturalization provision.[13] In that case, the Court considered whether willful misrepresentations by a naturalized German national, Juozas Kungys, about the date and place of his birth were material for purposes of his denaturalization proceeding.[14] The Court rejected the notion that a misrepresentation or concealment is material if it would more likely than not have produced an erroneous decision, or would more likely than not have triggered an investigation, as the Court had suggested in *Chaunt*.[15] Instead, the Court held that materiality is established if the government presents "clear, unequivocal, and convincing" evidence that the misrepresentation or concealment "had a natural tendency to produce the conclusion that the applicant was qualified" for citizenship.[16]

Applying this standard, the Court held that Kungys's misrepresentation of the date and place of his birth was not material for purposes of his denaturalization proceeding because there was no indication that it had the natural tendency to influence the immigration official's decision whether to confer citizenship.[17] The Court determined there was no suggestion that Kungys's date and place of birth were "themselves relevant to his qualifications for citizenship," or that knowledge of his true date and place of birth would "predictably have disclosed other facts relevant to his qualifications."[18]

The Court also noted that, apart from showing a material misrepresentation or concealment, the government in a denaturalization proceeding must show that the naturalized citizen *procured* citizenship as a result of the misrepresentation or concealment.[19] The Court held that proof of a misrepresentation's materiality established a presumption that the naturalized citizen procured citizenship based on the misrepresentation, but that the

[10] *Id.* at 514–15, 518; *see* 8 U.S.C. § 1427(a) (requiring applicant to show five years of continuous residence in the United States after being lawfully admitted for permanent residence).

[11] *Fedorenko*, 449 U.S. at 516–17.

[12] *Id.* at 517.

[13] 485 U.S. 759 (1988).

[14] *Id.* at 766–67.

[15] *Id.* at 771. In *Kungys*, the Court explained that *Chaunt* had not provided "a conclusive judicial test" for determining whether a misrepresentation or concealment was "material," and noted that subsequent judicial rulings have struggled to uniformly interpret the materiality standard under *Chaunt*. *Id.* at 768–69.

[16] *Id.* at 772. The Court based this standard on the "uniform understanding" of "materiality" that had been adopted by courts in construing federal statutes criminalizing false statements to public officials. *Id.* at 770.

[17] *Id.* at 775–76.

[18] *Id.* at 774.

[19] *Id.* at 767; *see* 8 U.S.C. § 1451(a) (authorizing government to institute proceedings against a naturalized citizen on the ground that his order of citizenship and certificate of naturalization "were illegally procured or were procured by concealment of a material fact or by willful misrepresentation").

presumption could be rebutted "by showing, through a preponderance of the evidence, that the statutory requirement as to which the misrepresentation *had a natural tendency* to produce a favorable decision was in fact met."[20]

ArtI.S8.C4.1.6 Expatriation

ArtI.S8.C4.1.6.1 Expatriation (Termination of Citizenship) Generally

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Besides revoking citizenship fraudulently or unlawfully obtained through denaturalization, Congress may have the power to terminate citizenship as a result of an individual's voluntary actions abroad that evince an intent to relinquish citizenship.[1] Unlike its power over denaturalization, Congress's power over expatriation does not derive from any specific enumerated power in the Constitution.[2] But informed by the notion that an individual has the inherent right of expatriation, Congress has established a statutory framework that provides for the expatriation of U.S. citizens in certain specified circumstances.[3]

ArtI.S8.C4.1.6.2 Development of Expatriation Doctrine

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Under British common law, the "doctrine of perpetual allegiance" prescribed that an individual retained allegiance to his country of nationality, and could not lose that "bond of allegiance" through his own actions or the acts of a foreign nation.[1] But during the early years of the United States, there was some disagreement over whether a U.S. citizen had the right to

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[20] *Kungys*, 485 U.S. at 777. The Court also considered whether false testimony has a materiality requirement for purposes of establishing a lack of good moral character for naturalization. *Id.* at 779; *see* 8 U.S.C. §§ 1101(f)(6) (providing that one who has given false testimony for the purpose of obtaining immigration benefits does not have good moral character); 1427(a) (requiring naturalization applicant to show that he "has been and still is a person of good moral character" during the requisite periods of continuous residence). Citing the INA provision that enumerates the types of conduct that show a lack of good moral character, the Court observed that, with respect to false testimony, the statutory language "does not distinguish between material and immaterial misrepresentations," and concluded that there was no materiality requirement for false testimony. *Kungys*, 485 U.S. at 779–80.

[1] *See* Perez v. Brownell, 356 U.S. 44, 61 (1958), *overruled on other grounds by* Afroyim v. Rusk, 387 U.S. 253 (1967) (describing Congress's power "to enact legislation depriving individuals of their American citizenship").

[2] *See Afroyim*, 387 U.S. at 257 ("The Constitution of course, grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power."); *Perez*, 356 U.S. at 66 (Warren, C.J., dissenting) ("The Constitution also provides that citizenship can be bestowed under a 'uniform Rule of Naturalization, but there is no corresponding provision authorizing divestment. Of course, naturalization unlawfully procured can be set aside. But apart from this circumstance, the status of the naturalized citizen is secure.").

[3] *Afroyim*, 387 U.S. at 258 ("By 1818, however, almost no one doubted the existence of the right of voluntary expatriation, but several judicial decisions had indicated that the right could not be exercised by the citizen without the consent of the Federal Government in the form of enabling legislation."); *Perez*, 356 U.S. at 66 (Warren, C.J., dissenting) ("There is no question that citizenship may be voluntarily relinquished.").

[1] *See* Jonathan David Shaub, *Expatriation Restored*, 55 Harv. J. on Legis. 363, 370–71 (2018) ("Under British law at the time of the Declaration of Independence, the bond of allegiance between a sovereign and its subject was an immutable, permanent bond established by the law of nature.").

renounce citizenship.[2] Some argued that the doctrine of perpetual allegiance restricted an individual's ability to relinquish citizenship, while others contended that there was an inherent right of expatriation.[3] In one early case, *Talbot v. Jansen*, the Supreme Court in 1795 determined that a U.S. citizen's temporary absence from the United States could not be construed as an expatriation.[4] The U.S. citizen had captured a Dutch vessel in violation of piracy laws, and, when arrested upon returning to the United States, he claimed that he had expatriated himself by swearing allegiance to France.[5] While concluding that the individual "was, and still is, a citizen of the United States," the Court noted that "[a] statute of the United States, relative to expatriation is much wanted."[6]

Eventually Congress in 1868 passed a law declaring that "the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness."[7] The law prohibited government action that denied or restricted the right of expatriation, and provided protections to foreign nationals who had relinquished their native citizenship to become U.S. citizens, and who were detained by their former governments.[8] While the 1868 Act recognized an "inherent right" of expatriation, the law did not specify the circumstances in which an individual would be considered to have expatriated himself, or address the government's authority to remove citizenship on the grounds of expatriation.[9]

After the 1868 expatriation act, the United States entered into treaties with other countries that sought to resolve certain disagreements about citizenship.[10] While these treaties generally clarified that persons naturalized in a country would be considered citizens of that country, they also contemplated circumstances in which citizenship could be lost based on the commission of certain acts.[11] Based on these treaties, the State Department began issuing ad hoc rulings that determined, in individual cases, whether U.S. citizens had lost their citizenship following the commission of certain acts abroad.[12] These administrative rulings

[2] *Id.* at 372 ("The question of expatriation was of fundamental importance during the early days of the United States, and the debate largely fell along the familiar divide between the Federalists and Republicans, exemplified by the distinctly different views of Thomas Jefferson and Alexander Hamilton."); *see also* Afroyim v. Rusk, 387 U.S. 253, 257 (1967) ("And even before the adoption of the Fourteenth Amendment, views were expressed in Congress and by this Court that under the Constitution the Government was granted no power, even under its express power to pass a uniform rule of naturalization, to determine what conduct should and should not result in the loss of citizenship.").

[3] *See* Alan G. James, *Expatriation in the United States: Precept and Practice Today and Yesterday*, 27 San Diego L. Rev. 853, 862 (1990) ("Secretaries of State Jefferson, Marshall, Madison, and Monroe vigorously defended the view that expatriation is a natural right."); Shaub, *supra* note 1, at 372 ("The Federalists, by contrast, continued to espouse a vestige of the doctrine of perpetual allegiance, in which the sovereign retained authority over the relinquishment of citizenship.").

[4] 3 U.S. (3 Dall.) 133, 153–54 (1795).

[5] *Id.* at 152–54.

[6] *Id.* at 153–54; *see also* Shanks v. Dupont, 28 U.S. 242, 246 (1830) ("The general doctrine is, that no persons can by any act of their own, without the consent of the government, put off their allegiance, and become aliens."), *superseded by statute*, Act of July 27, 1868, ch. 249, 15 Stat. 223.

[7] Act of July 27, 1868, ch. 249, 15 Stat. 223.

[8] *Id.*

[9] *Id.*; *see also* Afroyim v. Rusk, 387 U.S. 253, 265–66 (1967) ("The Act, as finally passed, merely recognized the 'right of expatriation' as an inherent right of all people.").

[10] *See* James, *supra* note 3, at 866 ("Typically, these treaties provided that each of the signatories would acknowledge as a citizen of the other such of its citizens who became naturalized by the other. The treaties thus removed a serious irritant from the relations of the United States with the states with which they were concluded.").

[11] *See* Perez v. Brownell, 356 U.S. 44, 48 (1958) ("This series of treaties initiated this country's policy of automatic divestment of citizenship for specified conduct affecting our foreign relations."), *overruled by* Afroyim v. Rusk, 387 U.S. 253 (1967) .

[12] *See id.* at 49 ("On the basis, presumably, of the Act of 1868 and such treaties as were in force, it was the practice of the Department of State during the last third of the nineteenth century to make rulings as to forfeiture of United

laid the groundwork for legislation that would authorize the government to strip citizenship from U.S. citizens who were considered to have expatriated themselves abroad.[13]

ArtI.S8.C4.1.6.3 Expatriation Legislation

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In 1907, Congress passed a law on the expatriation of U.S. citizens.[1] The legislation provided that a U.S. citizen was "deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state."[2] The law also provided that, if a naturalized U.S citizen resided for two years in his or her native country, or for five years in any other foreign country, there was a rebuttable presumption that the U.S. citizen "ceased to be an American citizen."[3] Further, the law provided that "any American woman who marries a foreigner shall take the nationality of her husband," but allowed the woman to resume her U.S. citizenship upon the termination of the marriage if certain requirements were met.[4]

In 1940, Congress passed a more comprehensive nationality law that enumerated various circumstances in which a U.S. citizen (whether by birth or naturalization) would lose citizenship.[5] These circumstances (subject to certain exceptions) included obtaining citizenship in a foreign country; taking an oath of allegiance to a foreign country; serving in the armed forces of a foreign country; accepting certain foreign employment; voting in a political election in a foreign country; making a formal renunciation of nationality in a foreign country; conviction by military court martial of desertion during a time of war; and committing an act of treason against (or seeking to overthrow) the United States.[6] The statute also clarified when a naturalized U.S. citizen would lose citizenship by residing in his or her native country or another foreign country.[7]

States citizenship by individuals who performed various acts abroad."); Shaub, *supra* note 1, at 384 ("Recognizing that the United States had no authority to determine whether a foreign nation, under its law, considered a particular individual its citizen or subject, the United States entered into a series of international treaties and began to formulate a body of Executive Branch common law to implement them. The State Department was responsible for receiving and responding to requests for assistance from U.S. citizens abroad, and, in administering this responsibility, it applied the Executive Branch common law.").

[13] *See Perez*, 356 U.S. at 49 ("[I]t was recognized in the Executive Branch that the [State] Department had no specific legislative authority for nullifying citizenship, and several of the Presidents urged Congress to define the acts by which citizens should be held to have expatriated themselves."); Shaub, *supra* note 1, at 384 ("Ultimately, the rules and procedures of the Executive Branch common law were codified.").

[1] *See* Act of Mar. 2, 1907, ch. 2534, § 2, 34 Stat. 1228, 1228.

[2] *Id.* However, no U.S. citizen could expatriate himself when the United States was in a state of war. *Id.*

[3] *Id.* The presumption could be "overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States." *Id.*

[4] *Id.* § 3. Conversely, a foreign-born woman who obtained U.S. citizenship through marriage to a U.S. citizen was deemed to have retained her citizenship after termination of that marriage if she continued to reside in the United States (unless she formally renounced her U.S. citizenship). *Id.* § 4. If the woman resided abroad, she could retain her U.S. citizenship by registering abroad with a U.S. consul within one year after termination of the marriage. *Id.*

[5] *See* Nationality Act of 1940, ch. 876, § 401, 54 Stat. 1137, 1168–69.

[6] *Id.* § 401.

[7] *Id.* §§ 404, 405, 406. The law did not provide for the expatriation of U.S. citizen women who married non-U.S. citizens, as the 1907 law had required.

ArtI.S8.C4.1.6.3
Expatriation Legislation

Through enactment of the INA in 1952, Congress expanded the range of conduct that would trigger a loss of U.S. citizenship.[8] The INA added, as grounds for expatriation, the acts of making a formal renunciation of nationality in the United States during a time of war, and leaving or remaining outside the United States during a time of war or national emergency to avoid military service.[9] The INA also provided that a naturalized U.S. citizen would lose nationality by "having a continuous residence for three years in the territory of a foreign state of which he was formerly a national or in which the place of his birth is situated," or by "having a continuous residence for five years in any other foreign state or states."[10] The INA did not contain a similar foreign residence restriction for native-born U.S. citizens.

ArtI.S8.C4.1.6.4 Judicial Recognition of Congress's Expatriation Power

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In a number of cases, the Supreme Court considered Congress's authority to remove citizenship based on the performance of specified acts. Initially, the Court determined that Congress had broad authority to remove citizenship that was rooted in its power to regulate foreign affairs. But the Court later imposed limitations on Congress's authority, concluding that Congress can only remove citizenship from those who voluntarily commit specified acts with the intention of relinquishing their citizenship.

For example, in *Mackenzie v. Hare*, the Court in 1915 considered a challenge to the 1907 Act's provision that terminated citizenship of U.S. citizen women who married foreign nationals.[1] The Court rejected the plaintiff's contention that expatriation can be shown only by an act demonstrating a voluntary renunciation of citizenship.[2] Instead, the Court upheld the statute as a lawful exercise of Congress's authority to regulate foreign affairs and determine the conditions of nationality.[3]

Several decades later, in *Perez v. Brownell*, the Court in 1958 addressed a constitutional challenge to the INA provision that removed citizenship from a U.S. citizen who voted in a foreign political election.[4] The Court declared that "[a]lthough there is in the Constitution no

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[8] *See* Immigration and Nationality Act of 1952, Pub. L. No. 82-414, § 349(a), 66 Stat. 163, 267 (codified as amended at 8 U.S.C. § 1481(a)). The INA stated that that anyone who committed or performed one of the enumerated acts was "conclusively presumed" to have done the act voluntarily if that person was "a national of the state in which the act was performed and had been physically present in such state for a period or periods totaling ten years or more immediately prior to such act." *Id.* § 349(b).

[9] *Id.* § 349(a) (codified as amended at 8 U.S.C. § 1481(a)). The INA provided that no U.S. citizen could expatriate himself while *in the United States* (except if he or she made a formal renunciation of nationality in the United States during a time of war, was convicted by military court martial of desertion during a time of war, or committed an act of treason against the United States), but that expatriation would occur as a result of the performance of one of the enumerated acts within the United States when the individual subsequently resided outside the United States. *Id.* § 351(a) (codified at 8 U.S.C. § 1483(a)).

[10] *Id.* § 352(a), *repealed by* Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046. The INA provided for some exceptions to this restriction, such as for those who maintained their residence abroad in the employment of the U.S. Government, those whose residence abroad occurred at least twenty-five years after their naturalization and after they reached the age of sixty, those who were prevented from returning to the United States for health reasons, those who resided abroad for educational purposes, and certain war veterans and their immediate families. *Id.* §§ 353, 354, *repealed by* Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046.

[1] 239 U.S. 299, 306–07 (1915).

[2] *Id.* at 310–12.

[3] *Id.* at 311–12.

[4] 356 U.S. 44, 47 (1958), *overruled by* Afroyim v. Rusk, 387 U.S. 253 (1967).

specific grant to Congress of power to enact legislation for the effective regulation of foreign affairs, there can be no doubt of the existence of this power in the law-making organ of the Nation."[5] The Court determined that Congress's power to regulate foreign affairs authorized it to make voting in foreign elections an act of expatriation.[6] Additionally, while the Court recognized that "Congress can attach loss of citizenship only as a consequence of conduct engaged in voluntarily," the Court rejected the notion that an individual must *intend* to relinquish citizenship.[7]

ArtI.S8.C4.1.6.5 Judicial Limits on Congress's Expatriation Power

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In a series of cases decided in the 1950s and 1960s, the Supreme Court established some constraints upon Congress's expatriation power.[1] As for the standard of proof to establish expatriation, the Supreme Court in the 1958 case of *Nishikawa v. Dulles* held that the standard adopted in *Schneiderman v. United States* for denaturalization applied to expatriation cases.[2] Under this standard, the government has the burden of proving by "clear, convincing and unequivocal evidence" that a U.S. citizen voluntarily performed one of the statutorily enumerated acts that results in loss of citizenship.[3] Applying this standard, the Court held that the government failed to prove that a dual U.S.-Japanese citizen, Nishikawa, lost his U.S. citizenship by serving in the Japanese military during World War II because, according to his testimony, he had been drafted into the Japanese military under the country's penal conscription law while visiting Japan.[4]

Apart from setting the standard of proof for expatriation, the Supreme Court has struck down certain expatriation provisions as unconstitutional. In *Trop v. Dulles*, decided the same day as *Nishikawa*, the Court held that the statutory provision revoking citizenship of U.S. citizens convicted by general court martial of desertion was unconstitutional because it exceeded Congress's war power.[5] The Court reasoned that "[d]esertion in wartime, though it

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[5] *Perez*, 356 U.S. at 57.

[6] *Id.* at 59–62. The Court reasoned that "Congress has interpreted this conduct, not irrationally, as importing not only something less than complete and unswerving allegiance to the United States but also elements of an allegiance to another country in some measure, at least, inconsistent with American citizenship." *Id.* at 61.

[7] *Id.* at 61–62. The Court also briefly considered the Citizenship Clause of Fourteenth Amendment, which instructs that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." *Id.* at 58 n. 3; *see also* U.S. CONST. amend. XIV, § 1, cl. 1. The Court determined that "there is nothing in the terms, the context, the history or the manifest purpose of the Fourteenth Amendment to warrant drawing from it a restriction upon the power otherwise possessed by Congress to withdraw citizenship." *Perez*, 356 U.S. at 58 n.3. For more information about the Citizenship Clause, see Amdt14.S1.1.2 Citizenship Clause Doctrine.

[1] *See* Afroyim v. Rusk, 387 U.S. 253, 255 (1967) ("[I]n the other cases decided with and since *Perez*, this Court has consistently invalidated on a case-by-case basis various statutory sections providing for involuntary expatriation.").

[2] Nishikawa v. Dulles, 356 U.S. 129, 134–35 (1958), *superseded by statute*, 8 U.S.C. § 1481(b).

[3] *Id.* at 135–37, 137; *see also* Schneiderman v. United States, 320 U.S. 118, 122 (1943) (declaring that the right of citizenship "should not be taken away without the clearest sort of justification and proof"). The Court reasoned that, given the "drastic" consequences of depriving someone of his or her citizenship, the government should have the burden of proving voluntariness, which the Court described as "the essential ingredient of expatriation." *Nishikawa*, 356 U.S. at 134–35, 137. However, if voluntariness is not at issue, "the Government makes its case simply by proving the objective expatriating act." *Id.* at 136.

[4] *Nishikawa*, 356 U.S. at 136–37.

[5] 356 U.S. 86, 92–93 (1958).

may merit the ultimate penalty, does not necessarily signify allegiance to a foreign state."[6] The Court declared that "[c]itizenship is not a license that expires upon misbehavior," and concluded that "[a]s long as a person does not voluntarily renounce or abandon his citizenship, . . . his fundamental right of citizenship is secure."[7]

In the alternative, the Court held that revoking citizenship as punishment for a crime violates the Eighth Amendment's prohibition against "cruel and unusual" punishment because it causes "the total destruction of the individual's status in organized society."[8] For instance, the Court explained, the individual would become stateless, "a condition deplored in the international community of democracies," and subject only to the limited and potentially temporary protections available in the country where he happens to reside.[9] Furthermore, although the crime of desertion was punishable by death under criminal statutes, "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."[10]

In the 1963 case of *Kennedy v. Mendoza-Martinez*, the Supreme Court struck down the statutory provision that divested citizenship for leaving or remaining outside the United States at a time of war or national emergency to evade military service.[11] As in *Trop*, the Court construed the Immigration and Nationality Act (INA) provision as punitive because it strictly imposed penalties on those who engaged in specified conduct.[12] The Court held that the provision violated the Fifth and Sixth Amendments because it exacted a punishment (loss of citizenship) without providing any procedural safeguards, such as notice, the right to trial, the right to counsel, and the right to present witnesses.[13]

The term after it decided *Mendoza-Martinez*, the Supreme Court in *Schneider v. Rusk* considered the constitutionality of the INA's expatriation provision for naturalized U.S. citizens who maintained a continuous residence in their native country for three years.[14] The case involved a German national, Angelika Schneider, who had derived U.S. citizenship through her mother when she was a child, but later resided in Germany following her marriage to a German national.[15] Eventually, the State Department denied Schneider a passport on the ground that she lost her citizenship by maintaining a continuous residence in Germany, her native country, for at least three years.[16]

Because "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive," the Supreme Court held that the INA's expatriation provision violated due process by unjustifiably discriminating between naturalized U.S. citizens and native-born U.S. citizens, who were not subject to the INA's foreign residence

[6] *Id.* at 92.

[7] *Id.* at 92–93; *see also id.* at 92 ("The right may be voluntarily relinquished or abandoned either by express language or by language and conduct that show a renunciation of citizenship.").

[8] *Id.* at 99, 101–02. The Court rejected the government's contention that the statute authorizing expatriation based on military desertion was regulatory, rather than penal, in nature, concluding that "[t]he purpose of taking away citizenship from a convicted deserter is simply to punish him. There is no other legitimate purpose that the statute could serve." *Id.* at 97.

[9] *Id.* at 101–02.

[10] *Id.* at 99.

[11] 372 U.S. 144, 165–66 (1963).

[12] *Id.* at 180–84.

[13] *Id.* at 166–67.

[14] 377 U.S. 163 (1964).

[15] *Id.* at 164.

[16] *Id.*

restriction.[17] The Court reasoned that, although Congress has the power to set forth the various requirements for naturalization, "[t]he constitution does not authorize Congress to enlarge or abridge those rights" that are equally conferred upon both naturalized and native-born U.S. citizens.[18]

During this period, the Supreme Court also considered the constitutionality of removing citizenship from those who voted in a foreign political election. In its 1958 decision in *Perez v. Brownell*, the Supreme Court had initially ruled that Congress's inherent authority to regulate foreign affairs enabled it to make voting in foreign elections an act of expatriation resulting in loss of U.S. citizenship.[19] A few years later in *Afroyim v. Rusk*, however, the Supreme Court in 1967 reexamined this issue and reached a different conclusion.[20] *Afroyim* involved a naturalized U.S. citizen, Beys Afroyim, who voted in an Israeli election and was denied the opportunity to renew his U.S. passport on the ground that he had lost his U.S. citizenship.[21] Afroyim argued that the government's termination of his citizenship without his voluntary renunciation of it violated his right to due process under the Fifth Amendment, as well as the Fourteenth Amendment's command that "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside."[22]

In striking down the relevant statute, the Court turned away from the view expressed in *Perez* that Congress "has any general power, express or implied, to take away an American citizen's citizenship without his assent."[23] The Court rejected the theory that Congress derived the power to forcefully remove citizenship from its power to regulate foreign affairs, or "as an implied attribute of sovereignty possessed by all nations."[24] Further, the Court observed that the Fourteenth Amendment declares that all persons born or naturalized in the United States are U.S. citizens, and that "[t]here is no indication in these words of a fleeting citizenship, good at the moment it is acquired but subject to destruction by the Government at any time."[25] Instead, the Court held, a U.S. citizen has a constitutional right under the Fourteenth Amendment to remain a citizen unless he *voluntarily relinquishes* his citizenship, and the Federal Government has no power to terminate citizenship without the individual's consent.[26] This conclusion, the Court determined, "comports more nearly than *Perez* with the principles of liberty and equal justice to all that the entire Fourteenth Amendment was adopted to guarantee."[27]

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[17] *Id.* at 165, 168–69.

[18] *Id.* at 166. The Court rejected the government's contention that the expatriation provision reasonably advanced concerns that a naturalized citizen's prolonged residence in his or her native country would call into question allegiance to the United States and reliability as a U.S. citizen. *Id.* at 165, 168. Noting that native-born citizens may reside abroad indefinitely without losing their citizenship, the Court determined that "[l]iving abroad, whether the citizen be naturalized or native born, is no badge of lack of allegiance and in no way evidences a voluntary renunciation of nationality and allegiance." *Id.* at 168–69. In fact, the Court observed, residing abroad "may indeed be compelled by family, business, or other legitimate reasons." *Id.* at 169. Accordingly, the Court held that the foreign residence restriction significantly impeded a naturalized U.S. citizen's ability "to live and work abroad in a way that other citizens may," and essentially created "a second-class citizenship." *Id.* at 168–69.

[19] 356 U.S. 44, 59–62 (1958), *overruled by* Afroyim v. Rusk, 387 U.S. 253 (1967).

[20] 387 U.S. 253 (1967).

[21] *Id.* at 254.

[22] *Id.* at 254–55; *see also* U.S. Const. amend. XIV, § 1, cl. 1.

[23] *Afroyim*, 387 U.S. at 257.

[24] *Id.* at 257, 263.

[25] *Id.* at 262.

[26] *Id.* at 262, 267–68.

[27] *Id.* at 267.

ArtI.S8.C4.1.6.5
Judicial Limits on Congress's Expatriation Power

The Supreme Court most recently addressed expatriation in the 1980 case of *Vance v. Terrazas*.[28] In that case, a native-born U.S. citizen of Mexican descent, Laurence Terrazas, applied for and obtained a certificate of Mexican nationality while he was in Mexico, and renounced his allegiance to the United States in his application.[29] The Department of State determined that, based on these actions, Terrazas voluntarily relinquished his U.S. citizenship.[30] The Supreme Court disagreed, holding that, under *Afroyim*, evidence must show that "the citizen not only voluntarily committed the expatriating act prescribed in the statute, but also intended to relinquish his citizenship."[31] Because the evidence failed to show that Terrazas specifically intended to relinquish his U.S. citizenship when he applied for Mexican nationality, the Court held that he did not expatriate himself.[32]

The Supreme Court's post-*Perez* jurisprudence signals that the government may not remove an individual's citizenship unless that person voluntarily commits a specified act with intent to renounce citizenship.[33] In response, Congress amended the INA to clarify that the government has the burden of proving by "a preponderance of the evidence" that an individual committed an expatriating act "with the intention of relinquishing nationality."[34] The amendments clarified that, when an individual commits one of the enumerated acts, there is a presumption that the individual acted voluntarily, but this presumption may be rebutted by a preponderance of evidence that the act was involuntary.[35] Congress also repealed INA provisions that removed citizenship based on voting abroad, military desertion, departure from the United States during a time of war, and maintaining a foreign residence—provisions ruled unconstitutional by the Supreme Court.[36]

[28] 444 U.S. 252 (1980).

[29] *Id.* at 255.

[30] *Id.* at 256.

[31] *Id.* at 261.

[32] *Id.* at 263.

[33] *See Afroyim*, 387 U.S. at 255 (observing that, since *Perez*, the Court "has refused to hold that citizens can be expatriated without their voluntary renunciation of citizenship").

[34] Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, §§ 18, 19, 100 Stat. 3655, 3658; Act of Sept. 26, 1961, Pub. L. No. 87-301, § 19, 75 Stat. 650, 656. In *Terrazas*, the Supreme Court rejected the argument that the standard of proof in expatriation cases should be a "clear and convincing evidence" standard rather than the "preponderance of the evidence" standard established by Congress. *Terrazas*, 444 U.S. at 264–65. The Court recognized that, in *Nishikawa*, it had required (in the absence of legislative guidance) the government to prove a voluntary expatriating act by clear and convincing evidence, but determined that Congress had constitutional authority to prescribe the evidentiary standards in repatriation cases. *Id.* at 265–66.

[35] Act of Sept. 26, 1961, § 19. Congress later removed the INA provision that "conclusively presumed" that a person voluntarily committed one of the enumerated acts if he or she was a national of the state in which the act was performed and had been physically present there for at least ten years. Immigration and Nationality Act Amendments of 1986, Pub. L. No. 99-653, § 19, 100 Stat. 3655, 3658. In *Terrazas*, the Supreme Court held that it was constitutional for Congress to create a presumption that the commission of an expatriating act is committed voluntarily. *Terrazas*, 444 U.S. at 270. But there is no presumption that the act was performed with the intent to relinquish citizenship. *Id.* at 268. The government still has the burden of proving that intent by a preponderance of the evidence. *Id.*

[36] Act of Oct. 10, 1978, Pub. L. No. 95-432, § 2, 92 Stat. 1046, 1046; Act of Sept. 14, 1976, Pub. L. No. 94-412, § 501(a), 90 Stat. 1255, 1258.

ArtI.S8.C4.2 Bankruptcy

ArtI.S8.C4.2.1 Overview of Bankruptcy Clause

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

The Bankruptcy Clause grants Congress power to enact uniform, national laws governing bankruptcies in the United States.[1] In the colonial period, domestic bankruptcy and insolvency matters were governed by each colony's individual laws. After ratification of the Constitution, state law continued to govern bankruptcy and insolvency matters until Congress passed the first federal bankruptcy law in 1800.[2] States retained the ability to enforce their own bankruptcy laws in subsequent periods when there was no national law.[3]

While early English bankruptcy law at the time of American independence existed merely as a collective remedy for creditors and applied to a narrow category of debtors, neither Congress nor the Supreme Court has ever accepted the view that, under the Bankruptcy Clause, Congress may only enact laws of the type that governed England in the eighteenth century. Over the years, Congress has expanded the coverage of bankruptcy laws, increasingly enlarging the scope of relief afforded debtors and the rights of creditors and other parties.[4] However, in exercising its bankruptcy power, Congress is subject to certain constitutional limitations, including the requirement that it enact "uniform" bankruptcy laws.[5]

When no national bankruptcy law exists, the states may enact and enforce their own bankruptcy and insolvency laws. During the country's first eighty-nine years under the Constitution, a national bankruptcy law existed for only sixteen years in total.[6] Congress's enactment of a national bankruptcy law does not invalidate conflicting state laws, but only suspends them.[7] Upon repeal of a national bankruptcy statute, conflicting state bankruptcy laws again come into operation without the need for re-enactment.[8]

The following essays examine the history and meaning of the Bankruptcy Clause. They first review the historical background of the Clause. They then consider how the Supreme Court has interpreted the scope of the Clause and constitutional limitations on Congress's exercise of its bankruptcy power. Finally, they review general restrictions on state bankruptcy power.

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[1] U.S. Const. art. I, § 8, cl. 4.

[2] Act of April 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803); *see* ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power.

[3] *See* ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power.

[4] *See* ArtI.S8.C4.2.3 Scope of Federal Bankruptcy Clause.

[5] U.S. Const. art. I, § 8, cl. 4; *see* ArtI.S8.C4.2.3 Scope of Federal Bankruptcy Clause.

[6] *See* ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power.

[7] *See* ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power.

[8] *See* Tua v. Carriere, 117 U.S. 201, 210 (1886); *see* ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power.

ArtI.S8.C4.2.2 Historical Background on Bankruptcy Clause

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Colonial American bankruptcy and insolvency laws were inspired by the English bankruptcy experience.[1] Under English law, creditors were authorized to institute involuntary bankruptcy proceedings against debtors who committed certain unauthorized "acts of bankruptcy."[2] The debtor's property was liquidated and the proceeds from liquidation were distributed to his or her creditors.[3] Only a trader or merchant qualified as a debtor for purposes of bankruptcy.[4] Debtors could not institute voluntary bankruptcy proceedings—instead, the early English bankruptcy system was by design a collective remedy for creditors.[5] Debtors could be punished by, among other measures, imprisonment and, by 1705, death.[6] English law did not allow for the discharge of a debtor's debts until 1705; however, by 1706, a discharge was only available upon the consent of one's creditors.[7]

In the American colonies, domestic bankruptcy and insolvency matters were governed by each colony's laws.[8] Early statutes typically were modeled on English laws, but later colonial laws began to differ from English practice in various ways.[9] As opposed to English law, colonial American laws "broadly centered on the plight of imprisoned debtors, with somewhat lesser emphasis on the issue of insolvent traders (to the exclusion of other debtors)."[10] Colonial

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[1] *See* Stephen J. Lubben, *A New Understanding of the Bankruptcy Clause*, 64 Case W. Rsrv. L. Rev. 319, 337 (2013) (explaining that the early American approach to bankruptcy and insolvency "was heavily influenced by English practice," although noting that "it was never the case that English practice applied directly in the colonies"). Regarding the distinction between bankruptcy and insolvency laws, the Supreme Court has explained that "[w]hile attempts have been made to formulate a distinction between bankruptcy and insolvency, it long has been settled that, within the meaning of the constitutional provision, the terms are convertible." Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & P. R. Co., 294 U.S. 648, 667–68 (1938); *accord* Sturges v. Crowninshield, 17 U.S. 122, 194 (1819) ("[T]he subject is divisible in its nature into bankrupt and insolvent laws; though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws.").

[2] Lubben, *supra* note 1, at 329–30; Israel Treiman, *Acts of Bankruptcy: A Medieval Concept in Modern Bankruptcy Law*, 52 Harv. L. Rev. 189, 192 (1938). In 1542, during the reign of Henry VIII, Parliament passed what scholars generally consider England's first bankruptcy law. 34 & 35 Hen. 8, ch. 4 (1542); *see* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 Am. Bankr. L.J. 325, 329 n.21 (1991) [herinafter Tabb, *Discharge*]. England's second bankruptcy law arose in 1570 during Elizabeth I's reign. 13 Eliz., ch. 7 (1570). Parliament enacted several subseqent bankruptcy acts in the following years, although, as one scholar has noted, the 1570 act "filled out the basic parameters of the English bankruptcy system, lacking only the discharge provisions added in the early eighteenth century, and remained in effect until the time of the American Revolution." Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 8 (1995) [hereinafter Tabb, *History*].

[3] Tabb, *History*, *supra* note 2, at 8.

[4] Tabb, *History*, *supra* note 2, at 9, 12; Lubben, *supra* note 1, at 330.

[5] Tabb, *History*, *supra* note 2, at 8; Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 Tenn. L. Rev. 487, 500 (1996).

[6] Plank, *supra* note 5, at 506 (citing 4 Anne, ch. 17, §§ 1, 18 (1705)).

[7] Plank, *supra* note 5, at 506 (explaining that in 1706, "Parliament provided that the debtor could not receive a discharge unless 80% of the creditors, by number and by the value of the outstanding debts, consented") (citing 5 Anne, ch. 22, § 1 (1706); 4 Anne, ch. 17, § 7 (1705)); Tabb, *Discharge*, *supra* note 2, at 342 & n.112 (explaining that the English bankruptcy law in existence at the time of American independence retained the consent requirement, although it excluded creditors who held claims of less than £ 20) (citing 5 Geo. 2, c. 30, § 10 (1732)). A discharge refers to relief from some or all of one's debts. CRS Report R45137, Bankruptcy Basiscs: A Primer, by Kevin M. Lewis, at 28.

[8] *See* Lubben, *supra* note 1, at 337 ("Through a hodgepodge of general bankruptcy laws, often not titled as such, and private bills, the American colonies managed to provide a system of bankruptcy relief.").

[9] *See* Lubben, *supra* note 1, at 337–39.

[10] Lubben, *supra* note 1, at 337; *see* Plank, *supra* note 5, at 518–19.

legislatures often passed private bills that discharged individual debtors.[11] While English bankruptcy law did not directly govern creditor-debtor relations in the American colonies, colonial bankruptcy laws were subject to invalidation by the Privy Council.[12]

Following independence, bankruptcy and insolvency laws remained within the purview of the newly independent states. The Articles of Confederation did not empower Congress to establish federal bankruptcy laws.[13]

During the Constitutional Convention in Philadelphia, the Framers did not appear to spend a considerable amount of time debating what would become the Bankruptcy Clause.[14] Charles Pinckney of South Carolina proposed that the Convention add to what would become the Full Faith and Credit Clause[15] a provision granting Congress authority "[t]o establish uniform laws upon the subject of bankruptcies, and respecting the damages arising on the protest of foreign bills of exchange."[16] The Committee of Detail proposed adding slightly modified language—"to establish uniform laws on the subject of Bankruptcies"—to what would become the clause housing Congress's naturalization power.[17] The Convention ultimately approved the bankruptcy provision on September 3, 1787, with only Connecticut voting against the measure.[18] Roger Sherman of Connecticut objected to granting Congress authority to establish bankruptcy laws, remarking that in England, "[b]ankrutptcies were in some cases punishable with death."[19] In response, Gouverneur Morris of New York acknowledged that it "was an extensive & delicate subject," but agreed with the bankruptcy proposal because he did not see any "danger of abuse of the power by the Legislature of the U.S."[20]

Once the Constitution was submitted to the states for ratification, scant attention was paid to the Bankruptcy Clause in the ensuing public debate. In the *Federalist Papers*, James Madison remarked that the bankruptcy power "is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different States, that the expediency of it seems not likely to be drawn into question."[21] However, some expressed opposition to the Bankruptcy Clause. For example, the Anti-Federalist "Federal Farmer" wrote in one letter that the bankruptcy power "will

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[11] Lubben, *supra* note 1, at 339.

[12] Lubben, *supra* note 1, at 339 ("A common problem throughout most of the colonies was the requirement that any commercial legislation, including bankruptcy statutes, obtain the approval of the Privy Counsel and its Lords of Trade. Quite often, colonies enacted statutes only to have them revoked by officials in London.").

[13] Lubben, *supra* note 1, at 340.

[14] *See* Plank, *supra* note 5, at 527 (explaining that the Constitutional Convention "adopted [the Bankruptcy Clause] with little debate").

[15] *See* U.S. Const. art. IV, § 1. For information on the Full Faith and Credit Clause, see ArtIV.S1.1 Overview of Full Faith and Credit Clause.

[16] Debates in the Federal Convention of 1787 as Reported by James Madison [hereinafter Debates in the Federal Convention of 1787], *in* Documents Illustrative of the Formation of the Union of the American States, H.R. Doc. No. 398, at 632 (1927); *see* Plank, *supra* note 5, at 527; Judith Schenck Koffler, *The Bankruptcy Clause and Exemption Laws: A Reexamination of the Doctrine of Geographic Uniformity*, 58 N.Y.U. L. Rev. 22, 35 (1983).

[17] Debates in the Federal Convention of 1787, *supra* note 16, at 655; Plank, *supra* note 5, at 527; *see* U.S. Const. art. I, § 8, cl. 4. For an overview of Congress's naturalization power, see ArtI.S8.C4.1.1 Overview of Naturalization Clause.

[18] Debates in the Federal Convention of 1787, *supra* note 16, at 657.

[19] Debates in the Federal Convention of 1787, *supra* note 16, at 657.

[20] Debates in the Federal Convention of 1787, *supra* note 16, at 657.

[21] The Federalist No. 42 (James Madison). Madison wrote that the bankruptcy power was one of the powers contained in the Constitution that "provide for the harmony and proper intercourse among the States." *Id.*

immediately and extensively interfere with the internal police of the separate states" and aggrandize the new federal judiciary.[22] Ultimately, however, the Clause was not a focal point for extensive debate during this period.

ArtI.S8.C4.2.3 Scope of Federal Bankruptcy Clause

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In an 1817 opinion issued while riding circuit, Justice Henry Livingston suggested that because the English statutes on the subject of bankruptcy from the time of Henry VIII down had applied only to traders, it might "well be doubted, whether an act of Congress subjecting to such a law every description of persons within the United States, would comport with the spirit of the powers vested in them in relation to this subject."[1] Neither Congress nor the Supreme Court has ever accepted this limited view. The first bankruptcy law, passed in 1800, departed from the English practice by including bankers, brokers, factors, and underwriters as well as traders.[2] Justice Joseph Story argued that the narrow scope of the English bankruptcy statutes merely reflected Parliament's policy judgment about how far bankruptcy relief should extend, but that this policy judgment was not an immutable part of the nature of bankruptcy laws.[3] Justice Story defined bankruptcy legislation, in a constitutional sense, as lawmaking provisions for persons who failed to pay their debts.[4]

This interpretation has been ratified by the Supreme Court. In *Hanover National Bank v. Moyses*,[5] the Court upheld the Bankruptcy Act of 1898,[6] which provided that persons other than traders might become bankrupts and that this might be done on voluntary petition.[7] Over the years, the Court has given tacit approval to extending bankruptcy laws to cover a variety of classes of persons and corporations,[8] including municipal corporations[9] and wage-earning individuals.[10] In its 1935 decision in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Ry.*,[11] the Court wrote that "as far reaching" as the federal bankruptcy laws up to that point had been, they "have not gone beyond the limit of Congressional power; but rather have constituted extensions into a field whose boundaries may not yet be fully revealed."[12]

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[22] Letter XVIII of the Federal Farmer (Jan. 25, 1788), *in* 2 The Complete Anti-Federalist 344 (Herbert J. Storing ed., 1981). While not seeking the Clause's elimination, the New York ratifying convention recommended that the scope of Congress's bankruptcy power be limited "to merchants and other traders," and that the states be permitted to "pass laws for the relief of other insolvent debtors." NY Ratification Convention Debates and Proceedings (July 25, 1788), https://www.consource.org/document/ny-ratification-convention-debates-and-proceedings-1788-7-25/.

[1] Adams v. Storey, 1 F. Cas. 141, 142 (C.C.D.N.Y. 1817).

[2] Act of April 4, 1800, ch. 19, 2 Stat. 19 (1800) (repealed 1803).

[3] 2 Joseph Story, Commentaries on the Constitution of the United States § 1113 (1833).

[4] *Id.*

[5] 186 U.S. 181 (1902).

[6] Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

[7] Hanover Nat'l Bank v. Moyses, 186 U.S. 181, 187 (1902).

[8] Continental Bank v. Rock Island Ry., 294 U.S. 648, 670 (1935)

[9] United States v. Bekins, 304 U.S. 27 (1938).

[10] *See* Perry v. Commerce Loan Co., 383 U.S. 392, 394–95 (1966).

[11] 294 U.S. 648 (1935).

[12] *Id.* at 671. The Court has emphasized the breadth of Congress's bankruptcy power by acknowledging that the Constitution's framers "understood that laws 'on the subject of Bankruptcies' included laws providing, in certain

Congress repealed and replaced the 1898 act with the Bankruptcy Reform Act of 1978.[13] The 1978 act, as amended, is the current national bankruptcy law. It is commonly referred to as the Bankruptcy Code.

ArtI.S8.C4.2.4 Expansion of the Scope of Bankruptcy Power

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Through the years, Congress has expanded the coverage of the bankruptcy laws. As a result, the scope of statutory relief afforded debtors and the rights of creditors have been correspondingly adjusted. The act of 1800,[1] like its English antecedents, was designed primarily to benefit creditors.[2] Beginning with the act of 1841,[3] which first permitted voluntary petitions, debtor rehabilitation has become an object of increasing importance in American bankruptcy law.[4] Under the act of 1867,[5] as amended in 1874,[6] the debtor was permitted, either before or after adjudication of his or her bankruptcy, to propose terms of composition that would become binding if accepted by a designated majority of his or her creditors and confirmed by a bankruptcy court.[7] In a decision by the United States District Court for the Southern District of New York that the Supreme Court would later cite with approval, future-Justice Samuel Blatchford held that this measure was constitutional.[8] The Supreme Court has upheld the constitutionality of laws that provided for the reorganization of corporations that were insolvent or unable to meet their debts as they matured,[9] limitation of landlords' claims for indemnification for rent,[10] and composition and extension of debts in proceedings for the relief of individual farmer debtors.[11] The Court also has concluded that a bankruptcy court is permitted under the Constitution to authorize sales of property free from

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limited respects, for more than simple adjudications of rights in the res," such as those granting courts "the power to issue ancillary orders enforcing their *in rem* adjudications." Cent. Va. Cmty. College v. Katz, 546 U.S. 356, 370 (2006); *cf.* Thomas E. Plank, *The Constitutional Limits of Bankruptcy*, 63 Tenn. L. Rev. 487, 499 (1996) (writing that the development of federal bankruptcy laws led "courts and scholars [to conclude] that the boundaries of the Bankruptcy Clause are constantly expanding to meet the new demands and forms of commercial and business development").

[13] Pub. L. 95-598, 92 Stat. 2549 (Nov. 6, 1978) (codified at 11 U.S.C. §§ 101 et seq.).

[1] Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

[2] *See* Continental Bank v. Rock Island Ry., 294 U.S. 648, 670 (1935).

[3] Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).

[4] *See* Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 588 (1935) ("The discharge of the debtor has come to be an object of no less concern than the distribution of his property.").

[5] Act of March 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878).

[6] Act of June 22, 1874, ch. 390, 18 Stat. 178 (repealed 1878).

[7] *Id.* § 17, 18 Stat. at 182–84. Under the composition procedure of the 1874 amendments, a debtor could offer a plan to retain its property and repay its creditors a portion of its obligations over a period of time. Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 Am. Bankr. Inst. L. Rev. 5, 21 (1995) (discussing Section 17 of the 1874 amendments). If a creditor did not agree to the composition agreement, the 1874 amendments provided that the creditor must obtain the same amount of value it would have obtained in liquidation proceedings. *Id.* at 21 (citing Act of June 22, 1874, Ch. 390, § 17, 18 Stat. at 183).

[8] In re Reiman, 20 F. Cas. 490 (D.C.S.D.N.Y. 1874) (Blatchford, J.), cited with approval in *Continental Bank*, 294 U.S. at 672.

[9] *Rock Island Ry.*, 294 U.S. 648, 671–75 (1935).

[10] Kuehner v. Irving Trust Co., 299 U.S. 445, 450–51 (1937).

[11] Wright v. Vinton Branch, 300 U.S. 440, 466–70 (1937); Adair v. Bank of America Ass'n, 303 U.S. 350, 355–56 (1938).

encumbrance by state tax liens,[12] and that, because Congress "possesses supreme power in respect of bankruptcies," a state that desires to recover assets in a bankruptcy must comply with bankruptcy court requirements regarding filing claims by a designated date.[13]

Congress's bankruptcy power is not limited to adjusting creditor rights. The Supreme Court has ruled that Congress's bankruptcy power extends to a purchaser's rights at a judicial sale of a debtor's property, and Congress may modify such rights by reasonably extending the period for redemption from such sale.[14] The Court has also held that a federal law permitting reorganization courts to stay pending bankruptcy court proceedings "was within the power of Congress,"[15] and that a statute enacted under Congress's bankruptcy power deprived a state court of power to proceed with pending foreclosure proceedings after a farmer-debtor filed a petition in federal bankruptcy court for a composition or extension of time to pay his debts.[16] All of these developments demonstrate the Supreme Court's broad view of "the subject of Bankruptcies."[17] In *Wright v. Union Central Life Insurance Co.*,[18] the Court explained that, while "incapable of final definition," "[t]he subject of bankruptcies is nothing less than the subject of the relations between an insolvent or nonpaying or fraudulent debtor and his creditors, extending to his and their relief."[19]

The Court considered the relationship between the Bankruptcy Clause and the Eleventh Amendment[20] in *Central Virginia Community College v. Katz*.[21] In *Katz*, the Court determined that the Eleventh Amendment poses no obstacle to proceedings by bankruptcy trustees to

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[12] Van Huffel v. Harkelrode, 284 U.S. 225, 228 (1931); *see* Gardner v. New Jersey, 329 U.S. 565, 578 (1947) (stating, citing *Van Huffel*, that "[t]he constitutional authority of Congress to grant the bankruptcy court power to deal with the lien of a State has been settled," and holding that a "reorganization court [had] jurisdiction over" property "on which [the State of] New Jersey assert[ed] a lien, and that the power of the court to deal with liens extend[ed] to the lien which New Jersey claim[ed]").

[13] New York v. Irving Trust Co., 288 U.S. 329, 333 (1933).

[14] Wright v. Union Cent. Life Ins. Co., 304 U.S. 502, 514–15 (1938). A right of redemption is "the right of the borrower to redeem the property by paying off the entire balance of the mortgage" and a "redemption period is a period during which the borrower has redemption rights." Andra Ghent, *How Do Case Law and Statute Differ? Lessons from the Evolution of Mortgage Law*, 57 J. Law & Econ. 1085, 1090 (2014).

[15] Duggan v. Sansberry, 327 U.S. 499, 510 (1946).

[16] Kalb v. Feuerstein, 308 U.S. 433, 439–40 (1940). The Court has upheld or opined on other statutory provisions as within the scope of Congress's bankruptcy power. *See* Reconstruction Fin. Corp. v. Denver & R. G. W. R. Co., 328 U.S. 495, 509 (1946) (holding that Congress's delegation of "authority to the [Interstate Commerce] Commission to eliminate valueless claims from participation in reorganization is a valid exercise of the federal bankruptcy power," and stating that this conclusion is a restatement of the Court's decisions in Group of Institutional Investors v. Chicago, M., S. P. & P. R. Co., 318 U.S. 523 (1943), and Ecker v. Western P. R. Corp., 318 U.S. 448 (1943)); *see also* BFP v. Resolution Trust Corp., 511 U.S. 531, 543 (1994) ("Surely Congress has the power pursuant to its constitutional grant of authority over bankruptcy . . . to disrupt the ancient harmony that foreclosure law and fraudulent conveyance law, those two pillars of debtor-creditor jurisprudence, have heretofore enjoyed. But absent clearer textual guidance . . . we will not presume such a radical departure."); Butner v. United States, 440 U.S. 48, 54 (1979) (opining that, although Congress had not elected to do so, "[t]he constitutional authority of Congress to establish 'uniform Laws on the subject of Bankruptcies throughout the United States' would clearly encompass a federal statute defining the mortgagee's interest in the rents and profits earned by property in a bankrupt estate") (quoting U.S. Const. art. I, § 8, cl. 4); Schumacher v. Beeler, 293 U.S. 367, 374 (1934) (explaining that "Congress, by virtue of its constitutional authority over bankruptcies, could confer or withhold jurisdiction to entertain . . . suits" by the bankruptcy trustee against an adverse claimant "and could prescribe the conditions upon which the federal courts should have jurisdiction."); United States v. Fox, 95 U.S. 670, 672 (1877) (explaining that statutory provisions designed to prevent fraud concerning the distribution of proceeds to creditors or the debtor's discharge "would seem to be within the competency of Congress").

[17] U.S. Const. art. I, § 8, cl. 4 (Congress is empowered "[t]o establish . . . uniform Laws on *the subject of Bankruptcies* throughout the United States" (emphasis added)).

[18] 304 U.S. 502 (1938).

[19] *Id.* at 513–14 (citation and internal quotation marks omitted).

[20] U.S. Const. amend. XI. For more information about the Eleventh Amendment, see Amdt11.1 Overview of Eleventh Amendment, Suits Against States to Amdt11.6.4 Tort Actions Against State Officials.

[21] 546 U.S. 356 (2006).

avoid preferential transfers of property to state agencies and to recover such property. The Court held that, when they ratified the Bankruptcy Clause, states relinquished their ability to assert sovereign immunity as a defense in proceedings that implicate a bankruptcy court's authority over the debtor's property and the bankruptcy estate.[22] The Court determined that given this relinquishment, Congress's effort to abrogate sovereign immunity in Section 106 of the Bankruptcy Code[23] was unnecessary.[24]

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

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

In exercising its bankruptcy powers, Congress is subject to certain constitutional limitations.[1] Congress may not circumscribe the creditor's right in property to such an unreasonable extent as to deny him due process of law or effect an unconstitutional taking.[2] Congress *may* impair the obligation of a contract or extend a federal bankruptcy law to contracts already entered into at the time Congress passed the law.[3] In 1935, the Court held that, under the Tenth Amendment,[4] Congress was unable to subject the fiscal affairs of a political subdivision of a state to a federal bankruptcy court's control.[5] A year later, however, the Court held that Congress may empower federal bankruptcy courts to entertain petitions by taxing agencies or instrumentalities for a composition of their indebtedness when the state has consented to the proceeding and the federal court is not authorized to interfere with the fiscal or governmental affairs of such petitioners.[6]

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[22] *Id.* at 378.

[23] 11 U.S.C. § 106. Section 106 states that "sovereign immunity is abrogated as to a governmental unit to the extent set forth in this section with respect to" a number of sections of the Bankruptcy Code. *Id.* § 106(a). A "governmental unit" includes a state. *Id.* § 101(27). The Court had held, in two prior decisions, that an earlier version of Section 106 had not successfully abrogated state or federal sovereign immunity regarding suits seeking monetary recoveries. United States v. Nordic Village, Inc., 503 U.S. 30, 39 (1992); Hoffman v. Conn. Dep't of Income Maintenance, 492 U.S. 96, 104 (1989) (plurality); *id.* at 105 (O'Connor, J., concurring); *id.* (Scalia, J., concurring in the judgment). In their concurring opinions in *Hoffman*, Justices O'Connor and Scalia, respectively, opined that the Bankruptcy Clause did *not* permit Congress to abrogate states' sovereign immunity. *Id.* at 105 (O'Connor, J., concurring); *id.* (Scalia, J., concurring in the judgment).

[24] *Katz*, 546 U.S. at 361–62. A year earlier, the Court held that a debtor's adversary proceeding against a state to establish the dischargeability of student loan debt was "not a suit against a State for purposes of the Eleventh Amendment." Tenn. Student Assistance Corp. v. Hood, 541 U.S. 440, 451 (2005).

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

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

[3] *In re* Klein, 42 U.S. (1 How.) 277 (1843); Hanover National Bank v. Moyses, 186 U.S. 181, 188 (1902). For information on the Contract Clause, U.S. Const. art. I, § 10, cl. 1, see ArtI.S10.C1.6.1 Overview of Contract Clause.

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

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

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

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

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

Article III of the U.S. Constitution contains relevant limits on Congress's exercise of the bankruptcy power.[14] The Supreme Court has considered Congress's power to vest the adjudication of claims in non-Article III bankruptcy courts in several decisions.[15] In *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,[16] the Court invalidated portions of the Bankruptcy Reform Act of 1978 that impermissibly empowered non-Article III bankruptcy courts with "jurisdiction over all 'civil proceedings arising under [the Bankruptcy Code] or arising in or related to cases under [the Bankruptcy Code],'" such as state law breach of contract claims and other claims unrelated to "the restructuring of debtor-creditor relations."[17] Later, in *Stern v. Marshall*,[18] the Court held a provision of the Bankruptcy Amendments and Federal Judgeship Act of 1984[19] unconstitutional for authorizing bankruptcy courts to enter final judgments on certain actions whose existence are not attributable to bankruptcy proceedings—such as tortious interference counterclaims against creditors—but which are

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

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

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

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

[11] *Id.* at 159–61.

[12] 455 U.S. 457.

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

[14] *See* U.S. Const. art. III.

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

[16] 458 U.S. 50 (1982).

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

[18] 564 U.S. 462 (2011).

[19] Pub. L. 98-353, 98 Stat. 333 (July 10, 1984).

merely intended to "augment the bankruptcy estate."[20] The Court subsequently held that a bankruptcy court may issue proposed findings and conclusions of law, subject to de novo review by the district court, on claims statutorily denominated as within the bounds of bankruptcy courts' "core" powers but which may only be constitutionally committed to an Article III adjudicator.[21] And in 2015, the Court held that a bankruptcy court may resolve such claims if a party consents to the bankruptcy court's jurisdiction.[22]

ArtI.S8.C4.2.6 Restrictions on State Bankruptcy Power

Article I, Section 8, Clause 4:

> *[The Congress shall have Power . . .] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States; . . .*

Prior to 1898, Congress exercised its authority "[t]o establish . . . uniform Laws on the subject of Bankruptcies" only intermittently.[1] It did not enact the first national bankruptcy law until 1800, twelve years after the Constitution's ratification. This first national bankruptcy law was soon after repealed in 1803.[2] Congress then passed the second national bankruptcy law in 1841, only to repeal it two years later.[3] And Congress enacted the third federal bankruptcy law in 1867, which it subsequently rescinded in 1878.[4] Thus, during the country's first eighty-nine years under the Constitution, a national bankruptcy law was in existence for only sixteen years altogether.[5] Consequently, a key issue of interpretation that arose during that period concerned the effect of the Bankruptcy Clause on state bankruptcy and insolvency laws.

The Supreme Court ruled at an early date that, in the absence of congressional action, states may enact bankruptcy and insolvency laws because it is not the mere existence of the federal bankruptcy power, but rather the power's actual exercise by Congress that is incompatible with states exercising bankruptcy power.[6] Thus, the Court has held that a state statute regulating the distribution of an insolvent's property was suspended by the then-governing national bankruptcy law.[7] Further, the Court held that a state law governing

[20] 564 U.S. at 495, 503.

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

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

[1] U.S. Const. art. I, § 8, cl. 4.

[2] *See* Act of April 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

[3] *See* Act of Aug. 19, 1841, ch. 9, 5 Stat. 440 (repealed 1843).

[4] *See* Act of March 2, 1867, ch. 176, 14 Stat. 517 (repealed 1878); Hanover National Bank v. Moyses, 186 U.S. 181, 184 (1902).

[5] Congress did not establish a new federal bankruptcy law again until 1898. *See* Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978). Congress replaced the 1898 Act with the current Bankruptcy Code in 1978. *See* Bankruptcy Reform Act of 1978, Pub. L. 95-598, 92 Stat. 2549 (Nov. 6, 1978) (codified, as amended, at 11 U.S.C. §§ 101 et seq.).

[6] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 199 (1819); Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 368 (1827).

[7] Int'l Shoe Co. v. Pinkus, 278 U.S. 261, 265 (1929).

fraudulent transfers was compatible with federal law.[8] But while a state insolvency or bankruptcy law is inoperative to the extent it conflicts with a national bankruptcy law in effect,[9] the Court has held that Congress's enactment of a national bankruptcy law does not *invalidate* conflicting state laws; it merely suspends them. Upon repeal of the national statute, the conflicting state laws again come into operation without the need for re-enactment.[10]

Clause 5—Standards

ArtI.S8.C5.1 Congress's Coinage Power

Article I, Section 8, Clause 5:

> *[The Congress shall have Power . . .] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures; . . .*

Because Article I, Section 10, Clause 1 of the Constitution prohibits the states from coining money,[1] the Supreme Court has recognized Congress's coinage power to be exclusive.[2] The Supreme Court has also construed Congress's power "to coin money" and "regulate the value thereof" to authorize Congress to regulate every phase of currency. Congress may charter banks and endow them with the right to issue circulating notes,[3] and it may restrain the circulation of notes not issued under its own authority.[4] To this end, it may impose a prohibitive tax upon the circulation of notes of state banks[5] or municipal corporations.[6]

Inasmuch as "every contract for the payment of money, simply, is necessarily subject to the constitutional power of the government over the currency, whatever that power may be, and the obligation of the parties is, therefore, assumed with reference to that power,"[7] the Supreme Court sustained the power of Congress to make Treasury notes legal tender in satisfaction of antecedent debts.[8]

The Supreme Court has also held that the power to coin money imports authority to maintain such coinage as a medium of exchange at home, and to forbid its diversion to other uses by defacement, melting, or exportation.[9] Consistent with this power, Congress may require holders of gold coin or gold certificates to surrender them in exchange for other currency not redeemable in gold. The Supreme Court denied recovery to a plaintiff who sought payment for gold coin and certificates thus surrendered in an amount measured by the higher

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[8] Stellwagon v. Clum, 245 U.S. 605, 615 (1918).

[9] Butner v. United States, 440 U.S. 48, 54 n.9 (1979); *see Pinkus*, 278 U.S. at 264; Stellwagon v. Clum, 245 U.S. 605, 613 (1918); *In re* Watts and Sachs, 190 U.S. 1, 27 (1903); Boese v. King, 108 U.S. 379, 385–87 (1883).
A state's bankruptcy law also may not extend to persons or property outside its jurisdiction, *see Ogden*, 25 U.S. at 368; Denny v. Bennett, 128 U.S. 489, 498 (1888); Brown v. Smart, 145 U.S. 454 (1892), or impair the obligation of contracts, *see Crowninshield*, 17 U.S. at 199. For information on the Contract Clause, U.S. Const. art. I, § 10, cl. 1, see ArtI.S10.C1.6.1 Overview of Contract Clause.

[10] Tua v. Carriere, 117 U.S. 201, 210 (1886) ; Butler v. Goreley, 146 U.S. 303, 314 (1892).

[1] U.S. Const. art. I, § 10, cl. 1.

[2] Houston v. Moore, 18 U.S. 1, 49 (1820); Sturges v. Crowninshield, 17 U.S. 122, 125 (1819).

[3] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[4] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

[5] *Id.* at 548.

[6] National Bank v. United States, 101 U.S. 1 (1880).

[7] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457, 549 (1871); Juilliard v. Greenman, 110 U.S. 421, 449 (1884).

[8] Legal Tender Cases (Knox v. Lee), 79 U.S. (12 Wall.) 457 (1871).

[9] Ling Su Fan v. United States, 218 U.S. 302 (1910).

market value of gold on the ground that the plaintiff had not proved that he would suffer any actual loss by being compelled to accept an equivalent amount of other currency.[10]

The Supreme Court also upheld Congress's authority to abrogate clauses in pre-existing private contracts calling for payment in gold coin.[11] However, as to obligations of the United States (as opposed to those of private parties), the Supreme Court has held that such an abrogation was an unconstitutional use of the coinage power. The Court reasoned that such abrogation would render obligations of the United States, entered into by earlier Congresses pursuant to their authority to borrow money on the credit of the United States, mere illusory pledges.[12]

Clause 6—Counterfeiters

ArtI.S8.C6.1 Congress's Power to Punish Counterfeiting

Article I, Section 8, Clause 6:

> *[The Congress shall have Power . . .] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States; . . .*

The Supreme Court has interpreted the Counterfeiting Clause narrowly. The Court has held that the language of the Clause covers only the specific offense of counterfeiting, understood as the creation of forged coin, and not the separate offense of fraudulently using forged coins in transactions.[1] At the same time, the Supreme Court has rebuffed attempts to read into this provision a limitation upon either the power of the states or upon the powers of Congress under the Coinage Clause and other provisions.[2] The Court has ruled that a state may punish the use of forged coins.[3] The Court also has sustained federal statutes penalizing the importation or circulation of counterfeit coin,[4] or the willing and conscious possession of dies in the likeness of those used for making coins of the United States,[5] on the ground that the power of Congress to coin money includes "the correspondent and necessary power and obligation to protect and to preserve in its purity this constitutional currency for the benefit of the nation."[6]

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[10] Nortz v. United States, 249 U.S. 317 (1935).

[11] Norman v. Baltimore & Ohio R.R., 294 U.S. 240 (1935). Similarly, the Supreme Court also upheld Congress's abrogation of clauses in pre-existing private contracts allowing bondholders to elect to be paid in foreign currencies. Guaranty Trust Co. of N.Y. v. Henwood, 307 U.S. 247 (1939).

[12] Perry v. United States, 294 U.S. 330 (1935).

[1] Fox v. Ohio, 46 U.S. (5 How.) 410, 433 (1847); United States v. Marigold, 50 U.S. (9 How.) 560, 568 (1850).

[2] Some commentators have therefore argued that the Counterfeiting Clause is superfluous or unnecessary as Congress would have the power to punish counterfeiters under the Necessary and Proper Clause. *See, e.g.*, Edward S. Corwin, The Constitution and What It Means Today 74 (Harold W. Chase & Craig R. Ducat, eds., 13th ed., 1973).

[3] *Fox*, 46 U.S. (5 How.) at 433.

[4] *Marigold*, 50 U.S. (9 How.) at 568.

[5] Baender v. Barnett, 255 U.S. 224 (1921).

[6] *Marigold*, 50 U.S. (9 How.) at 568. In a 1984 decision, the Supreme Court observed that Congress had relied on its counterfeiting authority to pass certain statutes that restricted the use of photographic depictions of currency, but did not directly consider the scope of the Counterfeiting Clause. Regan v. Time, Inc., 468 U.S. 641, 643 (1984). The Court held that aspects of the laws at issue were unconstitutional on First Amendment grounds. *Id.* at 658.

Clause 7—Post Offices

ArtI.S8.C7.1 Historical Background on Postal Power

Article I, Section 8, Clause 7:

[The Congress shall have Power . . .] To establish Post Offices and post Roads; . . .

The Articles of Confederation provided Congress with the "sole and exclusive . . . power of . . . establishing post offices."[1] During the Constitutional Convention, the Committee on Detail proposed similar language providing that "[t]he Legislature of the United States shall have the power . . . To establish Post-offices."[2] The Convention then adopted an amendment adding the phrase "and post roads"[3] to the Committee's draft.

The primary question raised in the early days of the Nation regarding the postal clause concerned the meaning of the word "establish" and whether it conferred upon Congress the power to construct new postal facilities and roads or only the power to designate existing buildings and routes to serve as post offices and post roads.[4] In 1845, the Court held that Congress, being "charged . . . with the transportation of the mails," could enter a valid compact with the State of Pennsylvania regarding the use and upkeep of the portion of the Cumberland Road lying in the state, but the Court did not pass upon the validity of Congress's authorization of the original construction of the road.[5] In 1855, however, Justice John McLean stated that the power to establish post roads "has generally been considered as exhausted in the designation of roads on which the mails are to be transported," and concluded that neither Congress's commerce power nor its power to establish post roads empowered Congress to construct a bridge over a navigable waterway.[6] The Court's 1876 decision in *Kohl v. United States*[7] ended the debate on the extent of Congress's power to establish post roads when the Court sustained a proceeding by the United States to appropriate a parcel of land in Cincinnati as a site for a post office and courthouse.

[1] Articles of Confederation of 1781, art. IX ("The United States in Congress assembled shall also have the sole and exclusive right and power of . . . establishing or regulating post offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office . . .").

[2] *Id.*

[3] 2 The Records of the Federal Convention 308 (Max Farrand ed., 1911) (August 16, 1787). According to James Madison: "The power of establishing post-roads, must in every view be a harmless power; and may perhaps, by judicious management, become productive of great public conveniency. Nothing which tends to facilitate the intercourse between the States, can be deemed unworthy of the public care." The Federalist No. 42 (James Madison).

[4] *See* Letter from Thomas Jefferson to James Madison (Mar. 6, 1796) ("Does the power to establish post roads, given you by Congress, mean that you shall make the roads, or only select from those already made, those on which there shall be a post?") *in* 3 The Works of Thomas Jefferson 223, 226 (Philip B. Kurland & Ralph Lerner eds., 1904). *See also* Robert G. Natelson, *Founding-Era Socialism: The Original Meaning of the Constitution's Postal Clause*, 7 Brit. J. Am. Legal Studies 1, 57 (2018) ("The suggestion was perhaps whimsical or mischievous, for there is no support for such an interpretation other than Jefferson's prestige. . . . founding-era sources show that 'establishing' a road included whatever was necessary for bringing it into existence: planning, laying out, clearing, surfacing, and so forth.").

[5] Searight v. Stokes, 44 U.S. (3 How.) 151, 166 (1845). In 1806, 2 Stat. 357, 358–359, without referring to the mails or the postal clause, Congress authorized the President to construct a road from Cumberland, Maryland, to Ohio, and "to obtain consent . . . of the state or states, through which . . . [it was] laid out."

[6] United States v. Railroad Bridge Co., 27 F. Cas. 686 (No. 16114) (C.C.N.D. Ill. 1855).

[7] 91 U.S. 367 (1875).

ArtI.S8.C7.2 Power to Protect the Mails

Article I, Section 8, Clause 7:

[The Congress shall have Power . . .] To establish Post Offices and post Roads; . . .

The postal powers of Congress embrace all measures necessary to insure the safe and speedy transit and prompt delivery of the mails.[1] And not only are the mails under the protection of the National Government, they are, in contemplation of the law, its property. This principle was recognized by the Supreme Court in 1845 in holding that wagons carrying United States mail were not subject to a state toll tax imposed for use of the Cumberland Road pursuant to a compact with the United States.[2] Half a century later it was availed of as one of the grounds on which the National Executive was conceded the right to enter the national courts and demand an injunction against the authors of any widespread disorder interfering with interstate commerce and the transmission of the mails.[3]

Prompted by the efforts of Northern anti-slavery elements to disseminate their propaganda in the Southern states through the mails, President Andrew Jackson, in his annual message to Congress in 1835, suggested "the propriety of passing such a law as will prohibit, under severe penalties, the circulation in the Southern States, through the mail, of incendiary publications intended to instigate the slaves to insurrection."[4] In the Senate, John C. Calhoun resisted this recommendation, taking the position that it belonged to the States and not to Congress to determine what is and what is not calculated to disturb their security. He expressed the fear that if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary and enforce their circulation.[5] On this point his reasoning would appear to be vindicated by Supreme Court decisions denying states the right to bar shipments of alcoholic beverages from other states.[6]

ArtI.S8.C7.3 Power to Prevent Harmful Use of Postal Facilities

Article I, Section 8, Clause 7:

[The Congress shall have Power . . .] To establish Post Offices and post Roads; . . .

In 1872, Congress passed the first of a series of acts to exclude from the mails publications designed to defraud the public or corrupt its morals. In the pioneer case of *Ex parte Jackson*,[1] the Court sustained the exclusion of circulars relating to lotteries on the general ground that "the right to designate what shall be carried necessarily involves the right to determine what shall be excluded."[2] The leading fraud order case, decided in 1904, held to the same effect.[3]

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[1] *Ex parte* Jackson, 96 U.S. 727, 732 (1878). *See In re* Rapier, 143 U.S. 110, 134 (1892) ("It is not necessary that congress should have the power to deal with crime or immorality within the states in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality."); U.S. Postal Serv. v. Council of Greenburgh Civic Assn's, 453 U.S. 114 (1981) (sustaining the constitutionality of a law making it unlawful for persons to use, without payment of a fee (postage), a letterbox which has been designated an "authorized depository" of the mail by the Postal Service).

[2] Searight v. Stokes, 44 U.S. (3 How.) 151, 169 (1845).

[3] *In re* Debs, 158 U.S. 564, 599 (1895).

[4] Jackson, Andrew, *Seventh Annual Message to Congress* (Dec. 8, 1835), available at https://www.presidency.ucsb.edu/documents/seventh-annual-message-2.

[5] Cong. Globe, 24th Cong., 1st Sess., 3, 10, 298 (1835).

[6] Bowman v. Chicago & Nw. Ry., 125 U.S. 465 (1888); Leisy v. Hardin, 135 U.S. 100 (1890).

[1] 96 U.S. 727 (1878).

[2] *Id.* at 732.

Noting that supplying postal facilities "is by no means an indispensable adjunct to a civil government," the Court held that the "legislative body in thus establishing a postal service may annex such conditions . . . as it chooses."[4]

Later cases first qualified these sweeping assertions and then overturned them, holding government operation of the mails to be subject to constitutional limitations. In upholding requirements that publishers of newspapers and periodicals seeking second-class mailing privileges file complete information regarding ownership, indebtedness, and circulation and that all paid advertisements in the publications be marked as such, the Court emphasized that these provisions were reasonably designed to safeguard the second-class privilege from exploitation by mere advertising publications.[5] Chief Justice Byron White warned that the Court by no means intended to imply that it endorsed the Government's "broad contentions concerning . . . the classification of the mails, or by the way of condition . . . ."[6] Again, when the Court sustained an order of the Postmaster General excluding from the second-class privilege a newspaper he had found to have published material in contravention of the Espionage Act of 1917, the claim of absolute power in Congress to withhold the privilege was sedulously avoided.[7]

A unanimous Court transformed these reservations into a holding in *Lamont v. Postmaster General*,[8] in which it struck down a statute authorizing the Post Office to detain mail it determined to be "communist political propaganda" and to forward it to the addressee only if he notified the Post Office he wanted to see it. Noting that Congress was not bound to operate a postal service, the Court observed that while it did, it was bound to observe constitutional guarantees.[9] The statute violated the First Amendment because it inhibited the right of persons to receive any information that they wished to receive.[10]

On the other hand, a statute authorizing persons to place their names on a list in order to reject receipt of obscene or sexually suggestive materials is constitutional, because no sender has a right to foist his material on any unwilling receiver.[11] But, as in other areas, postal

[3] Pub. Clearing House v. Coyne, 194 U.S. 497 (1904), *followed in* Donaldson v. Read Magazine, 333 U.S. 178 (1948).

[4] *Pub. Clearing House*, 194 U.S. at 506. *See also* United States v. Bromley, 53 U.S. 88 (1851) (upholding statute imposing fines on commercial carriers of mail for carrying non-mail letters not related to their cargo).

[5] Lewis Publishing Co. v. Morgan, 229 U.S. 288 (1913).

[6] *Id.* at 316.

[7] United States *ex rel.* Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407 (1921). *See also* Hannegan v. Esquire, 327 U.S. 146 (1946) (denying the Post Office the right to exclude Esquire Magazine from the mails on grounds of the poor taste and vulgarity of its contents).

[8] 381 U.S. 301 (1965).

[9] *Id.* at 305 ("'The United States may give up the Post Office when it sees fit, but while it carries it on the use of the mails is almost as much a part of free speech as the right to use our tongues.'") (quoting Justice Holmes in *United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson,* 255 U.S. 407, 437 (1921)) (dissenting opinion). *See also* Blount v. Rizzi, 400 U.S. 410, 416 (1971) (quoting same language). For a different perspective on the meaning and application of Holmes' language, see United States Postal Service v. Council of Greenburgh Civic Assn's, 453 U.S. 114, 127 n.5 (1981), although there, too, the Court observed that the postal power may not be used in a manner that abridges freedom of speech or press. *Id.* at 126. Additionally, first-class mail is protected against opening and inspection, except in accordance with the Fourth Amendment. *Ex parte* Jackson, 96 U.S. 727, 733 (1878); United States v. van Leeuwen, 397 U.S. 249 (1970). *But see* United States v. Ramsey, 431 U.S. 606 (1977) (border search).

[10] Lamont v. Postmaster General, 381 U.S. 301, 306–07 (1965). *See also id.* at 308 (concurring opinion). This was the first federal statute ever voided for being in conflict with the First Amendment. *See also* Bolger v. Youngs Drugs Products Corp., 463 U.S. 60 (1983) (holding unconstitutional a federal statute prohibiting the mailing of unsolicited advertisements for contraceptives); Roth v. United States, 354 U.S. 476, 493 (1957); United States v. Reidel, 402 U.S. 351, 356–357 (1971); Smith v. United States, 431 U.S. 291, 305 (1977) (upholding congressional authority under the postal clause to exclude obscene materials from the mail).

[11] Rowan v. Post Office Dep't, 397 U.S. 728 (1970).

censorship systems must contain procedural guarantees sufficient to ensure prompt resolution of disputes about the character of allegedly objectionable material consistently with the First Amendment.[12]

ArtI.S8.C7.4 Exclusive Power Over Post Offices as an Adjunct to Other Powers

Article I, Section 8, Clause 7:

[The Congress shall have Power . . .] To establish Post Offices and post Roads; . . .

Cases such as *Lamont v. Postmaster General*,[1] involved attempts to close the mails to communications that were deemed to be harmful. A much broader power of exclusion was asserted in the Public Utility Holding Company Act of 1935.[2] To induce compliance with the regulatory requirements of that act, Congress denied the privilege of using the mails for any purpose to holding companies that failed to obey that law, irrespective of the character of the material to be carried. Viewing the matter realistically, the Supreme Court treated this provision as a penalty. Although it held this statute constitutional because the regulations whose infractions were thus penalized were themselves valid,[3] it declared that "Congress may not exercise its control over the mails to enforce a requirement which lies outside its constitutional province. . . ."[4]

ArtI.S8.C7.5 Restrictions on State Power Over Post Offices

Article I, Section 8, Clause 7:

[The Congress shall have Power . . .] To establish Post Offices and post Roads; . . .

In determining the extent to which state laws may impinge upon persons or corporations whose services are used by Congress in executing its postal powers, the task of the Supreme Court has been to determine whether particular measures are consistent with the general policies indicated by Congress. Broadly speaking, the Court has approved regulations having a trivial or remote relation to the operation of the postal service, while disallowing those constituting a serious impediment to it. Thus, the Court held a state statute granting one company an exclusive right to operate a telegraph business in the state to be incompatible with a federal law that granted any telegraph company the right to construct its lines upon post roads.[1] The Court interpreted the federal statute to prohibit state monopolies in a field Congress was entitled to regulate in exercising its combined power over commerce and post roads.[2]

The Court also held an Illinois statute that, as construed by the state courts, required an interstate mail train to make a detour of seven miles in order to stop at a designated station to be an unconstitutional interference with Congress's postal power.[3] However, the Court held

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[12] Blount v. Rizzi, 400 U.S. 410 (1971).

[1] 381 U.S. 301 (1965)) (striking down statute authorizing the Post Office to detain mail that it determined to be "communist political propaganda" and to forward it to the addressee only if he notified the Post Office that he wanted it).

[2] 49 Stat. 803, 812, 813, 15 U.S.C. §§ 79d, 79e.

[3] Electric Bond & Share Co. v. SEC, 303 U.S. 419 (1938).

[4] *Id.* at 442.

[1] Pensacola Tel. Co. v. Western Union Tel. Co., 96 U.S. 1 (1878).

[2] *Id.* at 11.

[3] Illinois Cent. R.R. v. Illinois, 163 U.S. 142 (1896) (characterizing it as "a statute . . . which unnecessarily interferes with the speedy and uninterrupted carriage of the mails of the United States," and contrasting it with "a reasonable police regulation of the State"). *Id.* at 154.

that a Minnesota statute requiring any intrastate train to stop at county seats "directly on its course, for a few minutes," was "a reasonable exercise of police power" and not "an unconstitutional interference with . . . the transportation of the mails of the United States."[4]

Local laws classifying postal workers with railroad employees for the purpose of determining a railroad's liability for personal injuries,[5] or subjecting a union of railway mail clerks to a general law forbidding any "labor organization" to deny any person membership because of his race, color or creed,[6] have been held not to conflict with national legislation or policy in this field. A state also may arrest a postal employee charged with murder while he is engaged in carrying out his official duties,[7] despite the interference *pro tanto* with the performance of a federal function, but it cannot punish a person for operating a mail truck over its highways without a valid state driver's license.[8]

Clause 8—Intellectual Property

ArtI.S8.C8.1 Overview of Congress's Power Over Intellectual Property

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

The Intellectual Property Clause[1] (IP Clause) empowers Congress to grant authors and inventors exclusive rights in their writings and discoveries for limited times. This clause provides the foundation for the federal copyright[2] and patent[3] systems, with a parallel

[4] Gladson v. Minnesota, 166 U.S. 427 (1897).

[5] Price v. Pennsylvania R.R., 113 U.S. 218 (1895); Martin v. Pittsburgh & Lake Erie R.R., 203 U.S. 284 (1906).

[6] Railway Mail Ass'n v. Corsi, 326 U.S. 88 (1945).

[7] United States v. Kirby, 74 U.S. (7 Wall.) 482 (1869) ("the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder."). *Id.* at 484.

[8] Johnson v. Maryland, 254 U.S. 51, 57 (1920) ("the immunity of the instruments of the United States from state control in the performance of their duties extends to a requirement that they desist from performance until they satisfy a state officer upon examination that they are competent for a necessary part of them and pay a fee for permission to go on.").

[1] This provision is also known as the "Patent Clause," the "Copyright Clause," the "Patent and Copyright Clause," and the "Progress Clause." *See generally* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. Intell. Prop. L. 1, 56 (1994) ("[Article I, section 8, clause 8] is frequently referred to as either the Patent Clause, the Copyright Clause, or the Intellectual Property Clause, depending on the context in which it is being discussed."); Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 Neb. L. Rev. 754, 810 n.1 (2001) (noting usage of "Copyright and Patent Clause," "Intellectual Property Clause," "Exclusive Rights Clause," and "Progress Clause"). *See, e.g.*, Allen v. Cooper, No. 18-877, slip op. at 6 (U.S. Mar. 23, 2020) (using the term "Intellectual Property Clause"); *Eldred v. Ashcroft,* 537 U.S. 186, 194 (2003) (using the term "Copyright and Patent Clause"); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank,* 527 U.S. 627, 635 (1999) (using the term "Patent Clause"); Goldstein v. California, 412 U.S. 546, 555 (1973) (using the term "Copyright Clause"). Although this essay uses the term "Intellectual Property Clause," the terminology is somewhat imprecise because the Clause does not encompass all of the legal areas that may be considered intellectual property, such as trademarks and trade secrets. *See* Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 Geo. L.J. 1771, 1845 n.1 (2006).

[2] A copyright gives authors (or their assignees) the exclusive right to reproduce, adapt, display, and/or perform an original work of authorship, such as a literary, musical, artistic, photographic, or audiovisual work, for a specified time period. *See* 17 U.S.C. §§ 102, 106.

[3] A patent gives inventors (or their assignees) the exclusive right to make, use, sell, or import an invention that is new, nonobvious, and useful, for a specified time period. 35 U.S.C. §§ 101–103, 271(a).

construction that divides into two parts, one for each form of intellectual property.[4] As to copyrights, Congress may grant "Authors" exclusive rights to their "Writings" in order to "promote the Progress of Science." (The "Progress of Science," at the time of the Framing, referred to "the creation and spread of knowledge and learning."[5]) As to patents, Congress may grant "Inventors" exclusive rights to their "Discoveries" in order to "promote the Progress of . . . useful Arts"—that is, to encourage technological "innovation, advancement, or social benefit."[6] Relying on the IP Clause, Congress has protected copyrights and patents in some form under federal law since 1790.[7]

Under the IP Clause, copyrights and patents are based on a utilitarian rationale that exclusive rights are necessary to provide incentives to create new artistic works and technological inventions.[8] Without legal protection, competitors could freely copy such creations, denying the original creators the ability to recoup their investments in time and effort, reducing the incentive to create in the first place.[9] The IP Clause thus reflects an "economic philosophy" that the "encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors."[10]

The Framers included the IP Clause in the Constitution to facilitate a uniform, national law governing patent and copyrights.[11] In the Framers' view, the states could not effectively protect copyrights or patents separately.[12] Under the patchwork state-law system that prevailed in the Articles of Confederation period, creators had to obtain copyrights and patents in multiple states under different standards, a difficult and expensive process that undermined the purpose and effectiveness of the legal regime.[13]

The IP Clause is "both a grant of power and a limitation."[14] Two such limitations apply to both copyrights and patents. First, the Clause's plain language requires that the exclusive rights can only persist for "limited Times." Thus, although the term of protection may be long,

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[4] *See generally* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Anatomy of a Congressional Power*, 43 IDEA J.L. & Tech. 1 (2002) ("[The IP Clause] exhibits a remarkably parallel or balanced structure . . . much favored in the eighteenth century . . . ."); Karl B. Lutz, *Patents and Science: A Clarification of the Patent Clause of the U.S. Constitution*, 32 J. Pat. Off. Soc'y 83, 84 (1952) (explaining the parallel structure of the IP Clause); *accord* Golan v. Holder, 565 U.S. 302, 319 (2012); Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5 n.1 (1966).

[5] *Golan*, 565 U.S. at 324.

[6] *Graham*, 383 U.S. at 6.

[7] *See* Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 (patents); Act of May 31, 1790, ch. 15, 1 Stat. 124 (copyrights).

[8] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 429 (1984) ("[Copyrights and patents are] intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired."); Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975) ("The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.").

[9] *See* Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 480 (1974) ("The patent laws promote [the progress of the useful arts] by offering a right of exclusion for a limited period as an incentive to inventors to risk the often enormous costs in terms of time, research, and development.").

[10] Mazer v. Stein, 347 U.S. 201, 219 (1954). Although economic incentives provide the dominant justification for copyright and patents, the IP Clause also empowers Congress to protect the so-called "moral rights" of creators, such as the right of attribution, in order to promote the progress of science and useful arts. *See, e.g.*, Visual Artist Rights Act of 1990, Pub. L. No. 101-650, tit. VI, 104 Stat. 5128 (1990).

[11] Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 162 (1989) ("One of the fundamental purposes behind the [IP Clause] was to promote national uniformity in the realm of intellectual property.").

[12] The Federalist No. 43 (James Madison).

[13] *See* Goldstein v. California, 412 U.S. 546, 556 (1973).

[14] Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5 (1966).

Congress cannot provide for a perpetual copyright or patent term.[15] Second, the exclusive rights must promote the progress of science or useful arts. Courts are broadly deferential to Congress, however, as to the means that it uses to achieve this goal.[16]

Other constitutional limitations of the IP Clause are specific to either copyright or patent law. For example, only works that are original are copyrightable, because copyright extends only to the "Authors" of "Writings."[17] In the context of patent law, only inventions that are novel and nonobvious are patentable "Discoveries" of "Inventors";[18] furthermore, patentable inventions must have some substantial utility to promote the progress of the "useful Arts."[19]

ArtI.S8.C8.2 Historical Background

ArtI.S8.C8.2.1 English Origins of Intellectual Property Law

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

The Intellectual Property Clause was written against the "backdrop" of English law and practice.[1] Patent law traces its origins to the English Parliament's 1623 Statute of Monopolies.[2] Prior to this law, many patents were "little more than feudal favors,"[3] a royal privilege granted by the Crown "to court favorites in goods or businesses which had long before been enjoyed by the public."[4] Parliament curtailed this practice in the Statute of Monopolies, which declared that "all monopolies and all commissions, grants, licences, charters and letters patents . . . are altogether contrary to the laws of the realm . . . and shall be utterly void and of none effect."[5] The statute contained an exception, however, that is the ancestor of modern patent law. Section 6 provided that the general prohibition on monopolies "shall not extend to

[15] *See* Eldred v. Ashcroft, 537 U.S. 186, 199–204 (2003).

[16] *See id.* at 212 ("[I]t is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."); *Graham*, 383 U.S. at 6 ("Within the limits of the constitutional grant, the Congress may, of course, implement the stated purpose [of the IP Clause] by selecting the policy which in its judgment best effectuates the constitutional aim.").

[17] Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 346 (1991); Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58–59 (1884).

[18] *See Graham*, 383 U.S. at 6 ("Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain."); Hotchkiss v. Greenwood, 52 U.S. (11 How.) 248, 267 (1851) (concluding that the "essential elements of every [patentable] invention" require "more ingenuity and skill [than] possessed by an ordinary mechanic acquainted with the business").

[19] Brenner v. Manson, 383 U.S. 519, 534 (1966) ("The basic quid pro quo contemplated by the Constitution and the Congress for granting a patent monopoly is the benefit derived by the public from an invention with substantial utility."); *Graham*, 383 U.S. at 6 ("Innovation, advancement, and things which add to the sum of useful knowledge are inherent requisites in a patent system which by constitutional command must 'promote the Progress of . . . useful Arts.'").

[1] Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5 (1966).

[2] *See* United States v. Line Material Co., 333 U.S. 287, 331–32 (1948) ("[The Statute of Monopolies] has become the foundation of the patent law securing exclusive rights to inventors . . . throughout the world.").

[3] Oil States Energy Servs., LLC v. Greene's Energy Grp., LLC, No. 16-712, slip op. at 5 (U.S. Apr. 24, 2018) (Gorsuch, J., dissenting).

[4] *Graham*, 383 U.S. at 5.

[5] 21 Jac. c. 3 § 1.

any letters patents . . . for the term of fourteen years or under, hereafter to be made, of the sole working or making of any manner of new manufactures within this realm to the true and first inventor . . . of such manufactures."[6]

Copyright, too, has its origins in English law.[7] The 1710 Statute of Anne, which was styled "[a]n act for the encouragement of learning,"[8] was also enacted against a background of monopolistic privileges granted by the Crown—in particular, the Stationers' Company's exclusive control over book printing.[9] To encourage the creation of new books, the Statute of Anne granted authors the exclusive right to copy their works for an initial term of fourteen years, renewable for another term of fourteen years if the author was still living.[10] For already published books, the Statute of Anne replaced the perpetual rights claimed by booksellers with a single twenty-one-year term.[11]

ArtI.S8.C8.2.2 Framing and Ratification of Intellectual Property Clause

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

Under the Articles of Confederation, the Federal Government lacked power to grant copyrights or patents.[1] Recognizing the limits on its authority, the Continental Congress passed a resolution in May 1783 calling upon the state legislatures to enact copyright legislation.[2] All of the then-existing states except Delaware adopted such laws, with varying scope and terms of protection.[3] Similarly, to the extent patent rights existed at all during this period, such rights derived from varying state laws.[4]

This patchwork of state-by-state protection created difficulties for authors and inventors: obtaining multiple state copyrights or patents was "time consuming, expensive, and frequently frustrating."[5] In April 1787, James Madison deplored the "want of uniformity in the laws concerning . . . literary property," though he conceded that the issue was of "inferior moment"

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[6] *Id.* § 6.

[7] Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 647 (1943) ("Anglo-American copyright legislation begins . . . with the Statute of 8 Anne, c. 19.").

[8] 8 Anne c. 19.

[9] *See* Eldred v. Ashcroft, 537 U.S. 186, 201 n.5 (2003).

[10] *Fred Fisher Music Co.*, 318 U.S. at 648–49.

[11] *Eldred*, 537 U.S. at 232 (Stevens, J. dissenting).

[1] *See* Articles of Confederation of 1781, art. II ("Each state retains . . . every Power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."). The articles did not expressly mention patents or copyrights. *See* Edward C. Walterscheid, *To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the United States Constitution*, 2 J. Intell. Prop. L. 1, 7 (1994).

[2] 24 Journals of the Continental Congress 1774–1989, at 326–27 (1922); *see also* Fred Fisher Music Co. v. M. Witmark & Sons, 318 U.S. 643, 648–49 (1943).

[3] *Fred Fisher Music Co.*, 318 U.S. at 649–50.

[4] *See generally* Bruce W. Bugbee, The Genesis of American Patent and Copyright Law 84–103 (1967) (surveying early state patent systems).

[5] Walterscheid, *supra* note 1, at 22; *see also* Goldstein v. California, 412 U.S. 546, 556 & n.12 (1973) (describing difficulties in the country's "early history" faced by an "author or inventor who wishes to achieve protection in all States when no federal system of protection is available"); *see generally* Bugbee, *supra* note 4, at 128–29.

compared to other concerns facing the early Republic.[6] Perhaps for this reason, neither the early plans of government presented at the Constitutional Convention nor the first draft of the Constitution mentioned intellectual property.[7]

On August 18, 1787, Madison and Charles Pinckney of South Carolina each proposed additions to the draft Constitution that would grant Congress power over intellectual property.[8] These proposals would have granted Congress the power to, among other things: (i) "secure to literary authors their copy rights for a limited time"; (ii) "encourage, by proper premiums and provisions, the advancement of useful knowledge and discoveries"; and (iii) "grant patents for useful inventions."[9] The matter was referred to the Committee of Eleven, who combined elements of these proposals to produce the language that would become the Intellectual Property (IP) Clause on September 5, 1787.[10] The Convention approved the IP Clause without objection or any recorded debate.[11]

In the *Federalist No. 43*, Madison explained the IP Clause's purpose:

> The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provisions for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.[12]

Madison's view of the IP Clause's utility was not universally held. Thomas Jefferson, learning of the IP Clause in Paris, wrote to Madison on July 31, 1788, suggesting that the proposed Bill of Rights include a provision "to abolish . . . Monopolies, in all cases."[13] Acknowledging this "may lessen[ ] the incitements to ingenuity," Jefferson argued "the benefit even of limited monopolies is too doubtful to be opposed to that of their general suppression."[14] Jefferson later tempered his views, proposing a constitutional amendment that "Monopolies may be allowed to persons for their own productions in literature, & their own inventions in the arts, for a term not exceeding—years, but for no longer term & no other purpose."[15] Congress did not act on Jefferson's proposal, but his views on intellectual property have influenced the Supreme Court.[16]

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[6] 4 Documentary History of the Constitution of the United States of America 1786–1870, at 128 (1905) [hereinafter Documentary History].

[7] *See* Walterscheid, *supra* note 1, at 25; Dotan Oliar, *Making Sense of the Intellectual Property Clause: Promotion of Progress as a Limitation on Congress's Intellectual Property Power*, 94 Geo. L.J. 1771, 1788–89 (2006).

[8] *See* Oliar, *supra* note 7, at 1789.

[9] 1 Documentary History, *supra* note 6, at 130–31 (journal of James Madison).

[10] Oliar, *supra* note 7, at 1790; 2 The Records of the Federal Convention of 1787, at 505–10 (Max Farrand ed., 1911) [hereinafter Farrand's Records].

[11] 2 Farrand's Records, *supra* note 10, at 509–10; Bilski v. Kappos, 561 U.S. 593, 631 (2010) (Stevens, J., concurring in the judgment).

[12] The Federalist No. 43 (James Madison). It should be noted that, contrary to Madison's statement in the *Federalist No. 43*, the House of Lords held, in *Donaldson v. Beckett* (1774), 1 Eng. Rep. 837, that copyright in England was not a common law right.

[13] 13 The Papers of Thomas Jefferson 442–43 (1956).

[14] *Id.*; *see also* Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 7–8 (1966).

[15] *Graham*, 383 U.S. at 8.

[16] *See id.* at 7–10 (discussing Jefferson's "philosophy on the nature and purpose of the patent monopoly").

Following the ratification of the Constitution, the first Congress invoked its power under the IP Clause to enact national copyright and patent laws in 1790.[17] Protections for patents and copyrights have been a part of federal law ever since.[18]

ArtI.S8.C8.3 Copyrights

ArtI.S8.C8.3.1 Authorship, Writings, and Originality

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

In 1834, the Supreme Court established in its first copyright case, *Wheaton v. Peters*, that federal copyright is purely a creation of statutory law—not federal common law.[1] *Wheaton* arose out of the reporting of the decisions of the Supreme Court itself; Wheaton, who published the annotated decisions of the Court from 1816 to 1827, sued a competing reporter.[2] Because it appeared that Wheaton had not complied with all of the statutory requirements for a copyright, he alternatively asserted a common law right in his publications.[3]

The Supreme Court held that although common law rights may exist in an unpublished manuscript under state law, after publication, federal protection for the work was available "if at all, under the acts of Congress."[4] The Court rejected the argument that the word "secure" in the Intellectual Property (IP) Clause was intended not "to originate a right, but to protect one already in existence."[5] Thus, copyright did not vest in the author unless he substantially complied with the statutory requirements imposed by Congress.[6]

The IP Clause empowers Congress to grant copyright to the "Authors" of "Writings." The term "Writings" has long been interpreted more broadly than merely "script or printed material."[7] In 1884, the Supreme Court held in *Burrow-Giles Lithographic Co. v. Sarony* that Congress could constitutionally provide for copyright in photography.[8] The Court defined an "Author" as "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature."[9] "Writings," in turn, encompassed "all forms of writing, printing, engravings, etchings, etc., by which the ideas in the mind of the author are given . . . expression."[10] Applying these definitions, the Court had "no doubt" that the IP Clause was

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[17] Act of Apr. 10, 1790, ch. 7, 1 Stat. 109 (patent); Act of May 31, 1790, ch. 15, 1 Stat. 124 (copyright).

[18] Of course, the scope of copyright and patent protection has changed substantially over time. For example, the subject matter of copyright under the 1790 Copyright Act was limited to maps, books, and charts, with an initial term of fourteen years (plus an optional fourteen-year renewal term). *See* 1 Stat. 124, 124 (1790). Today, copyright protects (among other things) computer programs, musical works, sound recordings, motion pictures, and architectural works, and generally persists for a term of the life of the author plus seventy years. *See* 17 U.S.C. §§ 102(a), 302(a).

[1] Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834).

[2] *Id.* at 593–95.

[3] *Id.* at 654.

[4] *Id.* at 661, 663. Similarly, in the patent context, the Court has understood the Intellectual Property (IP) Clause to be "permissive," such that the scope of patent rights is determined by the statutory language enacted pursuant to the IP Clause, not the Clause itself. Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518, 530 (1972).

[5] *Wheaton*, 33 U.S. at 661.

[6] *Id.* at 661, 665.

[7] Goldstein v. California, 412 U.S. 546, 561 (1973).

[8] Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 60 (1884).

[9] *Id.* at 58 (quoting Joseph E. Worcester's Dictionary of the English Language).

[10] *Id.* at 58.

broad enough to authorize copyright in photographs.[11] Indeed, under current law, copyright generally covers any original work of authorship, including literary works; musical works; dramatic works; choreography; audiovisual works; pictorial, graphic, and sculptural works; sound recordings; and architectural works.[12]

Having established that photography was copyrightable in general, *Burrow-Giles* turned to whether the photograph at issue possessed the requisite level of originality. The subject of the lawsuit was a portrait of Oscar Wilde taken by the photographer Napoleon Sarony.[13] The Court noted that Sarony conceived the portrait, posed Wilde in front of the camera, and arranged the subject and the lighting, all to evoke a desired expression.[14] On these facts, the Court concluded the photograph was more than a "mechanical reproduction," but "an original work" that could be copyrighted.[15] Indeed, so long as a work is original—and meets all statutory requirements—copyright is available irrespective of the aesthetic or social value of the work.[16]

A century later, in *Feist Publications v. Rural Telephone Service Co.*, the Supreme Court confirmed that originality is a constitutional requirement and more precisely defined what originality requires.[17] The issue in *Feist* was whether a telephone directory listing the names, addresses, and telephone numbers of people in a particular geographic area was copyrightable.[18] The Supreme Court held that originality, the "*sine qua non* of copyright,"[19] requires "that the work was independently created by the author" and "that it possesses at least some minimal degree of creativity."[20] On this standard, facts—such as names and telephone numbers arranged alphabetically—are neither original nor copyrightable because facts "do not owe their origin to an act of authorship."[21] That said, a *compilation* of facts may be copyrightable, but only if the selection and arrangement of facts is independently created and minimally creative.[22] Because the telephone directory in *Feist* simply listed names and telephone numbers alphabetically by surname, it lacked the minimal creativity necessary for copyright.[23]

Along with being original, a copyrightable work must be recorded or embodied in some physical form to be a copyrightable "Writing." Current law requires that the work be "fixed in any tangible medium of expression, now known or later developed, from which [it] can be perceived, reproduced, or otherwise communicated."[24] Although the Supreme Court has never squarely held that fixation is a constitutional requirement, it appears to be implicit in the Court's definition of "Writings" as "any *physical rendering* of the fruits of creative [activity]."[25]

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[11] *Id.*

[12] 17 U.S.C. § 102(a).

[13] *Burrow-Giles*, 111 U.S. at 54–55.

[14] *Id.* at 60.

[15] *Id.* at 59–60.

[16] *See* Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250–52 (1903) (Holmes, J.); *see also* Mitchell Bros. Film Grp. v. Cinema Adult Theater, 604 F.2d 852, 858–60 (5th Cir. 1979) (obscene material may be copyrighted).

[17] *Feist Publ'ns v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).

[18] *Id.* at 343–44.

[19] *Sine qua non* is Latin for "without which not," meaning "[a]n indispensable condition or thing." Sine qua non, Black's Law Dictionary (11th ed. 2019).

[20] *Feist*, 499 U.S. at 345.

[21] *Id.* at 347.

[22] *Id.* at 348.

[23] *Id.* at 362–63.

[24] 17 U.S.C. § 102(a).

[25] *See* Goldstein v. California, 412 U.S. 546, 561 (1973) (emphasis added).

Courts have thus generally assumed that, under the IP Clause, copyright cannot protect unfixed works, such as unrecorded live musical performances.[26]

ArtI.S8.C8.3.2 Limited Times for Copyrights and the Progress of Science

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

Even if a work is copyrightable, Congress may only grant copyright for limited times. Throughout American history, Congress has repeatedly lengthened copyright terms, with those extensions usually applying both prospectively and retroactively to works still under copyright.[1] In Congress's first Copyright Act of 1790, as under the Statute of Anne, copyright persisted for fourteen years, with the possibility of a fourteen-year renewal term.[2] Under current law, copyright in a work created by an individual author lasts for the life of that author, plus an additional seventy years.[3]

In *Eldred v. Ashcroft*, the Court addressed whether the 1998 Copyright Term Extension Act (CTEA), which retroactively extended existing copyright terms by twenty years, violated the Intellectual Property (IP) Clause's "limited Times" requirement.[4] *Eldred* held that a term of life of the author plus seventy years was a "limited" time, which required only that the term be "confine[d] within certain bounds," and not that the term must be fixed once granted.[5] On this point, the Court relied heavily on the historical practice of retroactive copyright extensions to inform its interpretation of the IP Clause.[6]

Satisfied that the CTEA complied with the "limited Times" requirement, the Court held that further judicial review was limited to whether the CTEA was "a rational exercise of the legislative authority conferred by the Copyright Clause."[7] In this determination, the Court "defer[red] substantially" to "congressional determinations and policy judgments."[8] Applying that standard, the Court found Congress's desire to conform American copyright terms to international norms sufficed as a rational basis.[9] *Eldred* further rejected arguments that the CTEA "effectively" amounted to a perpetual copyright, protected non-original works, or failed

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[26] *See, e.g.*, United States v. Martignon, 492 F.3d 140, 144 (2d Cir. 2007) ("[T]he government concedes [that] Congress could not have enacted [protection for live musical performances] pursuant to the Copyright Clause."); United States v. Moghadam, 175 F.3d 1269, 1277 (11th Cir. 1999) (assuming that "the Copyright Clause could not sustain [anti-bootlegging statute] because live performances, being unfixed, are not encompassed by the term 'Writings'"). Both *Martignon* and *Moghadam* ultimately upheld the anti-bootlegging laws at issue under Congress's Commerce Clause authority. *Martignon*, 492 U.S. F.3d at 152–53; *Moghadam*, 175 F.3d at 1282.

[1] *See generally* Eldred v. Ashcroft, 537 U.S. 186, 194–96 (2003) (reviewing history of congressional extensions of copyright term).

[2] *See* Act of May 31, 1790, ch. 15, § 1, 1 Stat. 124, 124 (1790); 8 Anne c. 19 (1710).

[3] 17 U.S.C. § 302(a). Anonymous works, pseudonymous works, and works made for hire have a copyright term of 95 years from the date of publication or 120 years from the date of creation, whichever is less. *Id.* § 302(c). Works published before 1978, if still covered by copyright, have a term lasting for 95 years from the date of publication. *See Eldred*, 537 U.S. at 196; 17 U.S.C. § 304(a), (b).

[4] *Eldred*, 537 U.S. at 199.

[5] *Id.* at 199.

[6] *Id.* at 200–04.

[7] *Id.* at 204.

[8] *Id.* at 205, 207

[9] *Id.* at 205–08.

to promote the progress of science,[10] reiterating "it is generally for Congress, not the courts, to decide how best to pursue the Copyright Clause's objectives."[11]

In 2012, *Golan v. Holder* extended *Eldred*'s deferential approach to the IP Clause's limitations.[12] *Golan* addressed whether Congress could, consistent with the IP Clause, grant copyright to works already in the U.S. public domain.[13] Motivated by compliance with international copyright treaties, Congress passed the Uruguay Round Agreements Act (URAA)[14] in 1994 to "restore" copyright to certain foreign works that had never been protected by copyright in the United States.[15]

The Supreme Court rejected the argument that the URAA failed to "promote the Progress of Science" because it did not encourage the creation of new works.[16] The Court held that providing incentives for new works was "not the sole means" Congress may use to advance the spread of knowledge, and Congress could rationally conclude that a "well-functioning international copyright system" would encourage the dissemination of existing works.[17] Ultimately, *Golan* held that it is for Congress to "determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the [IP] Clause."[18]

ArtI.S8.C8.3.3 Copyright and the First Amendment

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

Copyright, by its nature, may restrict speech—it operates to prevent others from, among other things, reproducing and distributing creative expression without the copyright holder's permission.[1] The Supreme Court has thus recognized that "some restriction on expression is the inherent and intended effect of every grant of copyright."[2] Even so, the restrictions on speech effected by copyright are not ordinarily subject to heightened scrutiny.[3]

The Supreme Court has reasoned that, because the Intellectual Property (IP) Clause and the First Amendment were adopted close in time, the Framers believed that "copyright's limited monopolies are compatible with free speech principles."[4] The Framers intended copyright to be "the engine of free expression" by providing "the economic incentive to create

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[10] *Id.* at 208–15.

[11] *Id.* at 212–13.

[12] Golan v. Holder, 565 U.S. 302 (2012).

[13] *Id.* at 308.

[14] The URAA implemented the Marrakesh Agreement of 1994, which transformed the General Agreement on Tariffs and Trade (GATT) into the World Trade Organization (WTO), into U.S. law. *See* Pub. L. No. 103-465, § 101, 108 Stat. 4809, 4814–15 (1994).

[15] *Golan*, 565 U.S. at 314.

[16] *Id.* at 324–27.

[17] *Id.* at 326–27.

[18] *Id.* at 325 (quoting *Eldred v. Ashcroft*, 537 U.S. 186, 222 (2003)).

[1] *See* 17 U.S.C. § 106.

[2] Golan v. Holder, 565 U.S. 302, 327–28 (2012).

[3] *See* Eldred v. Ashcroft, 537 U.S. 186, 218–19 (2003); Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 560 (1985).

[4] *Eldred*, 537 U.S. at 219.

and disseminate ideas."[5] As a result, so long as Congress maintains the "traditional contours" of copyright protection, copyright laws are not subject to heightened First Amendment scrutiny.[6]

The traditional contours of copyright law include two important "built-in First Amendment accommodations."[7] The first is the idea-expression distinction, which provides that copyright does not "extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."[8] For example, copyright in a nonfiction essay extends only to the particular creative expression used to describe its ideas; others remain free to communicate the same ideas in their own words.[9] Because of this distinction, copyright's impact on free expression is reduced because "every idea, theory, and fact in a copyrighted work becomes instantly available for public exploitation at the moment of publication."[10]

Copyright law's other First Amendment accommodation is the fair use doctrine. Fair use is a privilege that permits certain uses of a copyrighted work, for purposes such as "criticism, comment, news reporting, teaching[,] scholarship, or research," without the copyright holder's permission.[11] Courts assess whether a particular use is fair using a multifactor balancing test that looks to, among other considerations, the purpose and character of the use; the nature of the copyrighted work; the amount and substantiality of the portion used; and the economic impact of the use on the market for the original work.[12] Fair use also considers whether a use is "transformative"—that is, whether it "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[13] Fair use serves First Amendment purposes because it "allows the public to use not only facts and ideas contained in a copyrighted work, but also expression itself in certain circumstances."[14]

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[5] *Harper & Row*, 471 U.S. at 558.

[6] *Golan*, 565 U.S. at 890–91.

[7] *Eldred*, 537 U.S. at 219.

[8] 17 U.S.C. § 102(b).

[9] *Id.* The Supreme Court famously articulated the idea-expression distinction in *Baker v. Selden*, which concerned the scope of the copyright in a book describing an accounting system. 101 U.S. 99, 100 (1880).

[10] *Eldred*, 537 U.S. at 219 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349–50 (1991)).

[11] 17 U.S.C. § 107.

[12] *Id.* For applications of the fair use factors, see, e.g., Google LLC v. Oracle Am., Inc., No. 18-956 (U.S. Apr. 5, 2021); Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 575–94 (1994); Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 560–69 (1985); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 448–56 (1984); Folsom v. Marsh, 9 F. Cas. 342, 347–49 (C.C.D. Mass. 1841) (Story, J.).

[13] *Campbell*, 510 U.S. at 579.

[14] *Eldred*, 537 U.S. at 219.

ArtI.S8.C8.4 Patents

ArtI.S8.C8.4.1 Inventorship and Utility

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

To be patentable, an invention must be new, nonobvious, useful, and directed at patent-eligible subject matter.[1] Each of these four requirements are long-standing features of patent law, rooted in the Intellectual Property (IP) Clause.[2]

First, because only "Inventors" may secure patent rights under the IP Clause, a patent application cannot claim exclusive rights to an alleged discovery that is not *novel*. "Congress may not authorize the issuance of patents whose effects are to remove existent knowledge from the public domain, or to restrict free access to materials already available" to the public.[3] In other words, if every element of the claimed invention is already disclosed in the "prior art"—that is, information known or available to the public—then the alleged inventor "has added nothing to the total stock of knowledge," and no valid patent may issue to the individual.[4]

Second, a patentable invention, even if novel in the narrowest sense, cannot be *obvious* in light of the prior art. In 1851, *Hotchkiss v. Greenwood* articulated a standard of "invention" that required more than just novelty.[5] The patent in *Hotchkiss* claimed an improvement in making door knobs, where the only new element was "the substitution of a knob of a different material" over the material previously employed in making the knob.[6] The Supreme Court held this improvement too minor to be patentable; unless the discovery required "more ingenuity and skill" than that "possessed by an ordinary mechanic," it was not the work of an inventor.[7]

In *Graham v. John Deere Co. of Kansas City*, the Court concluded that Congress had codified the holding of *Hotchkiss* and its progeny in the 1952 Patent Act's "nonobviousness" requirement for patentability.[8] Under this test, "the scope and content of the prior art are to be determined; differences between the prior art and the claims at issue are to be ascertained; and the level of ordinary skill in the pertinent art resolved. Against this background, the obviousness or nonobviousness of the subject matter is determined."[9] When an invention does

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[1] 35 U.S.C. §§ 101–103. This essay focuses on utility patents, but protection for plants and ornamental design are also available under federal law with generally similar requirements. *See* 35 U.S.C. §§ 161–164, 171–173.

[2] *See* Graham v. John Deere Co. of Kan. City, 383 U.S. 1, 5–6 (1966) (novelty and nonobviousness requirement); Brenner v. Manson, 383 U.S. 519, 534–35 (1966) (utility requirement); Funk Bros. Seed Co. v. Kalo Inoculant Co., 333 U.S. 127 (1948) (patent-eligible subject matter); Hotchkiss v. Greenwood, 52 U.S. (11 How.) 248, 267 (1851) (nonobviousness requirement); *see also* Great Atl. & Pac. Tea Co. v. Supermarket Equip. Corp., 340 U.S. 147, 155 (1950) (Douglas, J., concurring) ("The standard of patentability is a constitutional standard . . . ."). Because these requirements (with the exception of nonobviousness) have been continuously part of patent law since 1790, it is difficult in some cases to determine the extent to which patentability standards articulated by the Supreme Court are required by the IP Clause, or are merely a construction of the patent statute.

[3] *Graham*, 383 U.S. at 6.

[4] Great Atl. & Pac. Tea Co., 340 U.S. at 153; *see also* 35 U.S.C. § 102.

[5] *Hotchkiss*, 52 U.S. (11 How.) at 265–67.

[6] *Id.* at 266.

[7] *Id.* at 266–67.

[8] *Graham*, 383 U.S. at 17.

[9] *Id.* In addition, such "secondary considerations as commercial success, long felt but unsolved needs, failure of others, etc., might be utilized to give light to the circumstances surrounding the origin of the subject matter sought to

no more than combine "familiar elements according to known methods," yielding only "predictable results," it is likely to be obvious.[10]

In addition to being novel and nonobvious, an invention must be *useful* to be patentable—that is, it must have a specific and substantial utility.[11] The utility requirement derives from the IP Clause's command that patent law serve to "promote the Progress of . . . *useful* Arts."[12] Justice Joseph Story, in an oft-quoted 1817 decision, interpreted the utility requirement narrowly, stating that to be "useful" an invention need only "not be frivolous or injurious to the well-being, good policy, or sound morals of society."[13] In 1966, the Supreme Court moved away from this standard in *Brenner v. Manson*, holding that the constitutional purpose of patent law requires a "benefit derived by the public from an invention with substantial utility," where the "specific benefit exists in currently available form."[14] Thus, in *Brenner* itself, a novel chemical process yielding a compound with no known use other than as "an object of scientific research" was not patentable because it lacked the requisite utility.[15]

ArtI.S8.C8.4.2 Patent-Eligible Subject Matter

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

In addition to the novelty, nonobviousness, and utility requirements, the claimed invention must be directed at *patent-eligible subject matter*.[1] By statute, an inventor may patent "any new and useful process, machine, manufacture, or composition of matter."[2] The Supreme Court has observed that Congress intended "anything under the sun that is made by man" to be patentable.[3] Nonetheless, despite the broad statutory language, the Court has held that three types of discoveries are categorically nonpatentable: "laws of nature, natural phenomena, and

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be patented." *Id.* at 17–18. The obviousness determination is an "expansive and flexible" approach that cannot be reduced to narrow, rigid tests. *See* KSR Int'l Co. v. Teleflex Inc., 550 U.S. 398, 415–19 (2007).

[10] *KSR*, 550 U.S. at 416.

[11] Brenner v. Manson, 383 U.S. 519, 534–35 (1966); *In re* Fisher, 421 F.3d 1365, 1371 (Fed. Cir. 2005).

[12] Stiftung v. Renishaw PLC, 945 F.2d 1173, 1180 (Fed. Cir. 1991) (citing *Brenner*, 383 U.S. at 528–29); *see also Graham*, 383 U.S. at 5–6.

[13] Lowell v. Lewis, 15 F. Cas. 1018, 1019 (C.C.D. Mass. 1817) (Story, J.). Whether the utility requirement prohibits patents on inventions that serve "immoral or illegal purposes" in modern times is an open question. *See* Juicy Whip, Inc. v. Orange Bang, Inc., 185 F.3d 1364, 1366–67 (Fed. Cir. 1999) ("[T]he principle that inventions are invalid if they are principally designed to serve immoral or illegal purposes has not been applied broadly in recent years.").

[14] *Brenner*, 383 U.S. at 534–35.

[15] *Id.* at 535–36. *Brenner* did not define the terms "specific" and "substantial." Subsequent lower court decisions have equated "substantial" with "practical utility," that is, the invention must have some "significant and presently available benefit to the public." *In re* Fisher, 421 F.3d at 1371. "Specific" utility requires only that the asserted use "is not so vague as to be meaningless." *Id.* at 1372.

[1] Because the statutory standard for patent-eligible subject matter has remained essentially unchanged for over two centuries, *see generally* Kevin J. Hickey, Cong. Rsch. Serv., R45918, Patent-Eligible Subject Matter Reform in the 116th Congress (2019), https://crsreports.congress.gov/product/pdf/R/R45918, it can be difficult to discern the extent to which the Supreme Court's patent-eligible subject matter cases are motivated or required by the IP Clause, or are merely a construction of the patent statute. *See* Bilski v. Kappos, 561 U.S. 593, 649 (2010) ("The Court has kept this 'constitutional standard' [of the IP Clause] in mind when deciding what is patentable subject matter under § 101. For example, we have held that no one can patent 'laws of nature, natural phenomena, and abstract ideas.'" (quoting Diamond v. Diehr, 450 U.S. 175, 185 (1981)) (Stevens, J., concurring in the judgment).

[2] 35 U.S.C. § 101.

[3] Diamond v. Chakrabarty, 447 U.S. 303, 309 (1980) (quoting S. Rep. No. 82-1979 (1952); H.R. Rep. No. 82-1923 (1952)).

abstract ideas."[4] The Court has reasoned that to permit a patent monopoly on the "'basic tools of scientific and technological work' . . . might tend to impede innovation more than it would tend to promote it."[5]

For example, a person who discovers a previously unknown product of nature (say, a plant with medicinal properties) cannot obtain a patent on this discovery.[6] On the other hand, a genetically engineered bacterium with "markedly different characteristics than any found in nature" may be patented.[7] Similarly, laws of nature—basic physical principles, like Einstein's mass-energy equivalence (E=mc2) or the law of gravity—are not patentable, even if newly discovered and useful.[8] However, a new and useful *application* of a law of nature, such as the use of a physical law in a novel process for molding uncured rubber, may be patentable,[9] so long as the application is not "conventional or obvious."[10] Lastly, abstract ideas are not patentable. For example, the Supreme Court has held that patents on a method for converting binary-coded decimal numerals into pure binary numerals[11] and a business method for hedging risk against price fluctuations[12] claimed nonpatentable abstract ideas.

In the 2010s, the Supreme Court decided a trio of cases that set forth the modern standards for patentable subject matter. These cases established a two-step test. The court first "determine[s] whether the claims at issue are directed to" ineligible subject matter such as a law of nature, natural phenomenon, or abstract idea.[13] If so, the claimed invention is nonpatentable unless the patent claims have an "inventive concept" that transforms the nature of the claim to a patent-eligible application, with elements "sufficient to ensure that the patent in practice amounts to significantly more than a patent upon the [ineligible concept] itself."[14]

In *Mayo Collaborative Services v. Prometheus Laboratories*, the Court addressed the scope of the "law of nature" exception.[15] The patent in *Mayo* claimed a method for measuring metabolites in the blood to calibrate the dosage of thiopurine drugs in the treatment of autoimmune disorders.[16] The Court found the patent claims were directed to a law of nature: "namely, relationships between concentrations of certain metabolites in the blood and the likelihood that a dosage of a thiopurine drug will prove ineffective or cause harm."[17] Because the claims were little "more than an instruction to doctors to apply the applicable laws when treating their patients," the patent lacked any inventive concept and the Court held it to be patent ineligible.[18]

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[4] *Diehr*, 450 U.S. at 185.

[5] Mayo Collaborative Servs. v. Prometheus Labs., Inc., 566 U.S. 66, 71 (2012) (quoting Gottschalk v. Benson, 409 U.S. 63, 67 (1972)).

[6] *Chakrabarty*, 447 U.S. at 309; Fred Funk Seed Bros. Co. v. Kalo Inoculant Co., 333 U.S. 127, 130 (1948).

[7] *Chakrabarty*, 447 U.S. at 310.

[8] *Id.* at 309.

[9] *Diehr*, 450 U.S. at 190–91.

[10] Parker v. Flook, 437 U.S. 584, 590 (1978).

[11] Gottschalk v. Benson, 409 U.S. 63, 67 (1972).

[12] Bilski v. Kappos, 561 U.S. 593, 609–12 (2010). However, the Court declined to hold that business methods are categorically nonpatentable. *See id.* at 606–09.

[13] Alice Corp. Pty. v. CLS Bank Int'l, 573 U.S. 208, 217 (2014).

[14] *Id.* at 217–18 (quoting Mayo Collaborative Servs. v. Prometheus Labs., Inc., 566 U.S. 66, 72–73 (2012)).

[15] *Mayo*, 566 U.S. at 77.

[16] *Id.* at 73–75.

[17] *Id.* at 77.

[18] *Id.* at 79.

The second decision in the trilogy, *Association for Molecular Pathology v. Myriad Genetics, Inc.*, concerned the applicability of the "natural phenomena" exception to the patentability of DNA.[19] The inventor in *Myriad* discovered the precise location and genetic sequence of two human genes associated with an increased risk of breast cancer.[20] Based on this discovery, the patentee claimed two molecules associated with the genes: (1) an isolated DNA segment; and (2) a complementary DNA (cDNA) segment, in which the nucleotide sequences that do not code for amino acids were removed.[21]

Myriad held that isolated DNA segments were nonpatentable products of nature because the patent claimed naturally-occurring genetic information.[22] The Court held, however, that cDNA, as a synthetic molecule distinct from naturally-occurring DNA, was patentable even though the underlying nucleotide sequence was dictated by nature.[23]

Lastly, *Alice Corp. v. CLS Bank International* examined the scope of the "abstract idea" category of nonpatentable subject matter.[24] *Alice* concerned a patent on a system for mitigating settlement risk (i.e., the risk that only one party will pay) using a computer.[25] The Court first held that the invention was directed at "the abstract idea of intermediated settlement."[26] Although the invention in *Alice* was implemented on a computer (which is, of course, a physical machine), the patent lacked an inventive concept because the claims merely "implement[ed] the abstract idea of intermediated settlement on a generic computer."[27]

ArtI.S8.C8.4.3 Constitutional Constraints on Congress's Power Over Granted Patents

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

Early Supreme Court cases suggest that Congress has "plenary" power to enlarge patent rights retrospectively.[1] The extent to which patent rights can be *limited* retrospectively, consistent with the Intellectual Property (IP) Clause and constitutional protections for property, is an unsettled area of law.

The Supreme Court has presumed that patents, once granted, are property rights subject to the Due Process Clause of the Fifth and Fourteenth Amendments.[2] The Court has repeatedly suggested that patents are "private property" the government cannot take without

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[19] Ass'n for Molecular Pathology v. Myriad Genetics, Inc., 569 U.S. 576, 580 (2013).

[20] *Id.* at 579.

[21] *Id.* at 580–85.

[22] *Id.* at 591–94.

[23] *Id.* at 594–95.

[24] Alice Corp. Pty. v. CLS Bank Int'l, 573 U.S. 208, 212 (2014).

[25] *Id.*

[26] *Id.* at 218.

[27] *Id.* at 225.

[1] McClurg v. Kingsland, 42 U.S. (1 How.) 202, 206 (1843) ("[T]he powers of Congress to legislate upon the subject of patents is plenary by the terms of the Constitution. . . . [T]here can be no limitation of their right to modify them at their pleasure, so that they do not take away the rights of property in existing patents."); *see also* Eldred v. Ashcroft, 537 U.S. 186, 202 (2003) ("[T]he Court has found no constitutional barrier to the legislative expansion of existing patents." (citing *McClurg*, 42 U.S. at 206)).

[2] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 642 (1999) ("Patents, however, have long been considered a species of property. . . . As such, they are surely included within the 'property' of which no

just compensation under the Fifth Amendment's Takings Clause.[3] The Court has not had occasion to decide the applicability of the Takings Clause to patents, however, because Congress has long provided by statute that a patent holder may sue for "reasonable and entire compensation" if the Federal Government uses or manufactures a patented invention without a license.[4]

In *Oil States Energy Services, LLC v. Greene's Energy Group, LLC*,[5] the Court distinguished these precedents regarding the nature of a patent as private property. *Oil States* held that because the grant of a patent was a "public right" (not a private right) under Article III of the Constitution, determinations of patent validity can be made by an administrative agency and need not be decided by an Article III court.[6] Although this holding is in some tension with the Court's earlier characterizations of patents as private property, *Oil States* emphasized "the narrowness of [its] holding"; the Court specifically noted that "our decision should not be misconstrued as suggesting that patents are not property for purposes of the Due Process Clause or the Takings Clause."[7]

ArtI.S8.C8.5 Federal Power Over Trademarks

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

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

person may be deprived by a State without due process of law [under the Fourteenth Amendment.]" (citations omitted)). For background on the Due Process Clause, see Amdt14.S1.3 Due Process Generally.

[3] *See, e.g.*, Horne v. Dep't of Agric., 576 U.S. 351, 359–60 (2015) ("'[A patent] confers upon the patentee an exclusive property in the patented invention which cannot be appropriated or used by the government itself, without just compensation, any more than it can appropriate or use without compensation land which has been patented to a private purchaser.'" (quoting James v. Campbell, 104 U.S. 356, 358 (1882))); *see also* McCormick Harvesting Mach. Co. v. C. Aultman & Co., 169 U.S. 606, 609 (1898) (concluding that a granted patent "become[s] the property of the patentee, and as such is entitled to the same legal protection as other property"); Brown v. Duchesne, 60 U.S. (19 How.) 183, 197 (1857) ("[B]y the laws of the United States, the rights of a party under a patent are his private property . . . ."). For more on the Takings Clause as applied to tangible property, see Amdt5.9.1 Overview of Takings Clause.

[4] *See* 28 U.S.C. § 1498(a). An analogous right to sue is afforded to copyright holders. *Id.* § 1498(b).

[5] Oil States Energy Servs., LLC v. Greene's Energy Grp., No. 16-712, slip op. at 10–11 (U.S. Apr. 24, 2018).

[6] *Id.* at 5–10. For a discussion of *Oil States* in the context of the limits on congressional power to establish non-Article III courts, see ArtIII.S1.9.1 Overview of Congressional Power to Establish Non-Article III Courts.

[7] *Oil States*, slip op. at 16–17. *Oil States* also specified that it did not decide "whether other patent matters, such as infringement actions, can be heard in a non-Article III forum," or whether the retroactive application of the inter partes review administrative procedure effected a due process violation. *Id.* at 17.

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

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

[3] *Id.*

twentieth century, however, courts have sustained federal trademark legislation as an exercise of Congress's power under the Commerce Clause.[4]

As with other forms of intellectual property, Congress's power over trademarks cannot be used in ways that infringe the constitutional rights of individuals. For example, because trademarks are considered private speech under the First Amendment, the government generally cannot engage in viewpoint discrimination in trademark registration decisions.[5]

ArtI.S8.C8.6 State Regulation of Intellectual Property

Article I, Section 8, Clause 8:

> *[The Congress shall have Power . . .] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.*

In the absence of preemptive federal legislation to the contrary, nondiscriminatory exercises of state police and taxing powers are not invalid just because such state laws affect federal copyrights and patents.[1] Thus, state safety regulations are not void because they limit or preclude the practice of an invention protected by a federal patent.[2] Similarly, a state may prescribe reasonable regulations on the transfer of intellectual property rights to protect its citizens from fraud.[3] States may tax royalties received from patent or copyright licenses as income.[4]

Furthermore, states may provide IP-like protections to material that Congress could regulate under the IP Clause, so long as these provisions are neither (i) expressly preempted by a valid act of Congress, nor (ii) in conflict with the purposes of, or the policy balance struck by, federal IP law.[5] For example, before the Copyright Act of 1976, federal copyright law only applied to published works, and many states protected unpublished creative works under "common law" copyright.[6] Similarly, in *Goldstein v. California*, the Supreme Court ruled that states may use criminal law to penalize the unauthorized pirating of sound recordings that (although they are the writings of authors) were not protected by federal copyright law.[7] States may also provide trade secret protections for economically valuable information that is kept secret, even if that information constitutes patentable subject matter.[8]

However, states may not regulate in the field of copyrights and patents in a way that "conflict[s] with the operation of the laws in this area passed by Congress" or "clashes with the

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[4] Dawn Donut Co. v. Hart's Food Stores, Inc., 267 F.2d 358, 365 (2d Cir. 1959) (holding that Congress has power under the Commerce Clause to regulate trademarks used in commerce, even if the use is purely intrastate). For an overview of the scope of the Commerce Clause, see ArtI.S8.C3.1 Overview of Commerce Clause.

[5] Iancu v. Brunetti, No. 18-302, slip op. at 1 (U.S. June 24, 2019); *Matal v. Tam,* slip op. at 18, 25–26 (U.S. June 19, 2017); *see generally* Amdt1.7.6.1 Commercial Speech Early Doctrine.

[1] Aronson v. Quick Point Pencil Co., 440 U.S. 257, 262 (1979) ("[S]tates are free to regulate the use of such intellectual property in any manner not inconsistent with federal law.").

[2] Patterson v. Kentucky, 97 U.S. 501, 505–07 (1879).

[3] Allen v. Riley, 203 U.S. 347, 356 (1906); *see also Aronson*, 440 U.S. at 262 ("State [contract] law is not displaced merely because the contract relates to intellectual property which may or may not be patentable . . . .").

[4] Fox Film Corp. v. Doyal, 286 U.S. 123, 128, 131 (1932).

[5] *See* Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 152, 165 (1989).

[6] *See* Harper & Row, Publishers v. Nation Enters., 471 U.S. 539, 550–51 (1985); Wheaton v. Peters, 33 U.S. (8 Pet.) 591, 657 (1834).

[7] 412 U.S. 546, 560–62 (1973). Congress later created federal protection for the pre-1972 sound recordings at issue in *Goldstein*. *See* Hatch-Goodlatte Music Modernization Act, Pub. L. No. 115-264, tit. II, 132 Stat. 3676, 3728–37 (2018).

[8] Kewanee Oil Co. v. Bicron Corp., 416 U.S. 470, 491 (1974).

balance struck by Congress" in its IP laws.[9] Indeed, a core purpose of the IP Clause's inclusion in the Constitution was to provide national uniformity in intellectual property law.[10] Thus, states cannot offer patent-like protection to the subject matter of an expired patent or to "intellectual creations which would otherwise remain unprotected as a matter of federal law."[11] For example, states may not use unfair competition law to prevent the copying of items that are not patentable for a lack of novelty or nonobviousness,[12] or create a patent-like regime that prohibits the copying of certain unpatented industrial designs.[13] Such state laws impermissibly interfere with the federal patent policy that "ideas once placed before the public without the protection of a valid patent are subject to appropriation [by the public] without significant restraint."[14]

Clause 9—Courts

ArtI.S8.C9.1 Inferior Federal Courts

Article I, Section 8, Clause 9:

[The Congress shall have Power . . .] To constitute Tribunals inferior to the supreme Court.

Congress's ninth enumerated power is to "constitute Tribunals inferior to the supreme Court"—that is, to establish lower federal courts subordinate to the Supreme Court of the United States.[1] This grant of power to Congress accords with Article III's Vesting Clause, which places the judicial power of the United States in the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish."[2]

As explained elsewhere in the *Constitution Annotated*,[3] the Constitutional Convention's delegates generally agreed that a national judiciary should be established with a supreme tribunal,[4] but disagreed as to whether there should be inferior federal tribunals.[5] James Wilson (who later served as an Associate Justice on the Supreme Court) and James Madison proposed a compromise in which Congress would be empowered to appoint inferior tribunals if necessary, which the Convention approved.[6]

The Constitution thus leaves the federal judiciary's structure—and, indeed, whether any federal courts besides the Supreme Court should exist at all—to congressional determination.

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[9] *Id.* at 479; *Bonito Boats*, 489 U.S. at 152.

[10] *Bonito Boats*, 489 U.S. at 162.

[11] *Id.* at 152, 156.

[12] Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964); *see also* Compco Corp. v. Day-Brite Lighting, Inc., 376 U.S. 234 (1964).

[13] *Bonito Boats*, 489 U.S. at 157.

[14] *Id.* at 156.

[1] *See* ArtIII.S1.8.4 Establishment of Inferior Federal Courts.

[2] *See* U.S. Const. art. III, § 1; *see* 3 Joseph Story, Commentaries on the Constitution of the United States § 1573 (1833) (noting that the inferior courts power "properly belongs to the third article of the Constitution").

[3] *See* ArtIII.S1.8.2 Historical Background on Establishment of Article III Courts; *see also* 3 Story's Commentaries, *supra* note 2, § 1574 (reviewing the debate at the Convention over inferior federal tribunals).

[4] *See* 1 Max Farrand, The Records of the Federal Convention of 1787, at 104 (1911).

[5] *See id.* at 124–25. John Rutledge, for example, argued that the existing state courts—and not inferior federal courts—ought to decide all cases in the first instance with a right of appeal to the supreme national tribunal. *Id.* at 124.

[6] *Id.* at 125, 127. Madison argued that the Supreme Court's appellate workload would become "oppressive" without inferior federal tribunals. *Id.* at 124; *see also* The Federalist No. 81 (Alexander Hamilton) ("The power of constituting inferior courts is evidently calculated to obviate the necessity of having recourse to the Supreme Court in every case of federal cognizance.").

Through the Judiciary Act of 1789 and subsequent enactments,[7] Congress organized the federal judiciary into district courts with original jurisdiction over most federal cases, intermediate circuit courts of appeal, and the Supreme Court.

Congress's Article I power to establish inferior federal courts, and to distribute federal jurisdiction among them, should be read alongside Article III's provisions, which set forth the reach of federal judicial power.[8] Article III also identifies certain cases in which the Supreme Court has original jurisdiction.[9]

Clause 10—Maritime Crimes

ArtI.S8.C10.1 Historical Background on Maritime Crimes

Article I, Section 8, Clause 10:

> *[The Congress shall have Power . . .] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; . . .*

"When the United States ceased to be a part of the British empire, and assumed the character of an independent nation, they became subject to that system of rules which reason, morality, and custom had established among civilized nations of Europe, as their public law. . . . The faithful observance of this law is essential to national character. . . ."[1] These words of the Chancellor Kent expressed the view of the binding character of international law that was generally accepted at the time the Constitution was adopted. During the Revolutionary War, Congress took cognizance of all matters arising under the law of nations and professed obedience to that law.[2] Under the Articles of Confederation, it was given exclusive power to appoint courts for the trial of piracies and felonies committed on the high seas, but no provision was made for dealing with offenses against the law of nations.[3] The draft of the Constitution submitted to the Convention of 1787 by its Committee of Detail empowered Congress "to declare the law and punishment of piracies and felonies committed on the high seas, and the punishment of counterfeiting the coin of the United States, and of offences against the law of nations."[4] In the debate on the floor of the Convention, the discussion turned on the question as to whether the terms, "felonies" and the "law of nations," were sufficiently precise to be generally understood. The view that these terms were often so vague and indefinite as to require definition eventually prevailed and Congress was authorized to define as well as punish piracies, felonies, and offenses against the law of nations.[5]

ArtI.S8.C10.2 Definition of Maritime Crimes and Offenses

Article I, Section 8, Clause 10:

> *[The Congress shall have Power . . .] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; . . .*

The fact that the Constitutional Convention considered it necessary to give Congress authority to define offenses against the law of nations does not mean that in every case

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[7] *See* An Act to Establish the Judicial Courts of the United States, 1 Stat. 73 (1789).

[8] U.S. Const. art. III, § 2, cl. 1; *see* ArtIII.S2.C1.1 Overview of Cases or Controversies.

[9] U.S. Const. art. III, § 2, cl. 2; *see* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[1] 1 J. Kent, Commentaries on American Law 1 (1826).

[2] 19 Journals of the Continental Congress 315, 361 (1912); 20 *id.* at 762; 21 *id.* at 1136–37, 1158.

[3] Article IX.

[4] 2 Records of the Federal Convention of 1787, at 168, 182 (Max Farrand ed., 1937).

[5] *Id.* at 316.

Congress must undertake to codify that law or mark its precise boundaries before prescribing punishments for infractions thereof. An act punishing "the crime of piracy, as defined by the law of nations[,]" was held to be an appropriate exercise of the constitutional authority to "define and punish" the offense, since it adopted by reference the sufficiently precise definition of International Law.[1] Similarly, in *Ex parte Quirin*,[2] the Court found that by the reference in the Fifteenth Article of War to "offenders or offenses that . . . by the law of war may be triable by such military commissions . . .," Congress had "exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals."[3] Where, conversely, Congress defines with particularity a crime which is "an offense against the law of nations," the law is valid, even if it contains no recital disclosing that it was enacted pursuant to this clause. Thus, the duty which the law of nations casts upon every government to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof, was found to furnish a sufficient justification for the punishment of the counterfeiting within the United States, of notes, bonds, and other securities of foreign governments.[4]

ArtI.S8.C10.3 Extraterritorial Reach

Article I, Section 8, Clause 10:

> *[The Congress shall have Power . . .] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations; . . .*

Since this clause contains the only specific grant of power to be found in the Constitution for the punishment of offenses outside the territorial limits of the United States, a lower federal court held in 1932[1] that the general grant of admiralty and maritime jurisdiction by Article III, Section 2, could not be construed as extending either the legislative or judicial power of the United States to cover offenses committed on vessels outside the United States but not on the high seas. Reversing that decision, the Supreme Court held that this provision "cannot be deemed to be a limitation on the powers, either legislative or judicial, conferred on the National Government by Article III, § 2. The two clauses are the result of separate steps independently taken in the Convention, by which the jurisdiction in admiralty, previously divided between the Confederation and the states, was transferred to the National Government. It would be a surprising result, and one plainly not anticipated by the framers or justified by principles which ought to govern the interpretation of a constitution devoted to the redistribution of governmental powers, if part of them were lost in the process of transfer. To construe the one clause as limiting rather than supplementing the other would be to ignore their history, and without effecting any discernible purpose of their enactment, to deny to both the states and the National Government powers which were common attributes of sovereignty before the adoption of the Constitution. The result would be to deny to both the power to define and punish crimes of less gravity than felonies committed on vessels of the United States while on the high seas, and crimes of every grade committed on them while in foreign territorial

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[1] United States v. Smith, 18 U.S. (5 Wheat.) 153, 160, 162 (1820). *See also* The Marianna Flora, 24 U.S. (11 Wheat.) 1, 40–41 (1826); United States v. Brig Malek Abhel, 43 U.S. (2 How.) 210, 232 (1844).

[2] 317 U.S. 1 (1942).

[3] 317 U.S. at 28.

[4] United States v. Arjona, 120 U.S. 479, 487, 488 (1887).

[1] United States v. Flores, 3 F. Supp. 134 (E.D. Pa. 1932).

waters."[2] Within the meaning of this Section, an offense is committed on the high seas even when the vessel on which it occurs is lying at anchor on the road in the territorial waters of another country.[3]

Clause 11—War Powers

ArtI.S8.C11.1 Source of Congress's War Powers

Article I, Section 8, Clause 11:

> *[The Congress shall have Power . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .*

Three different views regarding the source of "war powers" were expressed in the early years of the Constitution and continued to vie for supremacy for nearly a century and a half. In the *Federalist Papers*,[1] Alexander Hamilton elaborated on the theory that the war power is an aggregate of the particular powers granted to a National Government. In 1795, the argument was advanced that the National Government's war power is an attribute of sovereignty and hence not dependent upon the affirmative grants of the written Constitution.[2] In *McCulloch v. Maryland*, Chief Justice John Marshall appears to have taken a still different view, namely that the power to wage war is implied from the power to declare it.[3] During the Civil War era, the two latter theories emerged from the Supreme Court. Speaking for four Justices in *Ex parte Milligan*, Chief Justice Salmon P. Chase described the power to declare war as "necessarily" extending "to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and conduct of campaigns."[4] In another case, adopting the terminology used by President Abraham Lincoln in his Message to Congress on July 4, 1861,[5] the Court referred to "the war power" as a single unified power.[6]

In 1936, the Court explained the logical basis for imputing such an inherent power to the Federal Government. In *United States v. Curtiss-Wright Corp.*,[7] Justice George Sutherland stated the reasons for this conclusion:

> As a result of the separation from Great Britain by the colonies acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America. Even before the Declaration, the colonies were a unit in foreign affairs, acting through a common agency—namely, the Continental Congress, composed of delegates from the thirteen colonies. That agency exercised the powers of war and peace, raised

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[2] United States v. Flores, 289 U.S. 137, 149–50 (1933).

[3] United States v. Furlong, 18 U.S. (5 Wheat.) 184, 200 (1820).

[1] The Federalist No. 23 (Alexander Hamilton). Hamilton argued that the power to regulate the Armed Forces, like other powers related to the common defense, "ought to exist without limitation." *Id.*

[2] Penhallow v. Doane, 3 U.S. (3 Dall.) 54, 80 (1795) ("In [the Continental] Congress were vested, because by Congress were exercised with the approbation of the people, the rights and powers of war and peace. In every government, whether it consists of many states, or of a few, or whether it be of a federal or consolidated nature, there must be a supreme power or will; the rights of war and peace are component parts of this supremacy . . . ").

[3] McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 373 (1819) ("[T]he power to declare war involves, by necessary implication, if anything was to be implied, the powers of raising and supporting armies, and providing and maintaining a navy, to prosecute the war then declared.").

[4] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (dissenting opinion); *see also* Miller v. United States, 78 U.S. (11 Wall.) 268, 305 (1871).

[5] Cong. Globe, 37th Congress, 1st Sess., App. 1 (1861).

[6] Hamilton v. Dillin, 88 U.S. (21 Wall.) 73, 87 (1875).

[7] 299 U.S. 304 (1936).

an army, created a navy, and finally adopted the Declaration of Independence. It results that the investment of the Federal Government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the Federal Government as necessary concomitants of nationality.[8]

ArtI.S8.C11.2 Scope of Congress's War Powers

Article I, Section 8, Clause 11:

[The Congress shall have Power . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .

The Supreme Court has suggested the breadth of Congress's "war powers" covers matters beyond the authorization of military and naval operations to support economic measures with impact on private citizens.[1] For example, in *McCulloch v. Maryland*,[2] Chief Justice John Marshall listed the power "to declare and conduct a war" as one of the "enumerated powers" from which the authority to charter the Bank of the United States was deduced.[3]

In *Lichter v. United States*,[4] upholding the Renegotiation Act,[5] which permitted the government to recoup excessive profits from defense contractors, the Court declared that:

In view of this power 'To raise and support Armies,' and the power granted in the same Article of the Constitution 'to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers', the only question remaining is whether the Renegotiation Act was a law 'necessary and proper for carrying into Execution' the war powers of Congress and especially its power to support armies.[6]

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[8] *Id.* at 318; *but see* Torres v. Texas Dep't of Public Safety, No. 20-603, slip op. at 7 (U.S. June 29, 2022) ("For one thing, the Constitution's text, across several Articles, strongly suggests a complete delegation of authority to the Federal Government to provide for the common defense. Unlike most of the powers given to the national government, the Constitution spells out the war powers not in a single, simple phrase, but in many broad, interrelated provisions.").

[1] See. *e.g.*, United States v. Macintosh, 283 U.S. 605, 622 (1931), ("From its very nature the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law.") overruled on other grounds by Girouard v. United States, 328 U.S. 61, 66 (1946); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 426 (1934) ("[The] war power of the federal government is not created by the emergency of war, but it is a power given to meet that emergency. It is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme co-operative effort to preserve the nation."); Jacob Ruppert, Inc. v. Caffey, 251 U.S. 264, 299–300 (1920) (upholding the Volstead Act prohibition on the manufacture and sale of non-intoxicating beer on the basis that "the implied war power over intoxicating liquors extends to the enactment of laws which will not merely prohibit the sale of intoxicating liquors but will effectually prevent their sale"); Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1870) ("[T]he [war] power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress.").

[2] 17 U.S. (4 Wheat.) 316 (1819).

[3] *Id.* at 407–08 ("Although, among the enumerated powers of government, we do not find the word 'bank' or 'incorporation,' we find the great powers, to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. . . . [I]t may with great reason be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution.").

[4] 334 U.S. 742 (1948).

[5] Sixth Supplemental National Defense Appropriation Act § 403, 56 Stat. 226, 245–246 (1942) (as amended).

[6] 334 U.S. at 757–58.

In a footnote, the Court in *Lichter* listed the Preamble, the Necessary and Proper Clause, the provisions authorizing Congress to lay taxes and provide for the common defense, to declare war, and to provide and maintain a navy, together with the clause designating the President as Commander in Chief of the Army and Navy, as being "among the many other provisions implementing the Congress and the President with powers to meet the varied demands of war . . . ."[7] The Court in *Lichter* also compared the Renegotiation Act to the Selective Service Act, explaining that "[t]he authority of Congress to authorize each of them sprang from its war powers. Each was part of a national policy adopted in time of crisis in the conduct of total global warfare by a nation dedicated to the preservation, practice and development of the maximum measure of individual freedom consistent with the unity of effort essential to success."[8] The Court asserted that "[b]oth Acts were a form of mobilization" and that "[t]he language of the Constitution authorizing such measures is broad rather than restrictive."[9]

The Court has stated that "[the war power] is not limited to victories in the field . . . [as] [i]t carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."[10] After World War II hostilities ended, Congress enacted the Housing and Rent Act to continue the controls begun in 1942,[11] and continued the military draft.[12] With the outbreak of the Korean War, legislation was enacted establishing general presidential control over the economy again,[13] and by executive order the President created agencies to exercise the power.[14] The Court continued to assume the existence of a state of wartime emergency prior to Korea, but with misgivings. In *Woods v. Cloyd W. Miller Co.*,[15] the Court held that the new rent control law were constitutional on the ground that cessation of hostilities did not end the government's war power, but that the power continued to remedy the evil arising out of the emergency. Yet as Justice William Douglas noted for the Court:

> "We recognize the force of the argument that the effects of war under modern conditions may be felt in the economy for years and years, and that if the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and Tenth Amendments as well. There are no such implications in today's decision."[16]

Justice Robert Jackson, concurring, explained that he found the war power "the most dangerous one to free government in the whole catalogue of powers" and cautioned that its exercise "be scrutinized with care."[17] In *Ludecke v. Watkins*,[18] four dissenting Justices were prepared to hold that the presumption in the statute under review of continued war with

[7] *Id.* at 755 n.3.

[8] *Id.* at 754–55.

[9] *Id.* at 755.

[10] Stewart v. Kahn, 78 U.S. 493, 507 (1870); *see also* Hamilton v. Kentucky Distilleries & Warehouse Co., 251 U.S. 146 (1919).

[11] 61 Stat. 193 (1947).

[12] 62 Stat. 604 (1948).

[13] Defense Production Act of 1950, 64 Stat. 798.

[14] E.O. 10161, 15 Fed. Reg. 6105 (1950).

[15] 333 U.S. 138 (1948).

[16] *Id.* at 143–44.

[17] *Id.* at 146–47; *but see* Chastelton Corp. v. Sinclair, 265 U.S. 543, 547–48 (1924) ("[A] Court is not at liberty to shut its eyes to an obvious mistake, when the validity of the law depends upon the truth of what is declared. . . . A law depending upon the existence of an emergency or other certain state of facts to uphold it may cease to operate if the emergency ceases or the facts change even though valid when passed. . . . [The Court] is open to inquire whether the exigency still existed upon which the continued operation of the law depended.").

Germany was "a pure fiction" and not to be used. The majority in *Ludecke* held, however, that the delegated power of the President to remove enemy aliens during World War II continued after hostilities ended, determining that the termiation of "'[t]he state of war' . . . is a political act."[19]

ArtI.S8.C11.3 Declarations of War

Article I, Section 8, Clause 11:

> *[The Congress shall have Power . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .*

In the early draft of the Constitution presented to the Convention by its Committee of Detail, Congress was empowered "to make war."[1] Although there were solitary suggestions that the power should be vested in the President alone,[2] in the Senate alone,[3] or in the President and the Senate,[4] the limited notes of the proceedings indicate that the Convention's sentiment was that the potentially momentous consequences of initiating armed hostilities should require involvement by the President and both Houses of Congress.[5] In contrast to the English system, the Framers did not want the wealth and blood of the Nation committed by the decision of a single individual;[6] in contrast to the Articles of Confederation, they did not wish to forego entirely the advantages of Executive efficiency nor to entrust the matter solely to a branch so close to popular passions.[7]

The result of these conflicting considerations was that the Convention amended the clause so as to give Congress the power to "declare war."[8] Although this change could be read to give Congress the mere formal function of recognizing a state of hostilities, in the context of the Convention proceedings it appears more likely the change was intended to ensure that the

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[18] 335 U.S. 160, 175 (1948).

[19] *Id.* at 168–69 (explaining that "'[t]he state of war' may be terminated by treaty or legislation or Presidential proclamation").

[1] 2 Records of the Federal Convention of 1787, at 313 (Max Farrand ed., 1937).

[2] Mr. Pierce Butler favored "vesting the power in the President, who will have all the requisite qualities, and will not make war but when the Nation will support it." *Id.* at 318.

[3] Mr. Charles Pinkney thought the House was too numerous for such deliberations but that the Senate would be more capable of a proper resolution and more acquainted with foreign affairs. Additionally, with the states equally represented in the Senate, the interests of all would be safeguarded. *Id.*

[4] Alexander Hamilton's plan provided that the President was "to make war or peace, with the advice of the senate." 1 *id.* at 300.

[5] 2 *id.* at 318–319. In the *Federalist No. 69* (Alexander Hamilton), Hamilton notes: "[T]he President is to be commander-in-chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first General and admiral of the confederacy; while that of the British king extends to the *declaring* of war and to the *raising* and *regulating* of fleets and armies,—all which, by the Constitution under consideration, would appertain to the legislature." *See also id.* at No. 26, 164–171. *Cf.* C. Berdahl, War Powers of the Executive in the United States ch. V (1921).

[6] The Federalist No. 69 (Alexander Hamilton). During the Convention, Elbridge Gerry remarked that he "never expected to hear in a republic a motion to empower the Executive alone to declare war." 2 Records of the Federal Convention of 1787, at 318 (Max Farrand ed., 1937).

[7] The Articles of Confederation vested powers with regard to foreign relations in the Congress.

[8] 2 Records of the Federal Convention of 1787, at 318–19 (Max Farrand ed., 1937).

President was empowered to repel sudden attacks[9] without awaiting congressional action and to make clear that the conduct of war was vested exclusively in the President.[10]

An early controversy revolved about the issue of the President's powers and the necessity of congressional action when hostilities are initiated against the United States rather than the Nation instituting armed conflict. The Bey of Tripoli, in the course of attempting to extort payment for not molesting United States shipping, declared war upon the United States, and a debate began whether Congress had to enact a formal declaration of war to create a legal status of war. President Thomas Jefferson sent a squadron of frigates to the Mediterranean to protect American ships but limited its mission to defense in the narrowest sense of the term. Attacked by a Tripolitan cruiser, one of the frigates subdued it, disarmed it, and, pursuant to instructions, released it. Jefferson in a message to Congress announced his actions as in compliance with constitutional limitations on his authority in the absence of a declaration of war.[11] Alexander Hamilton espoused a different interpretation, contending that the Constitution vested in Congress the power to initiate war, but that when another nation made war upon the United States, the United States was already in a state of war and no declaration by Congress was needed.[12] Congress thereafter enacted a statute authorizing the President to instruct the commanders of armed vessels of the United States to seize all vessels and goods of the Bey of Tripoli "and also to cause to be done all such other acts of precaution or hostility as the state of war will justify."[13] But Congress, apparently accepting Hamilton's view, did not pass a formal declaration of war.[14]

Sixty years later, the Supreme Court sustained the blockade of the Southern ports that Lincoln instituted in April 1861 at a time when Congress was not in session.[15] Congress subsequently ratified Lincoln's action,[16] so that it was unnecessary for the Court to consider the constitutional basis of the President's action in the absence of congressional authorization, but the Court in its 1863 decision *The Prizes Cases* nonetheless approved, 5-4, the blockade order as an exercise of Presidential power alone, on the ground that a state of war was a fact.[17] The Court reasoned: "The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name; and no name given to it by him or them could change the fact."[18] The minority challenged this doctrine on the ground that while the President could unquestionably adopt such measures as the laws permitted for the

[9] Jointly introducing the amendment to substitute "declare" for "make," Madison and Gerry noted the change would "leav[e] to the Executive the power to repel sudden attacks." *Id.* at 318.

[10] Connecticut originally voted against the amendment to substitute "declare" for "make" but "on the remark by Mr. King that 'make' war might be understood to 'conduct' it which was an Executive function, Mr. Ellsworth gave up his opposition, and the vote of Connecticut was changed." *Id.* at 319. The contemporary and subsequent judicial interpretation was to the understanding set out in the text. *Cf.* Talbot v. Seeman, 5 U.S. (1 Cr.) 1, 28 (1801) (Chief Justice John Marshall stated: "The whole powers of war being, by the Constitution of the United States, vested in congress, the acts of that body alone can be resorted to as our guides in this inquiry."); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866).

[11] Messages and Papers of the Presidents 326, 327 (J. Richardson ed., 1896).

[12] 7 Works of Alexander Hamilton 746–747 (J. Hamilton ed., 1851).

[13] 2 Stat. 129, 130 (1802).

[14] Congress need not declare war in the all-out sense; it may provide for a limited war which, it may be, the 1802 statute recognized. *Cf.* Bas v. Tingy, 4 U.S. (4 Dall.) 37 (1800).

[15] Prize Cases, 67 U.S. (2 Bl.) 635 (1863).

[16] 12 Stat. 326 (1861).

[17] Prize Cases, 67 U.S. (2 Bl.) 635 (1863).

[18] *Id.* at 669.

enforcement of order against insurgency, Congress alone could stamp an insurrection with the character of war and thereby authorize the legal consequences ensuing from a state of war.[19]

A unanimous Court adopted the position of the majority in the *Prizes Case* a few years later in *The Protector* when it became necessary to ascertain the exact dates on which the war began and ended. In *The Protector*, Chief Justice Salmon P. Chase reasoned that the Court must "refer to some public act of the political departments of the government to fix the dates; and, for obvious reasons, those of the executive department, which may be, and, in fact, was, at the commencement of hostilities, obliged to act during the recess of Congress, must be taken. The proclamation of intended blockade by the President may therefore be assumed as marking the first of these dates, and the proclamation that the war had closed, as marking the second."[20]

These cases settled whether a state of war could exist without a formal declaration by Congress. When hostile action is taken against the Nation or against its citizens or commerce, the President may resort to force in response. But whether the Constitution empowers the President to commit troops abroad to further national interests absent a declaration of war or specific congressional authorization short of such a declaration has been controversial.[21] The Supreme Court has not addressed this issue[22] and lower courts have generally not adjudicated the matter on "political question" grounds.[23] Absent judicial guidance, Congress and the President have had to reach accommodations with each other.[24]

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[19] *Id.* at 682.

[20] The Protector, 79 U.S. (12 Wall.) 700, 702 (1872).

[21] The controversy, not susceptible of definitive resolution in any event, was stilled for the moment, when in 1973 Congress set a cut-off date for United States military activities in Indochina, Pub. L. No. 93–52, 108, 87 Stat. 134, and subsequently, over the President's veto, Congress enacted the War Powers Resolution, providing a framework for the assertion of congressional and presidential powers in the use of military force. Pub. L. No. 93–148, 87 Stat. 555 (1973), 50 U.S.C. §§ 1541–1548. *See* ArtII.S2.C1.10 1.10 Use of Troops Overseas and Congressional Authorization.

[22] In Atlee v. Richardson, 411 U.S. 911 (1973), *aff'g* 347 F. Supp. 689 (E.D. Pa., 1982), the Court summarily affirmed a three-judge court's dismissal of a suit challenging the constitutionality of United States activities in Vietnam on political question grounds. The action constituted approval on the merits of the dismissal, but it did not necessarily approve the lower court's grounds. *See also* Massachusetts v. Laird, 400 U.S. 886 (1970) (denying leave to file complaint); Holtzman v. Schlesinger, 414 U.S. 1304, 1316, 1321 (1973) (actions of individual justices on motions for stays). The Court has consistently denied certiorari in cases on its discretionary docket concerning this issue.

[23] *E.g.,* Velvel v. Johnson, 287 F. Supp. 846 (D. Kan. 1968), *aff'd sub nom.* Velvel v. Nixon, 415 F.2d 236 (10th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970); Luftig v. McNamara, 252 F. Supp. 819 (D.D.C. 1966), aff'd 373 F.2d 664 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 945 (1968); Mora v. McNamara, 387 F.2d 862 (D.C. Cir. 1967), *cert. denied*, 389 U.S. 934 (1968); Orlando v. Laird, 317 F. Supp. 1013 (E.D.N.Y. 1970), and Berk v. Laird, 317 F. Supp. 715 (E.D.N.Y. 1970), *consolidated and aff'd*, 443 F.2d 1039 (2d Cir. 1971), *cert. denied*, 404 U.S. 869 (1971); Massachusetts v. Laird, 451 F.2d 26 (1st Cir. 1971); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), *cert. denied*, 416 U.S. 936 (1974); Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973).

During the 1980s, based on the political question doctrine and certain other discretionary doctrines, courts were not receptive to suits, many by Members of Congress, seeking a declaration of the President's powers. *See, e.g.*, Crockett v. Reagan, 558 F. Supp. 893 (D.D.C. 1982) (military aid to El Salvador), *aff'd*, 720 F.2d 1355 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984); Conyers v. Reagan, 578 F. Supp. 324 (D.D.C. 1984) (invasion of Grenada), *dismissed as moot*, 765 F.2d 1124 (D.C. Cir. 1985); Lowry v. Reagan, 676 F. Supp. 333 (D.D.C. 1987) (reflagging and military escort operation in Persian Gulf), *aff'd.* No. 87-5426 (D.C. Cir. 1988); Dellums v. Bush, 752 F. Supp. 1141 (D.D.C. 1990) (U.S. Saudia Arabia/Persian Gulf deployment).

[24] For further discussion, see ArtII.S2.C1.1.1 Historical Background on Commander in Chief Clause to ArtII.S2.C1.1.19 Military Commissions.

ArtI.S8.C11.4 Enemy Property and Congress's War Powers

Article I, Section 8, Clause 11:

> *[The Congress shall have Power . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .*

In *Brown v. United States*,[1] Chief Justice John Marshall addressed the legal position of enemy property during wartime. He held that the mere declaration of war by Congress does not effect a confiscation of enemy property situated within the territorial jurisdiction of the United States, but that Congress could subject such property to confiscation by further action.[2] As an exercise of the war power, such confiscation is not subject to the restrictions of the Fifth and Sixth Amendments.[3] Since such confiscation is unrelated to the personal guilt of the property owner, it is immaterial whether the property belongs to an alien, a neutral, or even to a citizen.[4] Confiscation operates as an instrument of coercion, which, by depriving an enemy of his or her property, impairs the ability of such enemy to oppose the confiscating government while providing the confiscating government the means for conducting the war.[5]

ArtI.S8.C11.5 Prizes of War and Congress's War Powers

Article I, Section 8, Clause 11:

> *[The Congress shall have Power . . .] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; . . .*

The power of Congress with respect to prizes is plenary; no one can have any interest in prizes captured except by permission of Congress.[1] Nevertheless, since international law informs United States law, the Court will apply international law norms so long as such international law norms have not been modified by treaty or by legislative or executive action.[2]

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[1] 12 U.S. (8 Cr.) 110, 126 (1814). *See also* Conrad v. Waples, 96 U.S. 279, 284 (1878) ("[U]ntil some provision was made by law, the courts of the United States could not decree a confiscation of his property, and direct its sale.").

[2] *Brown*, 12 U.S. at 125 ("The constitution of the United States was framed at a time when this rule, introduced by commerce in favor of moderation and humanity, was received throughout the civilized world. In expounding that constitution, a construction ought not lightly to be admitted which would give to a declaration of war an effect in this country it does not possess elsewhere, and which would fetter that exercise of entire discretion respecting enemy property, which may enable the government to apply to the enemy the rule that he applies to us."). *See also* Cent. Union Tr. Co. of New York v. Garvan, 254 U.S. 554, 566 (1921) ("There can be no doubt that Congress has power to provide for an immediate seizure in war times of property supposed to belong to the enemy . . . ."); United States v. Chem. Found., 272 U.S. 1, 11 (1926) ("Congress was untrammeled and free to authorize the seizure, use or appropriation of such properties without any compensation to the owners."); Silesian Am. Corp. v. Clark, 332 U.S. 469, 475 (1947) ("There is no doubt but that under the war power, as heretofore interpreted by this Court, the United States, acting under a statute, may vest in itself the property of a national of an enemy nation. Unquestionably to wage war successfully, the United States may confiscate enemy property.").

[3] Miller v. United States, 78 U.S. (11 Wall.) 268, 304–305 (1871); Stoehr v. Wallace, 255 U.S. 239, 245 (1921) ("That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable."). *But see* Cities Serv. Co. v. McGrath, 342 U.S. 330, 335 (1952) (holding that confiscation of an instrument of debt could, in the event of a foreign court judgment effecting effecting a double recovery against them, give rise to a claim against the United States for a 'taking' of their property within the meaning of the Fifth Amendment).

[4] *Miller*, 78 U.S. at 305 (citing The Venus, 12 U.S. (8 Cranch) 253 (1814)); Juragua Iron Co. v. United States, 212 U.S. 297, 306–07 (1909) ("A neutral owning property within the enemy's lines holds it as enemy property, subject to the laws of war; and, if it is hostile property, subject to capture.") (quoting Young v. United States, 97 U.S. 39, 60 (1877)).

[5] *Miller*, 78 U.S. at 306; Kirk v. Lynd, 106 U.S. (16 Otto) 315, 316, (1882) ("All private property used, or intended to be used, in aid of an insurrection, with the knowledge or consent of the owner, is made the lawful subject of capture and judicial condemnation; and this, not to punish the owner for any crime, but to weaken the insurrection.").

[1] The Siren, 80 U.S. (13 Wall.) 389, 393 (1871).

[2] The Paquete Habana, 175 U.S. 677, 700, 711 (1900).

Thus, during the Civil War, the Court found that the Confiscation Act of 1861[3] and the Supplementary Act of 1863,[4] which, in authorizing the condemnation of vessels, made provision for the protection of interests of loyal citizens, merely created a municipal forfeiture and did not override or displace the law of prize.[5] The Court decided, therefore, that when a vessel was liable to condemnation under either law, the government was at liberty to proceed under the most stringent rules of international law, with the result that the citizen would be deprived of the benefit of the protective provisions of the statute.[6] Similarly, when Cuban ports were blockaded during the Spanish-American War, the Court held that the rule of international law exempting unarmed fishing vessels from capture applied in the absence of any treaty provision, or other public act of the government in relation to the subject.[7]

Clause 12—Army

ArtI.S8.C12.1 Historical Background on Congress's Authority to Raise and Support Armies

Article I, Section 8, Clause 12:

> *[The Congress shall have Power . . .] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; . . .*

The Framers did not insert the constitutional clauses that grant Congress authority to raise and support armies, as well as other related authorities, to endow the National Government rather than the states with these powers, but to designate the department of the Federal Government that would exercise the powers. The English King was endowed with the power not only to initiate war but the power to raise and maintain armies and navies.[1] Because these powers had been used historically to the detriment of the liberties and well-being of Englishmen and the English Declaration of Rights of 1688 provided that the King could not maintain standing armies without the consent of Parliament, the Framers vested these basic powers in Congress.[2]

ArtI.S8.C12.2 Time Limits on Appropriations for Army

Article I, Section 8, Clause 12:

> *[The Congress shall have Power . . .] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; . . .*

Prompted by the fear of standing armies to which Justice Joseph Story alluded, the Framers inserted the limitation that "no appropriation of money to that use shall be for a longer term than two years." In 1904, the question arose whether this provision would be violated if the government contracted to pay a royalty for use of a patent in constructing guns and other equipment where the payments are likely to continue for more than two years.

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[3] Act of Aug. 6, 1861, ch. 60, 12 Stat. 319.

[4] Act of Mar. 3, 1863, ch. 90, 12 Stat. 762.

[5] The Hampton, 72 U.S. (5 Wall.) 372, 376 (1867).

[6] *Id.*

[7] *The Paquete Habana*, 175 U.S. at 711.

[1] W. Blackstone, Commentaries 263 (St. G. Tucker ed., 1803).

[2] 3 Joseph Story, Commentaries on the Constitution of the United States 1187 (1833). While these clauses do not completely divest states of authority in this area, the Supreme Court has held that the states renounced their right to interfere with national policy in this area in the plan of the Convention. Torres v. Tex. Dep't of Pub. Safety, No. 20-603, slip op. 6 (U.S. 2022). Thus, Congress "may legislate at the expense of traditional state sovereignty to raise and support the Armed Forces." *Id.* at 9.

Solicitor-General Henry Hoyt ruled that such a contract would be lawful; that the appropriations limited by the Constitution "are those only which are to raise and support armies in the strict sense of the word 'support,' and that the inhibition of that clause does not extend to appropriations for the various means which an army may use in military operations, or which are deemed necessary for the common defense. . . ."[1] Relying on this earlier opinion, Attorney General Thomas Clark ruled in 1948 that there was "no legal objection to a request to the Congress to appropriate funds to the Air Force for the procurement of aircraft and aeronautical equipment to remain available until expended."[2]

ArtI.S8.C12.3 Conscription

Article I, Section 8, Clause 12:

> *[The Congress shall have Power . . .] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years; . . .*

The constitutions adopted during the Revolutionary War by at least nine of the states sanctioned compulsory military service.[1] Towards the end of the War of 1812, conscription of men for the army was proposed by James Monroe, then Secretary of War, but opposition developed and peace came before the bill could be enacted.[2] In 1863, a compulsory draft law was adopted and put into operation without being challenged in the federal courts.[3] Yet this was not so with the Selective Service Act of 1917.[4] This measure was attacked on the grounds that it tended to deprive the States of the right to "a well-regulated militia," that the only power of Congress to exact compulsory service was the power to provide for calling forth the militia for the three purposes specified in the Constitution, which did not comprehend service abroad, and finally that the compulsory draft imposed involuntary servitude in violation of the Thirteenth Amendment. The Supreme Court rejected all of these contentions. It held that the powers of the States with respect to the militia were exercised in subordination to the paramount power of the National Government to raise and support armies, and that the power of Congress to mobilize an army was distinct from its authority to provide for calling the militia and was not qualified or in any wise limited thereby.[5]

Before the United States entered World War I, the Court had anticipated the objection that compulsory military service would violate the Thirteenth Amendment and had answered it in the following words: "It introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the State, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of essential powers."[6] Accordingly, in the *Selective Draft Law Cases*,[7] it dismissed the objection under that Amendment as a contention that was "refuted by its mere statement."[8]

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[1] 25 Ops. Atty. Gen. 105, 108 (1904).

[2] 40 Ops. Atty. Gen. 555 (1948).

[1] Selective Draft Law Cases, 245 U.S. 366, 380 (1918); Cox v. Wood, 247 U.S. 3 (1918).

[2] 245 U.S. at 385.

[3] 245 U.S. at 386–88. The measure was upheld by a state court. Kneedler v. Lane, 45 Pa. St. 238 (1863).

[4] Act of May 18, 1917, 40 Stat. 76.

[5] Selective Draft Law Cases, 245 U.S. 366, 381, 382 (1918).

[6] Butler v. Perry, 240 U.S. 328, 333 (1916) (upholding state law requiring able-bodied men to work on the roads).

[7] 245 U.S. 366 (1918).

[8] 245 U.S. at 390.

Although the Supreme Court has so far formally declined to pass on the question of the "peacetime" draft,[9] its opinions leave no doubt of the constitutional validity of the act. In *United States v. O'Brien*,[10] upholding a statute prohibiting the destruction of selective service registration certificates, the Court, speaking through Chief Justice Earl Warren, thought "[t]he power of Congress to classify and conscript manpower for military service is 'beyond question.'"[11] In noting Congress's "broad constitutional power" to raise and regulate armies and navies,[12] the Court has specifically observed that the conscription act was passed "pursuant to" the grant of authority to Congress in clauses 12–14.[13]

Clause 13—Navy

ArtI.S8.C13.1 Congress's Naval Powers

Article I, Section 8, Clause 13:

[The Congress shall have Power . . .] To provide and maintain a Navy; . . .

Among the powers the states granted the U.S. Government pursuant to the Constitution was the power set forth at Article I, Section 8, Clause 13, to provide and maintain a navy. The Framers saw a navy as essential to the ability of the United States "to dictate the terms of the connection between the old and new world."[1] Among other things, the Framers viewed a navy as critical to whether the United States would be commercially independent of foreign naval powers, which might otherwise use their control of the seas to dictate terms under which the United States could trade.[2] Likewise, the Framers were concerned that, absent a navy, foreign nations could impede American citizens' access to the nation's fisheries or prevent them from navigating the Great Lakes and the Mississippi unimpaired.[3]

Not only was a navy essential to the nascent United States's viability but the Framers perceived that the vulnerabilities of individual states to the predations of foreign powers could only be addressed effectively and economically by the combined resources of the states—in

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[9] Universal Military Training and Service Act of 1948, 62 Stat. 604, as amended, 50 U.S.C. App. §§ 451–473. Actual conscription was precluded as of July 1, 1973, Pub. L. No. 92-129, 85 Stat. 353, 50 U.S.C. App. § 467(c), and registration was discontinued on March 29, 1975. Pres. Proc. No. 4360, 3 C.F.R. 462 (1971–1975 Compilation), 50 U.S.C. App. § 453 note. Registration, but not conscription, was reactivated in the wake of the invasion of Afghanistan. Pub. L. No. 96-282, 94 Stat. 552 (1980).

[10] 391 U.S. 367 (1968).

[11] 391 U.S. at 377, quoting Lichter v. United States, 334 U.S. 742, 756 (1948).

[12] Schlesinger v. Ballard, 419 U.S. 498, 510 (1975).

[13] Rostker v. Goldberg, 453 U.S. 57, 59 (1981). *See id.* at 64–65. *See also* Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) (upholding denial of federal financial assistance under Title IV of the Higher Education Act to young men who fail to register for the draft).

[1] The Federalist No. 11 (Alexander Hamilton). *See also* The Federalist No. 4 (John Jay) ("The extension of our own commerce in our own vessels cannot give pleasure to any nations who possess territories on or near this Continent, because of the cheapness and excellence of our productions, added to the circumstance of vicinity, and the enterprize [sic] and address of our merchants and navigators, will give us a greater share in the advantages which thos territories afford, than consists with the wishes or policy of their respective Sovereigns.").

[2] The Federalist No. 11 (Alexander Hamilton) ("It would be in the power of the maritime nations, availing themselves of our universal impotence, to prescribe the conditions of our political existence; and as they have a common interest in being our carriers, and still more in preventing our becoming theirs, they would in all probability combine to embarrass our navigation in such a manner as would in effect destroy it, and confine us to a PASSIVE COMMERCE. We should then be compelled to content ourselves with the first price of our commodities, and to see the profits of our trade snatched from us to enrich our enemies and persecutors.") (capitalization retained). *See also* The Federalist No. 24 (Alexander Hamilton) ("If we mean to be a commercial people, or even secure on our Atlantic side, we must endeavor, as soon as possible, to have a navy.").

[3] The Federalist No. 11 (Alexander Hamilton). *See also* The Federalist No. 15 (Alexander Hamilton) ("Are we entitled by nature and compact to a free participation in the navigation of the Mississippi? Spain excludes us from it.").

short, by the United States. Recognizing this, John Jay asked during the Constitution's ratification: "Leave America divided into thirteen, or if you please into three or four independent Governments, what armies could they raise and pay, what fleets could they ever hope to have?"[4] Similarly, Alexander Hamilton noted the inadequacy of any individual state to support a navy, commenting: "A navy of the United States, as it would embrace the resources of all, is an object far less remote than a navy of any single State or partial confederacy, which would only embrace the resources of a single part."[5]

The Articles of Confederation and initial drafts of the Constitution provided for Congress "to build and equip" fleets.[6] The Framers, however, ultimately settled on the language "to provide and maintain a Navy." While this change appears to have elicited little debate at the Constitutional Convention, delegates at state ratification conventions expressed concern that a standing navy would provoke Great Britain and other European naval powers, possibly leading to wars.[7] Delegates to state conventions also argued that the cost of maintaining a navy would be excessive,[8] while others responded that a navy would be necessary to encourage national objectives such as commerce and navigation.[9] Supporters of a navy also reasoned that it would allow the Federal Government to maintain its rights to fisheries and protect the Atlantic seaboard in the event of attack.[10]

The Supreme Court has recognized that the Constitution's grant of authority to Congress over the Navy under Article I, Section 8, Clause 13 in conjunction with its grant of authority "[t]o raise and support Armies"[11] and "to make Rules for the Government and Regulation of the land and naval Forces"[12] requires the Court to provide great deference to Congress's decisions regarding the military and national defense.[13] For instance, in *Rostker v. Goldberg*, the Court observed: "The case arises in the context of Congress's authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."[14] Likewise, in *Torres v. Texas Department of Public Safety*, the Supreme Court found that Congress's authority "[t]o provide and maintain a Navy" and "[t]o raise and support Armies" gives it broad authority to achieve these objectives, including power to provide "returning veterans the right to reclaim their prior jobs with state employers" and the right to sue if state "employers refuse to accommodate them" notwithstanding the State sovereign immunity doctrine.[15] In another example of the breadth of power the Constitution grants Congress pursuant to its powers "[t]o provide and maintain a Navy" and "to raise and support

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[4] The Federalist No. 4 (John Jay).

[5] The Federalist No. 11 (Alexander Hamilton).

[6] Max Farrand, The Framing of the Constitution 141 (1913).

[7] Joseph Story, Commentaries on the Constitution of the United States § 1189 (1833).

[8] *Id.* Justice Story stated: "But the attempt on our part to provide a navy would provoke these powers who would not suffer us to become a naval power. Thus, we should be immediately involved in wars with them. The expense, too, of maintaining a suitable navy would be enormous; and wholly disproportionate to our resources. If a navy should be provided at all, it ought to be limited to the mere protection of our trade. It was further urged, that the Southern states would share a large portion of the burthens [sic] of maintaining a navy, without any corresponding advantages." *Id.*

[9] *Id.* at § 1190.

[10] *Id.*

[11] U.S. Const. art. I, § 8, cl. 12.

[12] U.S. Const. art. I, § 8, cl. 14.

[13] For additional discussion on Congress's powers with regard to the military and national defense, see ArtI.S8.C14.1 Care of Armed Forces.

[14] 453 U.S. 57, 64–65 (1981). See also Schlesinger v. Ballard, 419 U.S. 498, 510 (1975); United States v. O'Brien, 391 U.S. 367, 377 (1968); Smith v. Whitney, 116 U.S. 167 (1886).

[15] Torres v. Tex. Dep't of Pub. Safety, No. 20–603, slip op. at 8 (U.S. June 29, 2022). In making this finding, the Court reasoned that "States may be sued if they agreed their sovereignty would yield as part of the 'plan of the convention,'—that is, if 'the structure of the original Constitution itself' reflects a waiver of States' sovereign

Armies," the Court found in *United States v. Bethlehem Steel Corporation* that the Government could recoup excess profits from a shipbuilder.[16] The Court stated:

> The Constitution art. 1, s 8 grants to Congress power 'to raise and support Armies', 'to provide and maintain a Navy', and to make all laws necessary and proper to carry these powers into execution. Under this authority Congress can draft men for battle service. Its power to draft business organizations to support the fighting men who risk their lives can be no less.[17]

Clause 14—Land and Naval Forces Rules

ArtI.S8.C14.1 Care of Armed Forces

Article I, Section 8, Clause 14:

> *[The Congress shall have Power . . .] To make Rules for the Government and Regulation of the land and naval Forces; . . .*

Scope of the congressional and executive authority to prescribe the rules for the governance of the military is broad and subject to great deference by the Judiciary. The Supreme Court recognizes "that the military is, by necessity, a specialized society separate from civilian society," that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian," and that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed than it is when prescribing rules for [civilian society]."[1] Denying that Congress or military authorities are free to disregard the Constitution when acting in this area,[2] the Court nonetheless operates with "a healthy deference to legislative and executive judgments" about military affairs,[3] so that, while constitutional guarantees apply, "the different character of the military community and of the military mission requires a different application of those protections."[4]

In reliance upon this deference to congressional judgment about the roles of the sexes in combat and the necessities of military mobilization, coupled with express congressional consideration of the precise questions, the Court sustained as constitutional the legislative judgment to provide for registration of males only for possible future conscription.[5] Emphasizing the unique, separate status of the military, the necessity to indoctrinate men in obedience and discipline, the tradition of military neutrality in political affairs, and the need to protect troop morale, the Court upheld the validity of military post regulations, backed by congressional enactments, banning speeches and demonstrations of a partisan political nature

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immunity. '[A]ctions do not offend state sovereignty' if 'the States consented' to them 'at the founding.'") (quoting PennEast Pipeline Co. v. New Jersey, No. 19-1039, (U.S. June 29, 2021); Alden v. Maine, 527 U.S. 706, 728 (1999)).

[16] United States v. Bethlehem Steel Corp., 315 U.S. 289, 305 (1942).

[17] *Id.* The Court cited *Selective Draft Law Cases (Arver v. United States),* 245 U.S. 366 (1918) for Congress's authority to draft men into military service. *Id.*

[1] Parker v. Levy, 417 U.S. 733, 743–52 (1974). *See also* Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953); Schlesinger v. Councilman, 420 U.S. 738, 746–48 (1975); Greer v. Spock, 424 U.S. 828, 837–38 (1976); Middendorf v. Henry, 425 U.S. 25, 45–46 (1976); Brown v. Glines, 444 U.S. 348, 353–58 (1980); Rostker v. Goldberg, 453 U.S. 57, 64–68 (1981).

[2] Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

[3] 453 U.S. at 66. "[P]erhaps in no other area has the Court accorded Congress greater deference." *Id.* at 64–65. *See also* Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

[4] Parker v. Levy, 417 U.S. 733, 758 (1974). "[T]he tests and limitations [of the Constitution] to be applied may differ because of the military context." Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

[5] Rostker v. Goldberg, 453 U.S. 57 (1981). *Compare* Frontiero v. Richardson, 411 U.S. 677 (1973), *with* Schlesinger v. Ballard, 419 U.S. 498 (1975).

and the distribution of literature without prior approval of post headquarters, with the commander authorized to keep out only those materials that would clearly endanger the loyalty, discipline, or morale of troops on the base.[6] On the same basis, the Court rejected challenges on constitutional and statutory grounds to military regulations requiring servicemen to obtain approval from their commanders before circulating petitions on base, in the context of circulations of petitions for presentation to Congress.[7] And the statements of a military officer urging disobedience to certain orders could be punished under provisions that would have been of questionable validity in a civilian context.[8] Reciting the considerations previously detailed, the Court has refused to allow enlisted men and officers to sue to challenge or set aside military decisions and actions.[9]

Congress has a plenary and exclusive power to determine the age at which a soldier or seaman shall serve, the compensation he shall be allowed, and the service to which he shall be assigned. This power may be exerted to supersede parents' control of minor sons who are needed for military service. Where the statute requiring the consent of parents for enlistment of a minor son did not permit such consent to be qualified, their attempt to impose a condition that the son carry war risk insurance for the benefit of his mother was not binding on the government.[10] Because the possession of government insurance payable to the person of his choice is calculated to enhance the morale of the serviceman, Congress may permit him to designate any beneficiary he desires, irrespective of state law, and may exempt the proceeds from the claims of creditors.[11] Likewise, Congress may bar a state from taxing the tangible, personal property of a soldier, assigned for duty in the state, but domiciled elsewhere.[12] To safeguard the health and welfare of the armed forces, Congress may authorize the suppression of bordellos in the vicinity of the places where forces are stationed.[13]

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[6] Greer v. Spock, 424 U.S. 828 (1976), limiting Flower v. United States, 407 U.S. 197 (1972).

[7] Brown v. Glines, 444 U.S. 348 (1980); Secretary of the Navy v. Huff, 444 U.S. 453 (1980). The statutory challenge was based on 10 U.S.C. § 1034, which protects the right of members of the armed forces to communicate with a Member of Congress, but which the Court interpreted narrowly.

[8] Parker v. Levy, 417 U.S. 733 (1974).

[9] Chappell v. Wallace, 462 U.S. 296 (1983) (enlisted men charging racial discrimination by their superiors in duty assignments and performance evaluations could not bring constitutional tort suits); United States v. Stanley, 483 U.S. 669 (1987) (officer who had been an unwitting, unconsenting subject of an Army experiment to test the effects of LSD on human subjects could not bring a constitutional tort action for damages). These considerations are also the basis of the Court's construction of the Federal Tort Claims Act as not reaching injuries arising incident to military service. Feres v. United States, 340 U.S. 135 (1950). In *United States v. Johnson,* 481 U.S. 681 (1987), four Justices urged reconsideration of *Feres*, but that has not occurred.

[10] United States v. Williams, 302 U.S. 46 (1937). *See also In re* Grimley, 137 U.S. 147, 153 (1890); *In re* Morrissey, 137 U.S. 157 (1890).

[11] Wissner v. Wissner, 338 U.S. 655 (1950); Ridgway v. Ridgway, 454 U.S. 46 (1981). In the absence of express congressional language, like that found in *Wissner*, the Court nonetheless held that a state court division under its community property system of an officer's military retirement benefits conflicted with the federal program and could not stand. McCarty v. McCarty, 453 U.S. 210 (1981). *See also* Porter v. Aetna Casualty Co., 370 U.S. 159 (1962) (exemption from creditors' claims of disability benefits deposited by a veteran's guardian in a savings and loan association).

[12] Dameron v. Brodhead, 345 U.S. 322 (1953). *See also* California v. Buzard, 382 U.S. 386 (1966); Sullivan v. United States, 395 U.S. 169 (1969).

[13] McKinley v. United States, 249 U.S. 397 (1919).

ArtI.S8.C14.2 Trial and Punishment of Servicemen (Courts-Martial)

Article I, Section 8, Clause 14:

> *[The Congress shall have Power . . .] To make Rules for the Government and Regulation of the land and naval Forces; . . .*

Under its power to make rules for the government and regulation of the armed forces, Congress has set up a system of criminal law binding on all servicemen, with its own substantive laws, its own courts and procedures, and its own appeals procedure.[1]

Although courts have disagreed about using courts-martial to try servicemen for nonmilitary offenses,[2] the matter became important during the Cold War period when the United States found it essential to maintain, both at home and abroad, a large standing army in which great numbers of servicemen were draftees. In *O'Callahan v. Parker*,[3] the Supreme Court held that courts-martial did not have jurisdiction to try servicemen charged with a crime that was not "service connected." While the Court did not define "service connection," it noted that the serviceman committed the crime off-base when he was lawfully off duty against a civilian in peacetime in the United States.[4] In *Solorio v. United States*,[5] the Court discussed *O'Callahan*, holding that "the requirements of the Constitution are not violated where . . . a court-martial is convened to try a serviceman who was a member of the armed services at the time of the offense charged."[6] Chief Justice William Rehnquist's opinion for the Court stated that *O'Callahan* had been based on erroneous readings of English and American history, and that "the service connection approach . . . has proved confusing and difficult for military courts to apply."[7]

How the Bill of Rights and other constitutional guarantees apply to court-martial trials is not clear. The Fifth Amendment expressly excepts "[c]ases arising in the land and naval forces" from its grand jury provision, and there cases may also be excepted from the Sixth Amendment.[8] The double jeopardy provision of the Fifth Amendment appears to apply, however.[9] The Court of Military Appeals now holds that servicemen are entitled to all constitutional rights except those that expressly or by implication do not apply to the

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[1] The Uniform Code of Military Justice of 1950, 64 Stat. 107, *as amended by* the Military Justice Act of 1968, 82 Stat. 1335, 10 U.S.C. §§ 801 *et seq*. For prior acts, see 12 Stat. 736 (1863); 39 Stat. 650 (1916). *See also* Loving v. United States, 517 U.S. 748 (1996) (in context of the death penalty under the UCMJ). The same power that authorized Congress to promulgate the Uniform Code of Military Justice—granted by this Clause and the Necessary and Proper Clause—also authorized Congress to make a civil registration requirement a consequence of certain military crime convictions. *See* United States v. Kebodeaux, 570 U.S. 387, 395 (2013) (holding that the Military Regulation and Necessary and Proper Clauses authorized Congress to make civil registration a consequence of a servicemember's federal sex offence conviction).

[2] *Compare* Solorio v. United States, 483 U.S. 435, 441–47 (1987) (majority opinion), *with id.* at 456–61 (dissenting opinion), and O'Callahan v. Parker, 395 U.S. 258, 268–72 (1969) (majority opinion), with *id.* at 276–80 (Harlan, J., dissenting). *See* Robert Duke & Howard Vogel, *The Constitution and the Standing Army: Another Problem of Court-Martial Jurisdiction*, 13 Vand. L. Rev. 435 (1960).

[3] 395 U.S. 258 (1969).

[4] 395 U.S. at 273–74. *See also* Relford v. Commandant, 401 U.S. 355 (1971); Gosa v. Mayden, 413 U.S. 665 (1973).

[5] 483 U.S. 435 (1987).

[6] 483 U.S. at 450–51.

[7] 483 U.S. at 448. Although the Court of Military Appeals had affirmed Solorio's military-court conviction on the basis that the service-connection test had been met, the Court elected to reconsider and overrule O'Callahan altogether.

[8] *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123, 138–39 (1866); *Ex parte* Quirin, 317 U.S. 1, 40 (1942). The matter was raised but left unresolved in *Middendorf v. Henry*, 425 U.S. 25 (1976).

[9] *See* Wade v. Hunter, 336 U.S. 684 (1949). *Cf.* Grafton v. United States, 206 U.S. 333 (1907).

military.[10] The Uniform Code of Military Justice, supplemented by the *Manual for Courts-Martial*, affirmatively grants due process rights roughly comparable to civilian procedures.[11] However, the Code leaves intact much of the traditional structure of courts-martial, including the possibility of command influence,[12] and the Court of Military Appeals scope of review is limited,[13] thus creating areas of potential constitutional challenges.

Upholding Articles 133 and 134 of the Uniform Code of Military Justice (UCMJ), the Court in *Parker v. Levy* stressed the special status of military society.[14] This difference has resulted in a military code that regulates aspects of military members' conduct that civilian governments do not regulate. In addition, the military code imposes penalties ranging from severe to below those possible in civilian life. Because of these factors, the Court, while agreeing that constitutional limitations apply to military justice, reasoned that the standards of constitutional guarantees were significantly different in the military. Thus, the Court held the vagueness challenge to UCMJ Articles 133 and 134 to be governed by the standard applied to criminal statutes regulating economic affairs—the most lenient of vagueness standards.[15] Applying USMJ Articles 133 and 134 to conduct essentially composed of speech did not require voiding the conviction, as the speech was unprotected, and, even if the Articles might reach protected speech, the officer in the instant case was unable to raise that issue.[16]

The Court has recognized that military courts are not Article III courts, but are agencies established pursuant to Article I.[17] In the nineteenth century, the Court established that the civil courts have no power to interfere with courts-martial and that court-martial decisions are not subject to civil court review.[18] The Supreme Court had no jurisdiction to review by writ of certiorari military commission proceedings until August 1, 1984, when Congress conferred appellate jurisdiction to the Court of Military Appeals.[19] Prior to that time, civil court review of court-martial decisions was possible through habeas corpus jurisdiction,[20] an avenue that continues to exist, but the Court severely limited the scope of such review, restricting it to

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[10] United States v. Jacoby, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960); United States v. Tempia, 16 U.S.C.M.A. 629, 37 C.M.R. 249 (1967). This conclusion by the Court of Military Appeals is at least questioned and perhaps disapproved in *Middendorf v. Henry*, 425 U.S. 25, 43–48 (1976), in the course of overturning a CMA rule that counsel was required in summary court-martial. For the CMA's response to the holding, *see* United States v. Booker, 5 M. J. 238 (C.M.A. 1977), *rev'd in part on reh.*, 5 M. J. 246 (C.M.A. 1978).

[11] The UCMJ guarantees counsel, protection from self-incrimination and double jeopardy, and warnings of rights prior to interrogation, to name a few.

[12] *Cf.* O'Callahan v. Parker, 395 U.S. 258, 263–64 (1969).

[13] 10 U.S.C. § 867.

[14] 417 U.S. 733 (1974). Article 133 punishes a commissioned officer for "conduct unbecoming an officer and gentleman," and Article 134 punishes any person subject to the Code for "all disorders and neglects to the prejudice of good order and discipline in the armed forces."

[15] 417 U.S. at 756.

[16] 417 U.S. at 757–61.

[17] Kurtz v. Moffitt, 115 U.S. 487 (1885); Dynes v. Hoover, 61 U.S. (20 How.) 65 (1858). Judges of Article I courts do not have the independence conferred by security of tenure and of compensation.

[18] Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857).

[19] Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, 28 U.S.C. § 1259 . *See also* Ortiz v. United States, No. 16-1423, slip op. 5–19 (U.S. 2018) (affirming the Supreme Court's appellate jurisdiction to review decisions of the Court of Appeals for the Armed Forces).

[20] *Cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); *Ex parte* Yerger, 75 U.S. (8 Wall.) 85 (1869); *Ex parte* Reed, 100 U.S. 13 (1879). While federal courts have jurisdiction to intervene in military court proceedings prior to judgment, as a matter of equity, following the standards applicable to federal court intervention in state criminal proceedings, they should act when the petitioner has not exhausted his military remedies only in extraordinary circumstances. Schlesinger v. Councilman, 420 U.S. 738 (1975).

whether the court-martial has jurisdiction over the person tried and the offense charged.[21] In *Burns v. Wilson*,[22] however, several Justices appeared to suggest that civil courts on habeas corpus could review claims of due process violations by military courts. Since *Burns*, the Court has thrown little light on the range of issues cognizable by a federal court in such litigation[23] and the lower federal courts have divided several possible ways.[24]

ArtI.S8.C14.3 Trial and Punishment of Civilians and Dependents (Courts-Martial)

Article I, Section 8, Clause 14:

> *[The Congress shall have Power . . .] To make Rules for the Government and Regulation of the land and naval Forces; . . .*

Over the years, the Supreme Court has narrowed the scope of persons Congress may constitutionally subject to the Uniform Code of Military Justice under its Clause 14 powers. In *United States ex rel. Toth v. Quarles*, the Court held that an honorably discharged former soldier, charged with having committed murder during military service in Korea, could not be tried by court-martial but, under the Constitution, could be charged in federal court.[1] In *Reid v. Covert*, the Court, after initially upholding the constitutionality of court-martial jurisdiction,[2] reached the opposite conclusion on rehearing, holding that court-martial jurisdiction was lacking, at least in peacetime, to try civilian dependents of service personnel for capital crimes committed outside the United States.[3] Subsequently, the Court extended its ruling to civilian dependents overseas charged with noncapital crimes[4] and to civilian employees of the military charged with either capital or noncapital crimes.[5]

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[21] *Ex parte* Reed, 100 U.S. 13 (1879); Swaim v. United States, 165 U.S. 553 (1897); Carter v. Roberts, 177 U.S. 496 (1900); Hiatt v. Brown, 339 U.S. 103 (1950).

[22] 346 U.S. 137 (1953).

[23] *Cf.* Fowler v. Wilkinson, 353 U.S. 583 (1957); United States v. Augenblick, 393 U.S. 348, 350 n.3, 351 (1969); Parker v. Levy, 417 U.S. 733 (1974); Secretary of the Navy v. Avrech, 418 U.S. 676 (1974).

[24] *E.g.*, Calley v. Callaway, 519 F.2d 184 (5th Cir., 1975) (en banc), *cert. denied*, 425 U.S. 911 (1976).

[1] 350 U.S. 11 (1955) (stating that it is within Congress's power to make former soldiers who are no longer subject to the military code subject to federal jurisdiction). Explaining the rationale for courts-martial, the Court noted: "Court-martial jurisdiction sprang from the belief that within the military ranks there is need for prompt, ready-at-hand means of compelling obedience and order. But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades." *Id.* at 22. *See also* Lee v. Madigan, 358 U.S. 228 (1959).

[2] *See* Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 487 (1956).

[3] Reid v. Covert, 354 U.S. 1 (1957) (voiding court-martial convictions of two women for murdering their soldier husbands stationed in Japan). No majority of Justices in *Reid* agreed on the extent to which Congress's power under Clause 14 could reach civilians. Chief Justice Earl Warren and Justices Hugo Black, William Douglas, and William Brennan were of the opinion Congress's power under Clause 14 could not reach civilians at all. Justices Felix Frankfurter and John Harlan concurred as to the result, but expressed the more limited view that Clause 14 cannot justify the exercise of court-martial jurisdiction over civilian dependents in capital cases in peacetime.

[4] Kinsella v. United States, 361 U.S. 234 (1960) (voiding court-martial conviction for noncapital crime committed overseas by civilian wife of soldier). The majority could see no reason for distinguishing between capital and noncapital crimes. Justices Harlan and Frankfurter dissented on the ground that in capital cases greater constitutional protection, available in civil courts, was required.

[5] Grisham v. Hagan, 361 U.S. 278 (1960); McElroy v. United States ex rel. Guagliardo, 361 U.S. 281 (1960).

Clause 15—Calling Militias

ArtI.S8.C15.1 Congress's Power to Call Militias

Article I, Section 8, Clause 15:

> *[The Congress shall have Power . . .] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; . . .*

The states as well as Congress may prescribe penalties for failure to obey the President's call of the militia. They also have a concurrent power to aid the National Government by calls under their own authority, and in emergencies may use the militia to put down armed insurrection.[1] The Federal Government may call out the militia in case of civil war; its authority to suppress rebellion is found in the power to suppress insurrection and to carry on war.[2] The act of February 28, 1795,[3] which delegated to the President the power to call out the militia, was held constitutional.[4] A militiaman who refused to obey such a call was not "employed in the service of the United States so as to be subject to the article of war," but was liable to be tried for disobedience of the act of 1795.[5]

Clause 16—Organizing Militias

ArtI.S8.C16.1 Congress's Power to Organize Militias

Article I, Section 8, Clause 16:

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

The Supreme Court has characterized Congress's power over the militia as "being unlimited, except in the two particulars of officering and training them" under the Militia Clauses,[1] such that the power "may be exercised to any extent that may be deemed necessary by Congress."[2] At the same time, the Court acknowledged "[t]he power of the state government to legislate on the same subjects, having existed prior to the formation of the Constitution" remained with the states.[3] However, this power, the Court continued, is nevertheless subordinate "to the paramount law of the General Government."[4]

Under the National Defense Act of 1916,[5] the militia, which had been an almost purely state institution, was brought under the control of the federal government. The act divided

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[1] Moore v. Houston, 3 S. & R. (Pa.) 169 (1817), *aff'd*, Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820).

[2] Texas v. White, 74 U.S. (7 Wall.) 700 (1869); Tyler v. Defrees, 78 U.S. (11 Wall.) 331 (1871).

[3] 1 Stat. 424 (1795), 10 U.S.C. § 332.

[4] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 32 (1827).

[5] Houston v. Moore, 18 U.S. (5 Wheat.) 1 (1820); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

[1] U.S. Const. art. I, § 8, cl. 15; U.S. Const. art. I, § 8, cl. 16. For discussion of Congress's power to call militias, see ArtI.S8.C15.1 Congress's Power to Call Militias.

[2] Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16 (1820).

[3] *Id.*

[4] *Id.* Because the Constitution commits organizing and providing for the militia to Congress and Congress has statutorily shared this authority with the Executive, the Judiciary is precluded from exercising oversight over the process, Gilligan v. Morgan, 413 U.S. 1 (1973), although wrongs committed by troops are subject to judicial relief in damages. Scheuer v. Rhodes, 416 U.S. 232 (1974).

[5] 39 Stat. 166, 197 (1916), codified in sections of Titles 10 & 32. *See* Frederick Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181 (1940).

"militia of the United States"—defined to include "all able-bodied male citizens of the United States and all other able-bodied males who have . . . declared their intention to become citizens of the United States" between the ages of eighteen and forty-five—into several classes of organized militias, including the National Guard. Among its measures, the act reorganized the National Guard, determined its size in proportion to the population of the several States, required that all enlistments be for "three years in service and three years in reserve," and limited the appointment of officers to those who "shall have successfully passed such tests as to . . . physical, moral and professional fitness as the President shall prescribe."[6] The act also authorized the President in certain emergencies to "draft into the military service of the United States to serve therein for the period of the war unless sooner discharged, any or all members of the National Guard and National Guard Reserve," who thereupon should "stand discharged from the militia."[7]

The Militia Clauses do not constrain Congress in raising and supporting a national army. The Supreme Court has approved the system of dual enlistment, under which persons enlisted in state militia (National Guard) units simultaneously enlist in the National Guard of the United States, and, when called to active duty in the federal service, are relieved of their status in the state militia.[8] Consequently, the restrictions in the first militia clause that limit the militia to be called forth for three specified purposes do not apply to the federalized National Guard.[9] Nor is there a constitutional requirement that state governors hold a veto power over federal duty training conducted outside the United States or that a national emergency be declared before such training may take place.[10]

Clause 17—Enclave Clause

ArtI.S8.C17.1 The Capitol

ArtI.S8.C17.1.1 Historical Background on Seat of Government Clause

Article I, Section 8, Clause 17:

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

The Convention was moved to provide for the creation of a site in which to locate the Capital of the Nation, completely removed from the control of any state, because of the humiliation suffered by the Continental Congress on June 21, 1783. Some eighty soldiers, unpaid and weary, marched on the Congress sitting in Philadelphia, physically threatened and verbally abused the members, and caused the Congress to flee the City when neither

[6] 39 Stat. 166 at 198, 200, 202.

[7] *Id.* at 211. Military and civilian personnel of the National Guard are state, rather than federal, employees and the Federal Government is thus not liable under the Federal Tort Claims Act for their negligence. Maryland v. United States, 381 U.S. 41 (1965).

[8] *See* Perpich v. Dep't of Defense, 496 U.S. 334, 345–47 (1990). *Cf.* King v. St. Vincent's Hosp., 502 U.S. 215, 217 (1991) (holding that a provision of the Veterans' Reemployment Rights Act protected the reemployment rights of a National Guard member during his three-year full-time appointment with the Guard).

[9] *Id.* at 347–355.

[10] *Id.*

municipal nor state authorities would take action to protect the members.[1] Thus, Madison noted that "[t]he indispensable necessity of complete authority at the seat of government, carries its own evidence with it. . . . Without it, not only the public authority might be insulted and its proceedings interrupted with impunity, but a dependence of the members of the general government on the State comprehending the seat of government, for protection in the exercise of their duty, might bring on the national council an imputation of awe or influence, equally dishonorable to the government and dissatisfactory to the other members of the confederacy."[2]

The actual site was selected by compromise, Northerners accepting the Southern-favored site on the Potomac in return for Southern support for a Northern aspiration, assumption of Revolutionary War debts by the National Government.[3] Maryland and Virginia both authorized the cession of territory[4] and Congress accepted.[5] Congress divided the District into two counties, Washington and Alexandria, and provided that the local laws of the two states should continue in effect.[6] It also established a circuit court and provided for the appointment of judicial and law enforcement officials.[7]

ArtI.S8.C17.1.2 Seat of Government Doctrine

Article I, Section 8, Clause 17:

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

There seems to have been no consideration, at least none recorded, given at the Convention or in the ratifying conventions to the question of the governance of the citizens of the District.[1] James Madison in the *Federalist Papers* did assume that the inhabitants "will have had their voice in the election of the government which is to exercise authority over them, as a municipal legislature for all local purposes, derived from their own suffrages, will of course be allowed

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[1] J. Fiske, The Critical Period of American History, 1783–1789 112–113 (1888); W. Tindall, The Origin and Government of the District of Columbia 31–36 (1903).

[2] The Federalist No. 43 (James Madison). *See also* 3 Joseph Story, Commentaries on the Constitution of the United States 1213, 1214 (1833).

[3] W. Tindall, The Origin and Government of the District of Columbia 5–30 (1903).

[4] Maryland Laws 1798, ch. 2, p. 46; 13 Laws of Virginia 43 (Hening 1789).

[5] Act of July 16, 1790, 1 Stat. 130. In 1846, Congress authorized a referendum in Alexandria County on the question of retroceding that portion to Virginia. The voters approved and the area again became part of Virginia. Laws of Virginia 1845–46, ch. 64, p. 50; Act of July 9, 1846, 9 Stat. 35; Proclamation of September 7, 1846; 9 Stat. 1000. Constitutional questions were raised about the retrocession but suit did not reach the Supreme Court until some forty years later and the Court held that the passage of time precluded the raising of the question. Phillips v. Payne, 92 U.S. 130 (1875).

[6] Act of February 27, 1801, 2 Stat. 103. The declaration of the continuing effect of state law meant that law in the District was frozen as of the date of cession, unless Congress should change it, which it seldom did. For some of the problems, *see* Tayloe v. Thompson, 30 U.S. (5 Pet.) 358 (1831); *Ex parte* Watkins, 32 U.S. (7 Pet.) 568 (1833); Stelle v. Carroll, 37 U.S. (12 Pet.) 201 (1838); Van Ness v. United States Bank, 38 U.S. (13 Pet.) 17 (1839); United States v. Eliason, 41 U.S. (16 Pet.) 291 (1842).

[7] Act of March 3, 1801, 2 Stat. 115.

[1] The objections raised in the ratifying conventions and elsewhere seemed to have consisted of prediction of the perils to the Nation of setting up the National Government in such a place. 3 Joseph Story, Commentaries on the Constitution of the United States 1215, 1216 (1833).

them. . . .”[2] Although there was some dispute about the constitutional propriety of permitting local residents a measure of “home rule,” to use the recent term,[3] almost from the first there were local elections provided for. In 1802, the District was divided into five divisions, in some of which the governing officials were elected; an elected mayor was provided in 1820. District residents elected some of those who governed them until this form of government was swept away in the aftermath of financial scandals in 1874[4] and replaced with a presidentially appointed Commission in 1878.[5] The Commission lasted until 1967 when it was replaced by an appointed Mayor-Commissioner and an appointed city council.[6] In recent years, Congress provided for a limited form of self-government in the District, with the major offices filled by election.[7] District residents vote for President and Vice President[8] and elect a nonvoting delegate to Congress.[9] An effort by constitutional amendment to confer voting representation in the House and Senate failed of ratification.[10]

Constitutionally, it appears that Congress is neither required to provide for a locally elected government[11] nor precluded from delegating its powers over the District to an elective local government.[12] The Court has indicated that the “exclusive” jurisdiction granted was meant to exclude any question of state power over the area and was not intended to require Congress to exercise all powers itself.[13]

Chief Justice John Marshall for the Court held in *Hepburn v. Ellzey*[14] that the District of Columbia was not a state within the meaning of the Diversity Jurisdiction Clause of Article III. This view, adhered to for nearly a century and a half,[15] was overturned in 1949, the Court upholding the constitutionality of a 1940 statute authorizing federal courts to take jurisdiction of nonfederal controversies between residents of the District of Columbia and the citizens of a state.[16] The decision was by a 5-4 division, but the five in the majority disagreed among themselves on the reasons. Three thought the statute to be an appropriate exercise of the power of Congress to legislate for the District of Columbia pursuant to this clause without

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[2] The Federalist No. 43 (James Madison).

[3] Such a contention was cited and rebutted in 3 Joseph Story, Commentaries on the Constitution of the United States 1218 (1833).

[4] Act of May 3, 1802, 2 Stat. 195; Act of May 15, 1820, 3 Stat. 583; Act of February 21, 1871, 16 Stat. 419; Act of June 20, 1874, 18 Stat. 116. The engrossing story of the postwar changes in the government is related in W. Whyte, The Uncivil War: Washington During the Reconstruction (1958).

[5] Act of June 11, 1878, 20 Stat. 103.

[6] Reorganization Plan No. 3 of 1967, 32 Fed. Reg. 11699, reprinted as appendix to District of Columbia Code, Title I.

[7] District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. No. 93-198, 87 Stat. 774.

[8] Twenty-third Amendment.

[9] Pub. L. No. 91-405, 84 Stat. 848, D.C. Code, § 1-291.

[10] H.J. Res. 554, 95th Congress, passed the House on March 2, 1978, and the Senate on August 22, 1978, but only 16 states had ratified before the expiration of the proposal after seven years.

[11] Loughborough v. Blake, 18 U.S. (5 Wheat.) 317 (1820); Heald v. District of Columbia, 259 U.S. 114 (1922).

[12] District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953). The case upheld the validity of ordinances enacted by the District governing bodies in 1872 and 1873 prohibiting racial discrimination in places of public accommodations.

[13] 346 U.S. at 109–10. *See also* Thompson v. Lessee of Carroll, 63 U.S. (22 How.) 422 (1860); Stoutenburgh v. Hennick, 129 U.S. 141 (1889).

[14] 6 U.S. (2 Cr.) 445 (1805); *see also* Sere v. Pitot, 10 U.S. (6 Cr.) 332 (1810); New Orleans v. Winter, 14 U.S. (1 Wheat.) 91 (1816). The District was held to be a state within the terms of a treaty. Geofroy v. Riggs, 133 U.S. 258 (1890).

[15] Barney v. City of Baltimore, 73 U.S. (6 Wall.) 280 (1868); Hooe v. Jamieson, 166 U.S. 395 (1897); Hooe v. Werner, 166 U.S. 399 (1897).

[16] National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949).

regard to Article III.[17] Two others thought that *Hepburn v. Ellzey* had been erroneously decided and would have overruled it.[18] But six Justices rejected the former rationale and seven Justices rejected the latter one; since five Justices agreed, however, that the statute was constitutional, it was sustained.

It is not disputed that the District is a part of the United States and that its residents are entitled to all the guarantees of the United States Constitution including the privilege of trial by jury[19] and of presentment by a grand jury.[20] Legislation restrictive of liberty and property in the District must find justification in facts adequate to support like legislation by a state in the exercise of its police power.[21]

Congress possesses over the District of Columbia the blended powers of a local and national legislature.[22] This fact means that in some respects ordinary constitutional restrictions do not operate; thus, for example, in creating local courts of local jurisdiction in the District, Congress acts pursuant to its legislative powers under Clause 17 and need not create courts that comply with Article III court requirements.[23] And when legislating for the District Congress remains the legislature of the Union, so that it may give its enactments nationwide operation to the extent necessary to make them locally effective.[24]

ArtI.S8.C17.2 Places Purchased

ArtI.S8.C17.2.1 Overview of Places Purchased Clause

Article I, Section 8, Clause 17:

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

This Clause has been broadly construed to cover all structures necessary for carrying on the business of the National Government.[1] It includes post offices,[2] a hospital and a hotel

[17] 337 U.S. at 588–600 (Justices Jackson, Black, and Burton).

[18] 337 U.S. at 604 (Justices Rutledge and Murphy). The dissents were by Chief Justice Vinson, *id.* at 626, joined by Justice Douglas and by Justice Frankfurter, *id.* at 646, joined by Justice Reed.

[19] Callan v. Wilson, 127 U.S. 540 (1888); Capital Traction Co. v. Hof, 174 U.S. 1 (1899).

[20] United States v. Moreland, 258 U.S. 433 (1922).

[21] Wright v. Davidson, 181 U.S. 371, 384 (1901); *cf.* Adkins v. Children's Hospital, 261 U.S. 525 (1923), overruled in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

[22] Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 619 (1838); Shoemaker v. United States, 147 U.S. 282, 300 (1893); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932); O'Donoghue v. United States, 289 U.S. 516, 518 (1933).

[23] In the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 111, 84 Stat. 475, D.C. Code, § 11-101, Congress specifically declared it was acting pursuant to Article I in creating the Superior Court and the District of Columbia Court of Appeals and pursuant to Article III in continuing the United States District Court and the United States Court of Appeals for the District of Columbia. The Article I courts were sustained in *Palmore v. United States,* 411 U.S. 389 (1973). *See also* Swain v. Pressley, 430 U.S. 372 (1977). The latter, federal courts, while Article III courts, traditionally have had some non-Article III functions imposed on them, under the "hybrid" theory announced in *O'Donoghue v. United States,* 289 U.S. 516 (1933). *E.g.*, Hobson v. Hansen, 265 F. Supp. 902 (D.D.C. 1967), *appeal dismissed*, 393 U.S. 801 (1968) (power then vested in District Court to appoint school board members). *See also* Keller v. Potomac Elec. Co., 261 U.S. 428 (1923); Embry v. Palmer, 107 U.S. 3 (1883).

[24] Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 428 (1821).

[1] James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

located in a national park,[3] and locks and dams for the improvement of navigation.[4] But it does not cover lands acquired for forests, parks, ranges, wild life sanctuaries or flood control.[5] Nevertheless, the Supreme Court has held that a state may convey, and the Congress may accept, either exclusive or qualified jurisdiction over property acquired within the geographical limits of a state, for purposes other than those enumerated in Clause 17.[6]

After exclusive jurisdiction over lands within a state has been ceded to the United States, Congress alone has the power to punish crimes committed within the ceded territory.[7] Private property located thereon is not subject to taxation by the state,[8] nor can state statutes enacted subsequent to the transfer have any operation therein.[9] But the local laws in force at the date of cession that are protective of private rights continue in force until abrogated by Congress.[10] Moreover, as long as there is no interference with the exclusive jurisdiction of the United States, an area subject to such jurisdiction may be annexed by a municipality.[11]

ArtI.S8.C17.2.2 Federal Jurisdiction Over Places Purchased

Article I, Section 8, Clause 17:

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

A state may qualify its cession of territory by a condition that jurisdiction shall be retained by the United States only so long as the place is used for specified purposes.[1] Such a provision operates prospectively and does not except from the grant that portion of a described tract which is then used as a railroad right of way.[2] In 1892, the Court upheld the jurisdiction of the United States to try a person charged with murder on a military reservation, over the objection that the state had ceded jurisdiction only over such portions of the area as were used for military purposes and that the particular place on which the murder was committed was used solely for farming. The Court held that the character and purpose of the occupation having been officially established by the political department of the government, it was not open to the

[2] Battle v. United States, 209 U.S. 36 (1908).

[3] Arlington Hotel v. Fant, 278 U.S. 439 (1929).

[4] James v. Dravo Contracting Co., 302 U.S. 134, 143 (1937).

[5] Collins v. Yosemite Park Co., 304 U.S. 518, 530 (1938).

[6] 304 U.S. at 528.

[7] Battle v. United States, 209 U.S. 36 (1908); Johnson v. Yellow Cab Co., 321 U.S. 383 (1944); Bowen v. Johnston, 306 U.S. 19 (1939).

[8] Surplus Trading Co. v. Cook, 281 U.S. 647 (1930).

[9] Western Union Tel. Co. v. Chiles, 214 U.S. 274 (1909); Arlington Hotel v. Fant, 278 U.S. 439 (1929); Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285 (1943). The Assimilative Crimes Act of 1948, 18 U.S.C. § 13, making applicable to a federal enclave a subsequently enacted criminal law of the state in which the enclave is situated entails no invalid delegation of legislative power to the state. United States v. Sharpnack, 355 U.S. 286, 294, 296–97 (1958).

[10] Chicago, R.I. & P. Ry. v. McGlinn, 114 U.S. 542, 545 (1885); Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).

[11] Howard v. Commissioners, 344 U.S. 624 (1953). As *Howard* recognized, such areas of federal property do not cease to be part of the state in which they are located and the residents of the areas are for most purposes residents of the state. Thus, a state may not constitutionally exclude such residents from the privileges of suffrage if they are otherwise qualified. Evans v. Cornman, 398 U.S. 419 (1970).

[1] Palmer v. Barrett, 162 U.S. 399 (1896).

[2] United States v. Unzeuta, 281 U.S. 138 (1930).

Court to inquire into the actual uses to which any portion of the area was temporarily put.[3] A few years later, however, it ruled that the lease to a city, for use as a market, of a portion of an area which had been ceded to the United States for a particular purpose, suspended the exclusive jurisdiction of the United States.[4]

The question arose whether the United States retains jurisdiction over a place that was ceded to it unconditionally, after it has abandoned the use of the property for governmental purposes and entered into a contract for sale to private persons. Minnesota asserted the right to tax the equitable interest of the purchaser in such land, and the Supreme Court upheld its right to do so. The majority assumed that "the Government's unrestricted transfer of property to nonfederal hands is a relinquishment of the exclusive legislative power."[5] In separate concurring opinions, Chief Justice Harlan Fiske Stone and Justice Felix Frankfurter reserved judgment on the question of territorial jurisdiction.[6]

ArtI.S8.C17.2.3 State Jurisdiction Over Places Purchased

Article I, Section 8, Clause 17:

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

For more than a century the Supreme Court kept alive, by repeated dicta,[1] the doubt expressed by Justice Joseph Story "whether Congress are by the terms of the Constitution, at liberty to purchase lands for forts, dockyards, etc., with the consent of a State legislature, where such consent is so qualified that it will not justify the 'exclusive legislation' of Congress there. It may well be doubted if such consent be not utterly void."[2] But when the issue was squarely presented in 1937, the Court ruled that, when the United States purchases property within a state with the consent of the latter, it is valid for the state to convey, and for the United States to accept, "concurrent jurisdiction" over such land, the state reserving to itself the right to execute process "and such other jurisdiction and authority over the same as is not inconsistent with the jurisdiction ceded to the United States."[3] The holding logically renders the second half of Clause 17 superfluous. In a companion case, the Court ruled further that even if a general state statute purports to cede exclusive jurisdiction, such jurisdiction does not pass unless the United States accepts it.[4]

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[3] Benson v. United States, 146 U.S. 325, 331 (1892).

[4] Palmer v. Barrett, 162 U.S. 399 (1896).

[5] S.R.A., Inc. v. Minnesota, 327 U.S. 558, 564 (1946).

[6] 327 U.S. at 570, 571.

[1] Fort Leavenworth R.R. v. Lowe, 114 U.S. 525, 532 (1885); United States v. Unzeuta, 281 U.S. 138, 142 (1930); Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930).

[2] United States v. Cornell, 25 F. Cas. 646, 649 (No. 14867) (C.C.D.R.I. 1819).

[3] James v. Dravo Contracting Co., 302 U.S. 134, 145 (1937).

[4] Mason Co. v. Tax Comm'n, 302 U.S. 186 (1937). *See also* Atkinson v. Tax Comm'n, 303 U.S. 20 (1938).

Clause 18—Necessary and Proper Clause

ArtI.S8.C18.1 Overview of Necessary and Proper Clause

Article I, Section 8, Clause 18:

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

The Necessary and Proper Clause[1] concludes Article I's list of Congress's enumerated powers with a general statement that Congress's powers include not only those expressly listed, but also the authority to use all means "necessary and proper" for executing those express powers. Under the Necessary and Proper Clause, congressional power encompasses all implied and incidental powers that are "conducive" to the "beneficial exercise" of an enumerated power.[2] The Clause does not require that legislation be *absolutely* necessary to the exercise of federal power.[3] Rather, so long as Congress's end is within the scope of federal power under the Constitution, the Necessary and Proper Clause authorizes Congress to employ any means that are "appropriate and plainly adapted to the permitted end."[4]

The Necessary and Proper Clause was included in the Constitution in response to the shortcomings of the Articles of Confederation, which had limited federal power to only those powers "expressly delegated to the United States."[5] While the Framers chose to follow the Articles in enumerating a list of specific federal powers—as opposed to some general statement of federal power[6]—they included the Necessary and Proper Clause to make clear that Congress's power encompassed the implied power to use all appropriate means required to execute those express powers.[7] The Necessary and Proper Clause was not a primary focus of debate at the Constitutional Convention itself, but its meaning quickly became a major issue in the debates over the ratification of the Constitution,[8] and in the early Republic.[9]

The Supreme Court has interpreted the Necessary and Proper Clause as an extension of the other powers vested in the Federal Government, most notably Congress's enumerated

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[1] Although "Necessary and Proper Clause" is the modern term for the constitutional provision, historically it was often called the "Sweeping Clause." *See, e.g.*, The Federalist No. 33 (Alexander Hamilton) ("[T]he sweeping clause, as it has been affectedly called, authori[z]es the national legislature to pass all *necessary* and *proper* laws."); *see generally* John Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L.J. 1045, 1059 & n.47 (2014) ("[The Framers] referred to the last clause of Article I, Section 8 as the 'Sweeping Clause.'"). The terms "Elastic Clause," "Basket Clause," and "Coefficient Clause" are also occasionally used to refer to this provision. *See* Devotion Garner & Cheryl Nyberg, *Popular Names of Constitutional Provisions*, Univ. of Wash. Sch. of Law, https://lib.law.uw.edu/ref/consticlauses.html#oth (listing these terms as "popular name[s]" for the provision).

[2] *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 418 (1819).

[3] *See id.* ("[T]his limited construction of the word 'necessary' [as meaning indispensably necessary] must be abandoned.").

[4] United States v. Darby, 312 U.S. 100, 124 (1941).

[5] Articles of Confederation of 1781, art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.").

[6] *See* ArtI.S8.C18.2 Historical Background on Necessary and Proper Clause notes 2–8 and accompanying text (discussing alternative formulations of federal power considered at the Constitutional Convention).

[7] *See* The Federalist No. 44 (James Madison).

[8] *See* ArtI.S8.C18.2 Historical Background on Necessary and Proper Clause notes 17–24 and accompanying text (reviewing the role of the Clause in the ratification debates).

[9] *See* ArtI.S8.C18.2 Historical Background on Necessary and Proper Clause notes 25–28 and accompanying text (reviewing the debate over the constitutionality of the First Bank of the United States).

Article I powers.[10] Thus, whenever the Supreme Court addresses the outer limits of Congress's enumerated powers, it necessarily invokes the Necessary and Proper Clause as well, either explicitly or implicitly.[11] However, the Necessary and Proper Clause is not, in itself, an independent grant of congressional power.[12] Although the Necessary and Proper Clause is therefore implicated in many cases examining the extent of Congress's power under, for example, the Commerce Clause, those decisions are primarily addressed elsewhere in the *Constitution Annotated*, under the particular enumerated federal power at issue.[13]

In a few cases, however, the Supreme Court has analyzed Congress's power under the Necessary and Proper Clause separately from any specific enumerated power. Typically, these cases involve either multiple enumerated powers[14] or congressional actions that are many steps removed from the exercise of the underlying enumerated federal power.[15] Because the extent of the Necessary and Proper Clause defines the outer reaches of Congress's Article I legislative powers, these cases, in effect, delineate the boundary between the authority of the Federal Government and those areas reserved to the states.[16]

This section first reviews the history of the Necessary and Proper Clause's inclusion in the Constitution and its role in the ratification debates. Next, the section turns to the early judicial interpretation of the Clause, culminating in the Chief Justice John Marshall's landmark 1819 opinion in *McCulloch v. Maryland*. After briefly reviewing the major nineteenth century Supreme Court decisions on the Necessary and Proper Clause following *McCulloch*, the section concludes with a review of the modern Supreme Court cases on the scope of Congress's power under the Clause.

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[10] *See generally* United States v. Comstock, 560 U.S. 126, 133–34 (2010).

[11] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 5 (2005) (addressing whether the prohibition of intrastate use and cultivation of marijuana was necessary and proper to Congress's power to regulate interstate commerce); United States v. Kahriger, 345 U.S. 22, 29–32 (1953) (addressing whether registration requirement for tax on illegal gambling activities was a necessary and proper exercise of Congress's power to tax), *overruled in part by* Marchetti v. United States, 390 U.S. 39 (1968); United States v. Darby, 312 U.S. 100, 121–25 (1941) (addressing whether wage and hour regulations, as applied to intrastate activities, were necessary and proper to Congress's power to regulate interstate commerce).

[12] *See* Kinsella v. United States *ex rel.* Singleton, 361 U.S. 234, 247 (1960) ("The [Necessary and Proper Clause] is not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out the specifically granted 'foregoing' powers of [Article I, Section 8] 'and all other Powers vested by this Constitution.'").

[13] *See e.g.*, ArtI.S8.C1.1.1 Overview of Taxing Clause; ArtI.S8.C1.2.1 Overview of Spending Clause; and ArtI.S8.C3.6.1 United States v. Lopez and Interstate Commerce Clause.

[14] *See, e.g.*, *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 407 (1819) (considering whether Congress's powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies" implied the power to establish a national bank under the Necessary and Proper Clause); Juilliard v. Greenman, 110 U.S. 421, 439–40 (1884) (considering whether Congress's powers to borrow money, coin money, lay and collect taxes, and regulate interstate and foreign commerce implied the power to make paper notes legal tender for public and private debts under the Necessary and Proper Clause).

[15] *See, e.g.*, United States v. Comstock, 560 U.S. 126, 148 (2010) (considering whether "the same enumerated power that justifies the creation of a federal criminal statute" further justifies indefinite civil commitment of federal prisoners after the expiration of their criminal sentences).

[16] *See* U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution . . . are reserved to the states respectively, or to the people.").

ArtI.S8.C18.2 Historical Background on Necessary and Proper Clause

Article I, Section 8, Clause 18:

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

Under the Articles of Confederation, the Federal Government's powers were limited to those "expressly delegated to the United States."[1] Whether to maintain this limitation or to provide broader or implied powers to the National Government was a matter of debate at the Constitutional Convention. Under the South Carolina Plan of government presented by Charles Pinckney, the states would have retained all powers "not expressly delegated."[2] Similarly, the New Jersey Plan would have slightly expanded federal power by amending the Articles of Confederation to add new enumerated federal powers.[3] At the other extreme, Alexander Hamilton's plan would have empowered the national legislature to pass "all laws whatsoever," subject only to the veto of the executive.[4]

The Virginia Plan of government, which ultimately became the blueprint for the Constitution, took a different approach. As presented to the Convention by Edmund Randolph, Resolution VI of the Virginia Plan would have granted Congress power to "legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation."[5] Several delegates, including Pinckney and John Rutledge, objected to the vagueness of the word "incompetent,"[6] but a motion to replace this general statement with a specific enumeration of powers failed by an equally divided vote.[7] On July 17, 1787, the Convention approved Resolution VI following an amendment by Gunning Bedford, resolving that Congress should have power to legislate "in all cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent, or in which the Harmony of the United States may be interrupted by the Exercise of individual Legislation."[8]

On July 26, 1787, the Convention referred the amended Resolution VI (along with the other resolutions approved by the Convention) to the Committee of Detail, which developed the

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[1] Articles of Confederation of 1781, art. II ("Each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled."). For more information on the history, origins, and original meaning of the Necessary and Proper Clause, see generally Gary Lawson et al., The Origins of the Necessary and Proper Clause 35–119 (2010); John Mikhail, *The Necessary and Proper Clauses*, 102 Geo. L.J. 1045, 1086–1106 (2014); Kurt T. Lash, *"Resolution VI": The Virginia Plan and Authority to Resolve Collective Action Problems Under Article I, Section 8*, 87 Notre Dame L. Rev. 2123, 2134–41 (2012); Robert G. Natelson, *The Agency Law Origins of the Necessary and Proper Clause*, 55 Case W. Res. L. Rev. 243, 267–73 (2004); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183, 188–220 (2003); Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 297–326 (1993).

[2] 2 The Records of the Federal Convention of 1787, at 135 (Max Farrand ed., 1911) [hereinafter Farrand's Records]. Pinckney's plan was presented to the Convention on May 29, 1787, but it was neither debated nor voted on. *See* 1 Farrand's Records, *supra* note 2, at 16.

[3] 2 *Id.* at 242–43.

[4] *Id.* at 291.

[5] 1 *Id.* at 21.

[6] *Id.* at 53; 2 *id.* at 17.

[7] *See* 2 *id.* at 17 (motion by John Rutledge for a "specification of . . . powers" failed 5-5). The Convention also rejected an alternative formulation of Resolution VI that would have empowered Congress to legislate "in all cases [which may concern the common interest of the Union]." *Id.* at 25–26 (brackets in original).

[8] *Id.* at 26–27 (Bedford amendment); *id.* at 131–32 (final form as referred to the Committee of Detail).

first draft of the Constitution.[9] Ultimately, the Committee replaced Resolution VI's general statement of national legislative power with a list of enumerated powers (essentially those in the Articles of Confederation, plus a number of additional powers), followed by the Necessary and Proper Clause.[10] Because the Committee of Detail did not keep any record of its deliberations, it is a matter of speculation why it made this change.[11]

Although there is no record of the Committee's motivations, it is possible to trace the drafting history of the Necessary and Proper Clause based on the Committee's papers. In his markup of Randolph's draft Constitution, Rutledge added, at the end of the list of enumerated powers, that Congress shall have a "right to make all Laws necessary to carry the foregoing Powers into Execut[ion]."[12] In a subsequent draft, James Wilson expanded Rutledge's language to grant Congress power "to make all Laws that shall be necessary and proper for carrying into (full and complete) Execution (the foregoing Powers, and) all other powers vested, by this Constitution, in the Government of the United States, or in any Department or Officer thereof."[13]

On August 6, 1787, the Committee of Detail reported its draft Constitution to the Convention, which contained the Necessary and Proper Clause in its final form.[14] The Convention unanimously approved the Necessary and Proper Clause on August 20, 1787.[15] There was no further substantial debate on the Clause during the Convention itself, although the three members of the Convention who declined to sign the Constitution—Randolph, George Mason, and Elbridge Gerry—all cited the breadth of the Necessary and Proper Clause among their objections to the document.[16]

Following the signing of the Constitution on September 17, 1787,[17] the Constitution was submitted to the states for ratification pursuant to Article VII.[18] During the ratification debates, opponents of the Constitution, such as Patrick Henry, strongly criticized the

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[9] *Id.* at 128.

[10] *Compare* Articles of Confederation of 1781, art. IX *with* 2 Farrand's Records, *supra* note 2, at 181–82 (August 6, 1787 draft of the Constitution); *see also* Mikhail, *supra* note 1, at 1104–05 (highlighting the enumerated powers derived from the Articles of Confederation, versus those added by the Committee of Detail).

[11] One view is that the Committee of Detail effectively rejected Resolution VI by adopting an enumeration of powers and the Necessary and Proper Clause. *See* Carter v. Carter Coal Co., 298 U.S. 238, 292 (1936) ("The convention, however, declined to confer upon Congress power in such general terms [as Resolution VI]."); Barnett, *supra* note 1, at 185 (characterizing the enumeration of powers as a "reject[ion]" of Resolution VI). Other scholars see the enumeration and the Necessary and Proper Clause as the Committee of Detail's attempt to "*enact*" Resolution VI. *See* Jack M. Balkin, Commerce, 109 Mich. L. Rev. 1, 11 (2010). Another view is that Resolution VI was merely a "placeholder" provision: the Committee of Detail's enumeration served to *identify* the specific areas where the states were separately incompetent or where the general interests of the Union required federal authority. *See* Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 177–78 (1997); *accord* Clinton Rossiter, 1787: The Grand Convention 208–09 (1966) (describing the Committee of Detail's enumeration of powers as a "conver[sion]" of "the general resolution of law-making authority" approved by the Convention into a specific list of powers).

[12] 2 Farrand's Records, *supra* note 2, at 144. At the same time, Rutledge suggested that the Committee "Insert the II Article," apparently referencing the Articles of Confederation's statement that all powers not "expressly delegated" are retained by the states. 2 Farrand's Records, *supra* note 2, at 144.

[13] 2 Farrand's Records, *supra* note 2, at 168. The language in parentheses is crossed out in the original document. 2 Farrand's Records, *supra* note 2, at 163 n.17.

[14] 2 Farrand's Records, *supra* note 2, at 182. There are only stylistic differences (e.g., differences in capitalization) between the August 6, 1787 version and the version in the ratified Constitution. *Compare* 2 Farrand's Records, *supra* note 2, at 182 *with* U.S. Const. art. I, § 8, cl. 18.

[15] 2 Farrand's Records, *supra* note 2, at 345.

[16] 2 Farrand's Records, *supra* note 2, at 563 (Randolph); 2 Farrand's Records, *supra* note 2, at 633 (Gerry); 2 Farrand's Records, *supra* note 2, at 640 (Mason).

[17] 2 Farrand's Records, *supra* note 2, at 648–49.

[18] *See* ArtVII.1 Historical Background on Ratification Clause.

Necessary and Proper Clause.[19] Antifederalists argued that the Clause would empower Congress to enact any law that it deemed to be necessary and proper, amounting to an open-ended, general grant of power for Congress to legislate on virtually any subject.[20]

Federalist proponents of ratification maintained that the Necessary and Proper Clause had a more limited meaning. In the *Federalist No. 33*, Alexander Hamilton maintained that the Clause was merely "declaratory": the "unavoidable implication" of "constituting a [f]ederal [g]overnment, and vesting it with certain specified powers."[21] The worst that could be said of the Clause, in Hamilton's view, is that it was "chargeable with tautology or redundancy."[22] In the *Federalist No. 44*, James Madison agreed that even if the Constitution had been "silent" on this point, "there can be no doubt that all the particular powers, requisite as means of executing the general powers would, have resulted to the government . . . . No axiom is more clearly established in law, or in reason, than that wherever the end is required, the means are authori[z]ed."[23] If, as the Antifederalists feared, Congress should "misconstrue" the Clause and "exercise powers not warranted by its true meaning," then "the executive and [the] judiciary" would act to stop the usurpation.[24]

Following the ratification of the Constitution, debate over the meaning of the Necessary and Proper Clause resumed almost immediately when the First Congress moved to create a national bank.[25] Opposing the bank, Madison and Thomas Jefferson maintained that the Necessary and Proper Clause only empowered Congress to use "necessary" means, not means that were merely "convenien[t]" or "conducive" to the exercise of an enumerated power (such as the power to tax or borrow money).[26] Alexander Hamilton, supporting the constitutionality of the bank, argued that "necessary" in this context means no more than "needful, requisite, incidental, useful, or conducive to," and that Jefferson had misconstrued "necessary" as if "the

[19] *See* 3 The Debates in Several State Conventions on the Adoption of the Federal Constitution 436–37 (Jonathan Elliot ed., 1891) (statement of Patrick Henry) (arguing that the "sweeping clause" would give Congress "unlimited power").

[20] *See, e.g.*, The Antifederalist No. 32 (*Brutus V*), *in* The Antifederalist Papers 82–86 (Morton Borden ed., 1965) (arguing that it is "utterly impossible to fully define" Congress's powers under the Necessary and Proper Clause, which would give Congress power to "pass any law which they may think proper"); The Antifederalist No. 46 (*An Old Whig II*) *in* The Antifederalist Papers, *supra* note 20, at 131–32 (arguing that the Necessary and Proper Clause granted Congress "*undefined*, *unbounded* and *immense* power"). These objections largely traced the views of George Mason, a dissenter at the Constitution Convention, who argued that the Necessary and Proper Clause would empower Congress to "extend their powers as far as they shall think proper." 2 Farrand's Records, *supra* note 2, at 640.

[21] The Federalist No. 33 (Alexander Hamilton).

[22] *Id.*

[23] The Federalist No. 44 (James Madison).

[24] *Id.*

[25] The practice of the First Congress has been treated by the Supreme Court as probative of the original meaning of constitutional provisions. *See, e.g.*, Marsh v. Chambers, 463 U.S. 783, 787–90 (1983) ("An act 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument, . . . is contemporaneous and weighty evidence of its true meaning.'" (ellipses in original) (quoting Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888), *overruled in part by* Milwaukee Cty. v. M.E. White Co., 296 U.S. 268 (1935))).

[26] 2 Annals of Cong. 1946–50 (1791) (speech of James Madison); Thomas Jefferson, Opinion on the Constitutionality of the Bill to Establish the Bank of the United States (Feb. 15, 1791), *reprinted in* Legislative and Documentary History of the Bank of the United States 93–94 (M. St. Clair Clarke & D.A. Hall eds., 1832) [hereinafter History of the Bank]; *see also* Edmund Randolph, Opinion on the Constitutionality of the Bill to Establish the Bank of the United States (Feb. 12, 1791), *reprinted in* History of the Bank, *supra*, at 86–91.

word absolutely, or indispensably, had been prefixed to it."[27] President Washington, apparently persuaded by Hamilton's view, signed into law the bill chartering the First Bank of the United States in 1791.[28]

ArtI.S8.C18.3 Necessary and Proper Clause Early Doctrine and McCulloch v. Maryland

Article I, Section 8, Clause 18:

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

The Supreme Court was first called upon to construe the Necessary and Proper Clause in an 1805 case, *United States v. Fisher*, which concerned a law giving the United States priority over other creditors in the collection of debts.[1] Chief Justice Marshall held that this law was a necessary and proper means of executing Congress's power to raise revenue and pay the debts of the United States.[2] Marshall rejected the argument that acts of Congress must be "indispensably necessary to give effect to a specified power," reasoning that such a requirement would produce "endless difficulties."[3] Rather, under the Necessary and Proper Clause, "Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the [C]onstitution."[4]

Marshall's 1819 opinion in *McCulloch v. Maryland*[5] expanded on *Fisher* to provide the canonical interpretation of the Necessary and Proper Clause.[6] *McCulloch* resolved the long-simmering debate over whether Congress had the power to incorporate a national bank.[7] Because the enumerated powers of Article I do not explicitly include the power to establish a bank, the issue in *McCulloch* was whether creating a national bank was a necessary and

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[27] Alexander Hamilton, Opinion of the Bill to Establish the Bank of the United States (Feb. 23, 1791), *reprinted in* History of the Bank, *supra* note 26, at 95–96 (emphasis omitted).

[28] History of the Bank, *supra* note 26, at 85–86. The First Bank of the United States remained in operation during Jefferson's presidency, despite his earlier opposition. *See* History of the Bank, *supra* note 26, at 115. However, The First Bank of the United States ceased operations after a vote in Congress to renew its charter failed by a single vote in 1811. History of the Bank, *supra* note 26, at 446. In 1816, President Madison, again despite his earlier view, signed into law a bill chartering the Second Bank of the United States. History of the Bank, *supra* note 26, at 713.

[1] 6 U.S. (2 Cranch.) 358, 385 (1805).

[2] *Id.* at 396–97.

[3] *Id.*

[4] *Id.* at 396.

[5] 17 U.S. (4 Wheat.) 316 (1819). The nine days of oral argument in *McCulloch* brought together an extraordinary constellation of legal talent, with Daniel Webster, then U.S. Attorney General William Wirt, and former U.S. Attorney General William Pinkney arguing for McCulloch. *See* Edward S. Corwin, John Marshall and the Constitution 128–29 (1921) (describing the arguments); Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, 20 Const. Comment. 679, 690–98 (2004) (same). Luther Martin, a member of the Constitutional Convention and prominent Antifederalist, argued for Maryland, notably citing the assertions made in the *Federalist Papers* that, he argued, disclaimed that broad interpretations of the Necessary and Proper Clause now offered to support the Bank. *See McCulloch*, 17 U.S. at 372–73.

[6] Alison L. LaCroix, *The Shadow Powers of Article I*, 123 Yale L.J. 2044, 2061 (2014) (describing *McCulloch* as "the lodestar for understanding the [Necessary and Proper] clause"); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 Tex. L. Rev. 795, 814 (1996) ("Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch*.").

[7] 17 U.S. (4 Wheat.) at 401.

proper means of effectuating Congress's powers "to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct a war; and to raise and support armies and navies."[8]

The decision hinged on the interpretation of the Necessary and Proper Clause. In *McCulloch*, the Court empathically rejected a narrow interpretation of "necessary" as limiting Congress's powers to those that are "indispensably" or "absolutely" necessary to the exercise of a enumerated federal power.[9] Adopting this strict reading, Marshall argued, would effectively hobble the operations of the Federal Government, "rendering [it] incompetent to its great objects" and "depriv[ing] the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances."[10] In Marshall's view, such a narrow construction was particularly inappropriate for "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."[11] The Court instead held that, in context, "necessary" was better understood to mean merely "conducive to" or "needful."[12] As the unanimous opinion famously concluded: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[13]

ArtI.S8.C18.4 Nineteenth Century Evolution of Necessary and Proper Clause Jurisprudence

Article I, Section 8, Clause 18:

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

Following *McCulloch*, the Necessary and Proper Clause received relatively little attention on its own through the nineteenth and twentieth centuries,[1] although it served as an important component in many Commerce Clause cases.[2] For example, in its 1824 opinion in *Gibbons v. Ogden*,[3] the Supreme Court addressed the scope of Congress's power to regulate

[8] *Id.* at 406–07.

[9] *Id.* at 414–17.

[10] *Id.* at 415–16, 418.

[11] *Id.* (emphasis omitted).

[12] *Id.* at 418.

[13] *Id.* at 421. Five years later, the Court extended *McCulloch* to hold that Congress may not only incorporate banks but further confer upon them any powers or privileges that are essential to their effective operation. Osborn v. Bank of the U.S., 22 U.S. (9 Wheat.) 738, 862 (1824). For later development of this doctrine, see, e.g., Pittman v. Home Owners' Loan Corp., 308 U.S. 21, 32–33 (1939) ("Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized [by granting immunity from state taxation.]"); Watters v. Wachovia Bank, N.A., 550 U.S. 1, 15 (2007) (holding that Congress may exempt national banks from state licensing, registration, and inspection requirements).

[1] *See* Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2060 (2014) ("Before 2005, one would have been hard pressed to identify a body of doctrine on the necessary and proper power. . . . [T]he necessary and proper power has tended to ride along as a quieter, sometimes overlooked presence in the case law—the perpetual bridesmaid to the commerce power's bride."); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 814 (1996) ("Analysis of the Necessary and Proper Clause has historically begun and ended with *McCulloch*[.]").

[2] *See, e.g.*, United States v. Wrightwood Dairy Co., 315 U.S. 110, 119–21 (1942); United States v. Darby, 312 U.S. 100, 118 (1941); Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342, 353 (1914).

[3] 22 U.S. (9 Wheat.) 1 (1824).

interstate commerce[4] as supplemented by the Necessary and Proper Clause. Chief Justice Marshall concluded that the Commerce Clause empowers Congress "to prescribe the rule by which commerce is to be governed," including "every species of commercial intercourse" among the states.[5] *Gibbons* relied on the Necessary and Proper Clause as supporting a broad construction of commerce power,[6] while at same time noting that the power did not reach purely intrastate commerce that "does not extend to or affect other States," because such power "would be inconvenient, and is certainly unnecessary."[7]

In a series of late nineteenth century opinions known as the *Legal Tender Cases*,[8] the Supreme Court relied on *McCulloch*'s reading of the Necessary and Proper Clause to establish Congress's power to issue paper money and make it legal tender for all debts, public and private.[9] Although the Constitution expressly grants Congress the power "to coin Money,"[10] this had been previously understood as limited to actual coinage (i.e., metal tokens).[11] Nonetheless, the *Legal Tender Cases* upheld the issuance of paper money and its status as legal tender as necessary and proper to Congress's powers to tax, borrow money, coin money, and regulate interstate and foreign commerce.[12] These powers, taken together with the Necessary and Proper Clause, authorized Congress to "establish a national currency, either in coin or in paper, and to make that currency lawful money for all purposes."[13]

ArtI.S8.C18.5 Modern Necessary and Proper Clause Doctrine

Article I, Section 8, Clause 18:

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

Building on the foundation established by *McCulloch*, modern Necessary and Proper Clause doctrine holds that the Clause permits any federal legislation that is "convenient" or "useful" to the exercise of federal power—that is, any "means that is rationally related to the implementation of a constitutionally enumerated power."[1] The significance of this broad

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[4] U.S. Const. art. I, § 8, cl. 3; *see* ArtI.S8.C3.8.1 Overview of Foreign Commerce Clause through ArtI.S8.C3.7.11.1 Overview of State Taxation and Dormant Commerce Clause.

[5] 22 U.S. (9 Wheat.) at 196.

[6] *Id.* at 187.

[7] *Id.* at 193–94.

[8] Juilliard v. Greenman, 110 U.S. 421 (1884); Knox v. Lee, 79 U.S. (12 Wall.) 457 (1870). These cases overturned *Hepburn v. Griswold*, which held that a law making United States notes legal tender for the payment of debts exceeded the powers of Congress. *See* 75 U.S. (8 Wall.) 603, 616–22 (1869). For further discussion of these cases, see ArtI.S8.C5.1 Congress's Coinage Power.

[9] *See Juilliard*, 110 U.S. at 449–50.

[10] U.S. Const. art. I, § 8, cl. 5.

[11] *Hepburn*, 75 U.S. (8 Wall.) at 616 ("[The power to make paper notes] is certainly not the same power as the power to coin money."); *Juilliard*, 110 U.S. at 462 (Field, J., dissenting) ("The meaning of the terms 'to coin money' is not at all doubtful. It is to mould metallic substances into forms convenient for circulation and to stamp them with the impress of the government authority indicating their value with reference to the unit of value established by law. Coins are pieces of metal of definite weight and value, stamped such by the authority of the government.").

[12] *Juilliard*, 110 U.S. at 439–40, 448.

[13] *Id.* at 448. As a corollary to its power over the currency, the Supreme Court later upheld Congress's power to abrogate clauses in private contracts that required payment in gold. *See* Norman v. Baltimore & Ohio R.R., 294 U.S. 240, 316 (1935).

[1] United States v. Comstock, 560 U.S. 126, 134 (2010).

understanding of *McCulloch* on the powers of the Federal Government is difficult to overstate.[2] Much federal law rests on the foundation established by *McCulloch*, and practically every power of the Federal Government has been expanded in some degree by the Necessary and Proper Clause.[3] Under the authority granted it by the Clause, Congress has adopted measures required to comply with treaty obligations,[4] organized the federal judicial system,[5] regulated intrastate matters that substantially affect interstate commerce,[6] seized property pursuant to its taxing powers,[7] and exercised the power of eminent domain to acquire private property for public use.[8]

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[2] *See, e.g.*, David S. Schwartz, *Misreading McCulloch v. Maryland*, 18 U. Pa. J. Const. L. 1, 3 (2015) (describing universal view of *McCulloch* as "a decision of the highest importance in American constitutional law"); Daniel A. Farber, *The Story of McCulloch: Banking on National Power*, 20 Const. Comment. 679 (2004) ("Many scholars consider [*McCulloch*] the single most important opinion in the Court's history."); Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 987 (1998) ("At least within the field of constitutional law, almost everyone seems to agree that *McCulloch* is canonical.").

[3] *See, e.g.*, Kurt T. Lash, *The Original Meaning of an Omission: The Tenth Amendment, Popular Sovereignty, and "Expressly" Delegated Power*, 83 Notre Dame L. Rev. 1889, 1942 (2008) ("[In *McCulloch*, Chief Justice Marshall] articulated a vision of federal power not only expansive for its day, but expansive enough to become the foundational theory of the modern administrative state."); Felix Frankfurter, *John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 219 (1955) ("One can, I believe, say with assurance that a failure to conceive the Constitution as Marshall conceived it in [*McCulloch*], to draw from it the national powers which have since been exercised and to exact deference to such powers from the states, would have been reflected by a very different United States than history knows."); *see also supra* note 2 (sources discussing the influence and importance of *McCulloch*).

Moreover, later amendments to the Constitution, including the Civil War Amendments, drew on *McCulloch*'s language to empower Congress to enforce their provisions by "by appropriate legislation." U.S. Const. amends. XIII, § 2; XIV, § 5; XV, § 2; XIX, § 2; XXIII, § 2; XXIV, § 2; XXVI, § 2. For the connection between *McCulloch* and the term "appropriate legislation," see, for example, Cong. Globe, 39th Cong., 1st Sess. 1118 (1866) (statement of Rep. Wilson) (equating "appropriate" as used in section two of the Thirteenth Amendment with "necessary and proper" and citing *McCulloch*); Katzenbach v. Morgan, 384 U.S. 641, 651 (1966) ("[T]he *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under § 5 of the Fourteenth Amendment."); The Civil Rights Cases, 109 U.S. 3, 51 (1883) (Harlan, J., dissenting) ("The word appropriate was undoubtedly used with reference to its meaning, as established by repeated decisions of th[e] [C]ourt." (citing *McCulloch*)); *Ex parte* Virginia, 100 U.S. 339, 346 (1879) (defining "appropriate legislation" by paraphrasing the *McCulloch* standard).

[4] Missouri v. Holland, 252 U.S. 416, 432 (1920) (holding that congressional statutes to implement a treaty are valid under the Necessary and Proper Clause so long as the treaty is valid); Neely v. Henkel, 180 U.S. 109, 121 (1901) (observing that the Necessary and Proper Clause empowers Congress to "enact such legislation as is appropriate to give efficacy" to a treaty with a foreign power).

[5] Jinks v. Richland Cty., 538 U.S. 456, 461–64 (2003) (holding that federal courts may exercise supplemental jurisdiction, including tolling of state statutes of limitation, pursuant to Article III and the Necessary and Proper Clause); Willy v. Coastal Corp., 503 U.S. 131, 136–37 (1992) (holding that federal courts may impose sanctions on litigants pursuant to Article III and the Necessary and Proper Clause, even if it is later determined that the court lacked subject matter jurisdiction); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 32 (1988) (holding that the federal transfer statute is "comfortably with Congress'[s] powers under Article III as augmented by the Necessary and Proper Clause"); Burlington N. R.R. v. Woods, 480 U.S. 1, 5 n.3 (1987) ("Article III of the Constitution, augmented by the Necessary and Proper Clause of Article I, § 8, cl. 18, empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts."); *see also* Artis v. District of Columbia, No. 16-460, slip op. at 16–18 (2018) (reaffirming *Jinks*).

[6] *See, e.g.*, Gonzales v. Raich, 545 U.S. 1, 17–22 (2005) (holding that Congress had authority to criminalize intrastate possession of marijuana under the Commerce and Necessary and Proper Clauses); *see generally* ArtI.S8.C3.8.1 Overview of Foreign Commerce Clause through ArtI.S8.C3.7.11.1 Overview of State Taxation and Dormant Commerce Clause.

[7] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 281 (1856) ("The power to collect and disburse revenue, and to make all laws which shall be necessary and proper for carrying that power into effect, includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the constitution.").

[8] Kohl v. United States, 91 U.S. 367, 372–73 (1876) ("[T]he right of eminent domain exists in the Federal government . . . so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.").

Perhaps most notably, nearly all federal criminal law that applies outside of federal enclaves[9] relies on the Necessary and Proper Clause.[10] The Constitution expressly empowers Congress to punish only four crimes: counterfeiting, piracies, offenses against the law of nations, and treason.[11] The remainder of the federal criminal code—prohibitions on, for example, tax evasion, racketeering, mail fraud, and drug possession[12]—rests on a determination that criminalization is necessary to effectuate congressional power to regulate interstate commerce, collect taxes, establish post offices, spend for the general welfare, or some other enumerated federal power.[13] For example, as necessary and proper to Congress's authority under the Spending Clause, Congress may criminalize bribery of state and local officials receiving federal funds.[14] Or, as necessary and proper to its power to regulate interstate commerce, Congress may prohibit intrastate cultivation and use of controlled substances such as illegal drugs.[15]

In *United States v. Comstock*, the Roberts Court addressed whether the Necessary and Proper Clause could support a federal law that provided for indefinite civil commitment of certain persons in federal custody who were shown to be "sexually dangerous," authorizing detention of such prisoners even after they had served their sentences.[16] The difficulty with the law, as a matter of congressional power, was that sexual dangerousness was defined broadly, without an explicit tie to any enumerated federal power,[17] such as an impact on commerce. Moreover, the Court's 2000 decision in *United States v. Morrison* foreclosed the argument that Congress could regulate general sexual violence pursuant to the Commerce Clause.[18]

The Court in *Comstock* upheld the civil commitment provision under the Necessary and Proper Clause. Writing for a five-Justice majority, Justice Stephen Breyer held that whatever enumerated power justified the prisoner's crime of conviction[19] permitted Congress "to provide

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[9] *See* ArtI.S8.C17.1.1 Historical Background on Seat of Government Clause, ArtI.S8.C17.1.2 Seat of Government Doctrine, and ArtI.S8.C17.2.1 Overview of Places Purchased Clause.

[10] *See* United States v. Comstock, 560 U.S. 126, 135–36 (2010).

[11] *See* U.S. Const. art. I, § 8, cls. 6, 10; *id.* art. III, § 3, cl. 2.

[12] *See, e.g.*, 18 U.S.C. §§ 1341–51 (mail fraud and wire fraud); *id.* §§ 1951–68 (racketeering); 21 U.S.C. § 844 (drug possession); 27 U.S.C. § 7201 (tax evasion).

[13] For example, the Supreme Court has upheld federal laws criminalizing the alteration of registered bonds, *Ex parte* Carll, 106 U.S. 521 (1883), the bringing of counterfeit bonds into the country, United States v. Marigold, 50 U.S. (9 How.) 560, 567 (1850), conspiracy to injure prisoners in custody of a United States Marshal, Logan v. United States, 144 U.S. 263, 282–84 (1892), impersonation of a federal officer with intent to defraud, United States v. Barnow, 239 U.S. 74, 77–80 (1915), conspiracy to injure a citizen in the free exercise or enjoyment of any right or privilege secured by the Constitution or laws of the United States, *Ex parte* Yarbrough, 110 U.S. 651, 657–59 (1884), and the receipt by government officials of contributions from government employees for political purposes, *Ex parte* Curtis, 106 U.S. 371, 373–75 (1882).

[14] Sabri v. United States, 541 U.S. 600, 606 (2004).

[15] Gonzales v. Raich, 545 U.S. 1, 5, 22 (2005).

[16] 560 U.S. 126, 130–31 (2010).

[17] *See* 18 U.S.C. § 4247(a)(6) (defining a "sexually dangerous person" as one who "suffers from a serious mental illness . . . as a result of which he would have serious difficulty in refraining from sexually violent conduct or child molestation if released").

[18] 529 U.S. 598, 617 (2000) (holding that Congress may not regulate "noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce"); *see* Amdt14.S5.2 Who Congress May Regulate (discussing *Morrison*).

[19] Notably, the civil commitment provisions applied to any person in federal custody, regardless of whether his conviction was for a sex-related crime or not. *See* 18 U.S.C. §§ 4247(a)(5), 4248(a). In practice, however, many of the individuals committed under the statute were in federal custody for a sex crime that fell within federal jurisdiction, such as possession of child pornography that "has been shipped or transported in or affecting interstate or foreign commerce . . . by any means including by computer." *See id.* § 2252(a)(2); *Comstock*, 560 U.S. at 131 ("Three of the five [petitioners] had previously pleaded guilty in federal court to possession of child pornography.").

appropriately for those imprisoned, and to maintain the security of those who are not imprisoned but who may be affected by the federal imprisonment of others," including through post-sentence civil commitment.[20] This conclusion was justified by five factors:

> (1) the breadth of the Necessary and Proper Clause, (2) the long history of federal involvement in this arena, (3) the sound reasons for the statute's enactment in light of the Government's custodial interest in safeguarding the public from dangers posed by those in federal custody, (4) the statute's accommodation of state interests, and (5) the statute's narrow scope.[21]

In 2013, the Supreme Court reaffirmed *Comstock*'s reasoning in *United States v. Kebodeaux*.[22] Like *Comstock*, *Kebodeaux* concerned a federal regulation of sex offenders: the registration requirements of the 2006 Sex Offender Registration and Notification Act (SORNA).[23] Anthony Kebodeaux, a member of the U.S. Air Force, was convicted by a court martial of a sex crime in 1999; he served a three-month sentence and received a bad conduct discharge.[24] In 2007, Kebodeaux was convicted of violating SORNA when he moved from El Paso to San Antonio but failed to update his registration.[25]

Although Congress did not enact SORNA until after Kebodeaux's court martial and discharge, the Supreme Court upheld its application to Kebodeaux as necessary and proper to Congress's power to "make Rules for the . . . Regulation of the land and naval Forces."[26] Key to that conclusion was the Court's finding that Kebodeaux's release from federal custody was not "unconditional" because, as part of his original punishment by the court martial he was subject to an earlier federal statute, the Wetterling Act, which imposed "very similar" registration requirements to those of SORNA.[27] The Court thus framed the case as presenting a narrow question of whether Congress could later "modify" the Wetterling Act's registration requirements through SORNA.[28] Applying the five *Comstock* factors, the Court concluded that the breadth of the Necessary and Proper Clause and the reasonableness of Congress's registration requirements justified SORNA's application to Kebodeaux.[29]

Although *Comstock* and *Kebodeaux* embrace a broad, relatively deferential understanding of the Necessary and Proper Clause, the Supreme Court has at times taken a narrower view, especially in cases involving independent federalism concerns.[30] In the Commerce Clause context, for example, the Rehnquist Court found the Necessary and Proper Clause insufficient

[20] *Comstock*, 560 U.S. at 149.

[21] *Id.*

[22] 570 U.S. 387 (2013).

[23] *See* 34 U.S.C. §§ 20911–932; 18 U.S.C. § 2250(a).

[24] *Kebodeaux*, 570 U.S. at 389–90.

[25] *Id.* at 390.

[26] U.S. Const. art. I, § 8, cl. 14; *Kebodeaux*, 570 U.S. at 399.

[27] *Kebodeaux*, 570 U.S. at 391.

[28] *Id.* at 393–94.

[29] *See id.* at 395–99.

[30] *See, e.g.*, Alden v. Maine, 527 U.S. 706, 732 (1999) (holding that the Congress could not subject states to suit for federal claims in state courts because "the specific Article I powers delegated to Congress necessarily [do not] include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers"); Printz v. United States, 521 U.S. 898, 923–24 (1997) (holding that Congress cannot compel state officials to enforce federal law and characterizing the Necessary and Proper Clause as "the last, best hope of those who defend ultra vires congressional action").

to support laws prohibiting possession of guns near schools[31] and prohibiting gender-motivated violence,[32] despite arguments that these activities have an aggregate impact on interstate commerce.

Similarly, just two years after *Comstock*, five Justices separately concluded that the "individual mandate" provision of the Affordable Care Act (ACA), which required individuals to purchase insurance or pay a tax penalty, exceeded Congress's power under the Commerce and Necessary and Proper Clauses.[33] In *National Federation of Independent Business v. Sebelius (NFIB)*, Chief Justice Roberts's opinion reasoned that the individual mandate was not an "essential component" of the ACA's health insurance reforms because it operated to "vest[ ] Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power" by compelling individuals to engage in commerce.[34] Therefore, unlike the law in *Comstock*, the authority Congress attempted to exercise in *NFIB* was neither "narrow in scope" nor "incidental" to the exercise of Commerce Clause power.[35] However, a majority of the Court ultimately held that the individual mandate was authorized under Congress's power to lay and collect taxes.[36]

ArtI.S8.C18.6 Meaning of Proper

Article I, Section 8, Clause 18:

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

In general, Supreme Court doctrine has afforded relatively little attention to whether the word "proper" as used in the Necessary and Proper Clause independently limits Congress's authority.[1] Indeed, it is not clear that "proper" imparts any limitation on Congress's power beyond the *McCulloch* test itself, which requires a law to both be "appropriate" and "consist[ent] with the letter and spirit of the constitution."[2] At the least, to be "proper," an act of Congress must not violate another express or implied constitutional provision, including the system of dual state-federal sovereignty established by the Constitution.[3] For example, the

[31] United States v. Lopez, 514 U.S. 549, 566–68 (1995).

[32] United States v. Morrison, 529 U.S. 598, 617 (2000).

[33] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB), 567 U.S. 519, 558–61 (2012) (opinion of Roberts, C.J.). Although there were five votes for this holding, no single rationale was adopted by the Court. *Compare id.* at 558–61 (opinion of Roberts, C.J.) *with id.* at 649–55 (Scalia, Kennedy, Thomas, & Alito, JJ., dissenting).

[34] *Id.* at 560 (opinion of Roberts, C.J.).

[35] *Id.*

[36] *Id.* at 574.

[1] *See* Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 285 (1993) ("Historically, discussion of the [Necessary and Proper] Clause has been dominated by discussion of the meaning of the word 'necessary.' . . . The word 'proper' has generally been treated as a constitutional nullity or, at best, as a redundancy.").

[2] *See* United States v. Comstock, 560 U.S. 126, 160–61 (2010) (Thomas, J., dissenting) (brackets in original) "The means Congress selects will be . . . 'proper' if they are not otherwise 'prohibited' by the Constitution and not '[in]consistent' with its 'letter and spirit.'" (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819)).

[3] *See* Buckley v. Valeo, 424 U.S. 1, 135 (1976) ("Congress could not, merely because it concluded that such a measure was 'necessary and proper' to the discharge of its substantive legislative authority, pass a bill of attainder or ex post facto law contrary to the prohibitions contained in § 9 of Art[icle] I. No more may it vest in itself, or in its officers, the authority to appoint officers of the United States when the Appointments Clause by clear implication prohibits it from doing so."); New York v. United States, 505 U.S. 144, 166 (1992) ("We have always understood that

Court has held that the Tenth Amendment operates to restrain the scope of the Necessary and Proper Clause, holding that an otherwise valid law that violates principles of state sovereignty is not a "*proper*" exercise of federal power.[4]

ArtI.S8.C18.7 Investigations and Oversight

ArtI.S8.C18.7.1 Overview of Congress's Investigation and Oversight Powers

Article I, Section 8, Clause 18:

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

Congress's power to conduct investigations stands on equal footing with its authority to legislate and appropriate.[1] Although the "power of inquiry" was not expressly provided for in the Constitution, it has nonetheless been acknowledged as "an essential and appropriate auxiliary to the legislative function" derived implicitly from Article I's vesting of "legislative Powers" in the Congress.[2] This implied constitutional prerogative to gather information related to legislative activity is both critical in purpose, as Congress "cannot legislate wisely or effectively in the absence of information," and extensive in scope, as Congress is empowered to obtain pertinent testimony and documents through investigations into nearly any matter.[3] Included within the scope of the power is the authority to initiate investigations, hold hearings, gather testimony or documents from witnesses, and, in situations where either a government or private party is not forthcoming, compel compliance with congressional requests through the issuance and enforcement of subpoenas.

While Congress's investigative tools can be used to achieve a number of different purposes, congressional practice suggests that legislative inquiries primarily serve to either gather information valuable for considering and producing legislation (what may be called the self-informing or legislative-informing function)[4] or to ensure that existing laws are being

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even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

[4] *See, e.g.*, Printz v. United States, 521 U.S. 898, 924 (1997) ("When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in [the Tenth Amendment and other constitutional provisions] it is not a 'La[w] . . . *proper* for carrying into Execution the Commerce Clause.'").

[1] Barenblatt v. United States, 360 U.S. 109, 111 (1959); Woodrow Wilson, Congressional Government 303 (15th ed. 1913) (asserting that the "informing function of Congress should be preferred even to its legislative function"). *See also* J. William Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. Chi. L. Rev. 440, 441 (1951) (describing the power of investigation as "perhaps the most necessary of all the powers underlying the legislative function").

[2] *See* McGrain v. Daugherty, 273 U.S. 135, 174 (1927) ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.").

[3] *Id.* at 175 ("A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it."). Congress's oversight function is subject to a variety of legal limitations. *See* Eastland v. United States Servicemen's Fund, 421 U.S. 491, 504 n.15 (1975) ("Although the power to investigate is necessarily broad it is not unlimited . . . . We have made it clear [ ] that Congress is not invested with a "general' power to inquire into private affairs.' The subject of any inquiry always must be one 'on which legislation could be had.'") (citations omitted). For a discussion of other constitutional limitations on congressional investigations see CRS Report RL30240, Congressional Oversight Manual, by Christopher M. Davis et al.

[4] Congressional investigations have previously served to either inform Congress itself (for purposes of a legislative function) or to inform the public. *See* Hutchinson v. Proxmire, 443 U.S. 111, 132 (1979) ("Advocates of a broad reading of the "informing function" sometimes tend to confuse two uses of the term 'informing.' In one sense, Congress informs itself collectively by way of hearings of its committees . . . . The other sense of the term . . .

properly administered (what may be referred to as the oversight function.)[5] Although functionally distinguishable, the self-informing and oversight functions often merge during the conduct of significant investigations.

In the absence of explicit constitutional text, the scope of the investigatory power has been molded and defined primarily by congressional practice, negotiations between the political branches, and opinions of the Supreme Court. The Supreme Court has only rarely engaged in any significant discussion of Congress's investigatory power, and in fact has only once issued an opinion directly addressing an investigative oversight conflict between Congress and the Executive Branch.[6] A variety of factors contribute to the reduced judicial role in this area, including legal principles of judicial restraint and the separation of powers. But at least historically, the chief constraint appears to be the infrequency in which cases involving the investigatory power have been adjudicated.[7] As a general matter, the Judicial Branch generally has become involved in subpoena disputes in only three classes of cases: (1) when a party is subject to a contempt proceeding for failure to comply with congressional demands;[8] (2) when the House or Senate itself initiates a lawsuit in an attempt to enforce a subpoena—though the Supreme Court has never heard such a case;[9] or (3) when a subpoena seeks an individual's documents from a third party, and the individual brings suit to block the third party from complying with the subpoena.[10] The majority of cases have historically come from the first category, arising either in the context of a criminal prosecution for contempt of Congress, or a habeas proceeding stemming from a detention carried out pursuant to an exercise of Congress's inherent contempt power.[11] The relative dearth of jurisprudence means that historical practice, especially Congress's views of the reach of its own authority established through hundreds of years of investigations, plays a substantial role in establishing the outer bounds of the investigatory power.

Although Supreme Court decisions in this area are limited, they illuminate the basic constitutional foundation of Congress's investigatory power and establish key legal limitations

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perceives it to be the duty of Members to tell the public about their activities."). While the self-informing function is clearly a valid justification for exercise of the investigative power, the public-informing function sits on less certain ground. *Id.* ("Valuable and desirable as it may be in broad terms, the transmittal of such information by individual Members in order to inform the public and other Members is not a part of the legislative function or the deliberations that make up the legislative process.") *But see* Watkins v. United States, 354 U.S. 178, 200 n.33 (1957) (noting that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function'" the purpose of which is to "inquire into *and publicize* corruption, maladministration or inefficiency in agencies of the Government") (emphasis added).

[5] Watkins v. United States, 354 U.S. 178, 187 (1957) (holding that the investigatory power "encompasses inquiries concerning the administration of existing laws").

[6] Prior to *Trump v. Mazars*, 140 S. Ct. 2019 (2020), the Court's last significant discussion of the scope of the investigatory power was in 1975. *Eastland*, 421 U.S. at 505–11.

[7] *See Rumely*, 345 U.S. at 46–48 ("Experience admonishes us to tread warily in this domain . . . . Grave constitutional questions are matters properly to be decided by this Court but only when they inescapably come before us for adjudication. Until then it is our duty to abstain from marking the boundaries of congressional power . . . . Only by such self-restraint will we avoid the mischief which has followed occasional departures from the principles which we profess."). The Court has limited a witness's options for challenging a subpoena. For example, in *Eastland*, the Court held that the Speech or Debate Clause severely limits a court's ability to quash a congressional subpoena in a civil case. *See Eastland*, 421 U.S. at 511 (forbidding "invocation of judicial power to challenge the wisdom of Congress's use of its investigative authority").

[8] *See, e.g.*, *Watkins*, 354 U.S. at 181–82.

[9] *See, e.g.*, Comm. on the Judiciary of the United States House of Representatives v. McGahn, 968 F.3d 755, 762 (D.C. Cir. 2020) (House lawsuit to enforce a committee subpoena).

[10] *See, e.g.*, *Mazars*, 140 S. Ct. at 2028.

[11] *Trump v. Mazars* and *Eastland v. United States Serviceman's Fund* represent two opinions that come from outside the contempt context. *Mazars*, 140 S. Ct. at 2028–29 (involving a lawsuit filed by President Donald Trump to block his accounting firm from complying with a congressional subpoena); *Eastland*, 421 U.S. at 493–501 (involving application of the Speech or Debate Clause in a challenge to a congressional subpoena).

on its exercise. The Court's early jurisprudence began with a focus on establishing the source of the investigatory power before considering the power's scope.[12] In that vein, the Court established that the authority to conduct investigations was implied from the "legislative power" vested in Congress by Article I of the Constitution, but only to the extent that an inquiry actually served a "legislative purpose."[13] By the mid-twentieth century, judicial recognition of the investigatory power had been well established, and the Court's focus shifted to legal limitations on congressional inquiries, generally in the context of the tension between congressional investigations and the individual rights of private citizens.[14] These judicially identified limitations on Congress's power of inquiry emanated principally from the Bill of Rights, including the First and Fifth Amendments, as well as from the internal rules of the House and Senate, which can act as self-imposed constraints on the investigatory power. Intervention by the Supreme Court into investigative disputes has generally been confined to scenarios in which Congress is seeking information from a private citizen, rather than a government official. *Trump v. Mazars*, decided in 2020, was the first time the Supreme Court directly addressed an interbranch investigatory conflict. Even then, the case was technically brought by President Donald Trump in his private rather than official capacity, though the Court chose to treat the conflict as one between the branches.[15] Instead, the historical reality has generally been that inter-branch investigative conflicts are resolved through an informal tug-of-war between the political branches rather than through adjudication by the courts.[16]

ArtI.S8.C18.7.2 Historical Background on Congress's Investigation and Oversight Powers

Article I, Section 8, Clause 18:

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

The power to conduct investigations and oversight has long been considered an essential attribute of legislative bodies. In England, Parliament's protean investigatory powers first emerged in connection to its authority to protect the sanctity of the legislative body by punishing for contempt, a practice that can be traced back to at least 1548.[1] Through a contempt proceeding, the legislative body can detain, imprison, and fine those that either obstruct Parliament's operation, refuse to comply with its lawful orders, or threaten its

[12] *See Watkins*, 354 U.S. at 195 ("Prior cases . . . had defined the scope of investigative power in terms of the inherent limitations of the sources of that power. In the more recent cases, the emphasis shifted to problems of accommodating the interest of the Government with the rights and privileges of individuals.").

[13] Kilbourn v. Thompson, 103 U.S. 168, 204 (1880) (holding that exercise of Congress's implied power of inquiry must be made "in aid of the legislative function").

[14] *See e.g.*, *Watkins*, 354 U.S. at 215 (Fifth Amendment Due Process); Quinn v. United States, 349 U.S. 155, 161–65 (1955) (Fifth Amendment privilege against self-incrimination); *Barenblatt*, 360 U.S. at 125–34 (First Amendment).

[15] *Mazars*, 140 S. Ct. at 2028, 2034 ("The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity.").

[16] Andrew McCanse Wright, *Constitutional Conflict and Congressional Oversight,* 98 Marq. L. Rev. 881, 889–90 (2014) (arguing that "the constitutional scheme places a premium on good faith negotiation between Congress and the Executive backstopped by rare instances of judicial resolution . . . . In cases of impasse, Congress primarily enforces its requests through political self-help remedies rather than outsourcing enforcement to the courts. When Congress does seek judicial enforcement, restraint is generally the hallmark of Article III tribunals presented with bickering political branches.").

[1] James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 157 n. 15 (1926).

prerogatives.[2] These roots remain apparent today, as legal discussions of legislative investigatory powers in the United States are consistently and intimately intertwined with the contempt power.[3]

By the early seventeenth century, Parliament unmistakably recognized its power to investigate as the House of Commons began requiring, on a case by case basis, the attendance of witnesses or the production of documents in furtherance of the body's "duty to inquire into every Step of publick management . . . ."[4] Eventually, as gathering information relating to both the passage of new laws and the administration of existing laws became an apparent and essential ingredient of the legislative process, compulsory investigatory powers were provided on a more general and permanent basis to established parliamentary committees of inquiry.[5] This overarching historical notion of the power of inquiry as a necessary component part of the legislative power was transported to America, and incorporated into the practice of colonial governments, and, after independence, state governments.[6]

It is important to note that while the antecedent history of the English Parliament may be relevant to understanding the powers that the Framers of the U.S. Constitution understood the new national legislature to have, it is clear that there are limits to the usefulness of parliamentary precedents in defining Congress's investigatory powers due to significant distinctions between the two legislative bodies. As the Supreme Court has repeatedly reaffirmed, Parliament's investigatory and contempt powers were derived from the bodies' authority to exercise a "blend[ ]" of both legislative and judicial powers.[7] Congress, under the American system's separation of powers among three branches of government, exercises no judicial power.[8] Thus, unlike Parliament, any authority to investigate and subsequently enforce its orders must rest solely on legislative authority provided to the body by the Constitution.

The Constitutional Convention saw almost no discussion of Congress's power to conduct oversight and investigations, although individual delegates to the Convention appear to have understood Congress to possess "inquisitorial" powers.[9] A proposal to provide Congress explicitly with the power to punish for contempts—a power often used, and at times "abused," by Parliament as a means to effectuate its investigatory powers—was made, but not acted upon.[10] Nevertheless, it is likely that the general view of Convention delegates was that an express enumeration of the power of inquiry or the power to punish for contempt was unnecessary. The Framers' conception of legislative power, based on centuries of consistent

[2] For a broader discussion of the congressional contempt power see CRS Report RL 34097, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure, by Todd Garvey.

[3] *See* Watkins v. United States, 354 U.S. 178, 181–82 (1957); *See, e.g.*, Comm. on the Judiciary of the United States House of Representatives v. McGahn, 968 F.3d 755, 762 (D.C. Cir. 2020) (House lawsuit to enforce a committee subpoena).

[4] 13 R. Chandler, History & Proceedings of the House of Commons 172 (1743). Ernest J. Eberling, Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt 34 (1928) (noting that Parliament viewed the subpoena power as "too serious a matter for general delegation").

[5] Landis, *supra* note 1, at 161.

[6] *Id.* at 165.

[7] Marshall v. Gordon, 243 U.S. 521, 533, (1917) (concluding that the English contempt power "rested upon an assumed blending of legislative and judicial authority possessed by the Parliament").

[8] *Kilbourn*, 103 U.S. at 192 (1880) (suggesting that "no judicial power is vested in the Congress").

[9] *See e.g.,* 2 Max Farrand, The Records of the Federal Convention of 1787 206 (1937) (remarks of George Mason) (Members of Congress "are not only Legislators but they possess inquisitorial powers. They must meet frequently to inspect the Conduct of the public offices"); James Wilson, 3 The Works of the Honourable James Wilson 219 (1804) (noting the traditional power of legislators to act as "grand inquisitors of the realm").

[10] *See* 2 Farrand, *supra* note 9, at 340; Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers 171 (2017).

practice by both Parliament and colonial legislatures, included the ability to gather information relevant to the conduct of the House and Senate's legislative functions.[11] Congressional practice, executive acquiescence and acknowledgement, and judicial precedent all confirm the view that the power to investigate is implicit in the legislative power.

ArtI.S8.C18.7.3 Congress's Investigation and Oversight Powers (1787–1864)

Article I, Section 8, Clause 18:

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

Congress exhibited a robust view of its own investigatory powers from the very outset, especially in regard to the legislature's obligation to oversee the Executive Branch.[1] The first session of the First Congress saw the House establish a special committee to investigate Robert Morris's conduct as Superintendent of Finance under the Articles of Confederation.[2] The House then established an important special investigating committee in 1792 for the purpose of inquiring into Major General Arthur St. Clair's disastrous military excursion into the Northwest Territory in which nearly 700 federal troops were killed by the Western Confederacy of American Indians.[3] The mere act of authorizing such a committee set an important precedent, in that adoption of the resolution was preceded by a debate over whether it was appropriate, and indeed constitutional, for the House to investigate the matter, or whether it was preferable to urge the President to carry out the inquiry.[4] Although it was asserted by some that the House lacked authority to inquire into Executive operations, that position was defeated and Congress established an investigating committee with clear authority to "call for such persons, papers and records as may be necessary to assist their inquiries."[5] The investigation itself also established important precedents for Congress's authority to gather information from the Executive Branch, including in relation to sensitive military matters. After some discussion within Washington's cabinet of the President's authority to withhold requested information from Congress, the special committee obtained documents from both the War Department and the Treasury Department as well as testimony from cabinet officials Henry Knox and Alexander Hamilton.[6]

Congress also acted swiftly to use federal law and internal rules to strengthen its investigatory powers. In 1798, Congress enacted a statute recognizing its powers not only to obtain evidence through testimony, but also to do so from witnesses under oath.[7] The statute specifically authorized the President of the Senate, the Speaker of the House, and a chairman

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[11] As one scholar has put it, the contemporary understanding of legislative power, at the time of the adoption of the Constitution, "possessed a content sufficiently broad to include the use of committees of inquiry with powers to send for persons and paper." Landis, *supra* note 1, at 169.

[1] Ernest J. Eberling, Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt 33 (1928).

[2] 2 Annals of Cong. 1514 (1822).

[3] Telford Taylor, Grand Inquest: The Story of Congressional Investigations 17–19 (1974).

[4] *See* 3 Annals of Cong. 490–94 (1792).

[5] Taylor, *supra* note 3, at 22.

[6] *Id.* at 23–4

[7] Act of May 3, 1798, ch. 36, 1 stat. 554.

of a select committee to administer oaths to witnesses testifying before Congress.[8] In addition, both the House and Senate delegated to ad hoc select committees the authority to call for papers or persons beginning as early as the late eighteenth century.[9] However, those early years saw Congress use compulsory process sparingly, especially for purposes of informing itself when considering legislation.[10]

Congress's relatively broad understanding of its own investigatory powers continued into the nineteenth century as both the House and Senate engaged in ongoing oversight of the Executive Branch. A variety of inquiries set important precedents establishing Congress's authority to inquire into the expenditure of appropriated funds, activities of state officials, and operations of the military and post office.[11]

It was not until 1821 that the Supreme Court issued its first notable opinion in this area. That opinion, *Anderson v. Dunn*, dealt not with Congress's power to conduct the type of oversight with which it had been engaged, but instead with the related question of whether the House possessed the power to punish a private citizen for attempting to bribe a Member.[12] The *Anderson* opinion recognized the House's authority to defend its own powers and prerogatives by punishing certain contemptuous acts committed against the body, despite the absence of a constitutional provision granting the body such power.[13] The contempt power was "derived from implication" in Article I as essential to the self-preservation of all legislative bodies.[14] The Court said nothing about Congress's general investigatory or oversight powers, but *Anderson* marks the Court's first clear acknowledgment of implied legislative powers. That Congress holds certain implied powers necessary to the functioning of a deliberative legislative body is a principle that would later lead to the judicial affirmation of the wider investigatory and oversight powers that Congress had already asserted in practice.[15]

In the meantime, the House and Senate continued to engage in major investigations of the Executive Branch without intervention or interference from the courts. In 1832, the House established a select committee to investigate the operations of the federally chartered, but privately owned Second Bank of the United States.[16] The investigation, which inquired into both the operation of the Bank and whether the Bank's soon-to-expire charter should be renewed, represents an example of an investigation that blended both the oversight and

[8] *Id.* The power to administer oaths was expanded to all standing committee chairman in 1817. Act of Feb. 8, 1817, ch. 10, 3 stat. 345. *See also*, *McGrain*, 273 U.S. at 167.

[9] Eberling, *supra* note 1, at 34–5.

[10] Watkins v. United States, 354 U.S. 178, 193 (1957) ("There was very little use of the power of compulsory process in early years to enable Congress to obtain facts pertinent to the enactment of new statutes or the administration of existing laws."); Eberling, *supra* note 1, at 34.

[11] *See* James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 Harv. L. Rev. 153, 172–76 (1926).

[12] Anderson v. Dunn, 19 U.S. 204, 224–25 (1821).

[13] *Id.* at 229.

[14] *Id.* at 225. The Supreme Court acknowledged fundamental structural concerns associated with finding the existence of implied powers in a Constitution of enumerated powers, noting that the "[g]enius and spirit of our institutions are hostile to the exercise of implied powers." *Id.* But, the Court reasoned, to find no such power would "lead to the total annihilation of the Power of the House of Representatives." *Id.* at 228.

[15] *See* Barenblatt v. United States, 360 U.S. 109, 111 (1959) ("The congressional power in question concerns the internal process of Congress in moving within its legislative domain; it involves the utilization of its committees to secure 'testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constitution.'[ ] The power of inquiry has been employed by Congress throughout our history, over the whole range of the national interests concerning which Congress might legislate or decide upon due investigation not to legislate; it has similarly been utilized in determining what to appropriate from the national purse, or whether to appropriate. The scope of the power of inquiry, in short, is as penetrating and farreaching as the potential power to enact and appropriate under the Constitution.").

[16] 1 Congress Investigates: A Critical and Documentary History 71 [hereinafter Congress Investigates].

informing functions.[17] The majority report, after taking testimony from a variety of former and current bank officers and employees and reviewing the Bank's accounting books, found that the Bank had violated its charter on a number of occasions and specifically recommended that the Bank not be reauthorized.[18]

The House's investigation was not undertaken without dissent. Former President and then-Representative John Quincy Adams disagreed with both the committee majority's conclusion and the way in which it carried out its investigation. In his own minority report, Adams criticized the committee's focus on the actions of specific officers and employees of the Bank rather than the Bank's general operation—calling the investigation a "trial" that invaded both the "sanctuary of private life" and the judicial power.[19]

Adams' concerns over Congress's ability to inquire into personal conduct of private citizens were reflected in a Senate investigation into John Brown's raid on Harpers Ferry. Brown, an ardent and at times violent abolitionist, had led an attack on a federal arsenal in an effort to stimulate an armed slave uprising.[20] Following the failed attack, the Senate adopted a resolution establishing a select committee to investigate the facts of the raid, including whether Brown received financial support from other conspirators and whether legislation was necessary to prevent similar acts from occurring in the future.[21] The committee attempted to compel testimony from a number of individuals who were suspected of criminal involvement in the raid, but was unable to acquire testimony in a number of instances. One witness, Thaddeeus Hyatt, refused to testify, asserting that he had no constitutional obligation to do so because the "inquisitorial" investigation represented an exercise of judicial rather than legislative power.[22] Hyatt's refusals sparked a debate in the Senate, with a vocal minority of members arguing that the committee's assumption of judicial functions violated the separation of powers.[23] Ultimately, it appears that concerns expressed in the Senate over congressional inquiry into private conduct gave shelter to witnesses who refused to comply with committee investigative demands, resulting in what has been characterized as a failed and highly partisan investigation.[24]

ArtI.S8.C18.7.4 Congress's Investigation and Oversight Powers (1865–1940)

Article I, Section 8, Clause 18:

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

The end of the nineteenth and first half of the twentieth centuries saw the Supreme Court consider the question of Congress's power to investigate private conduct that the Adams report and Harpers Ferry investigation had placed into public view. In considering that question,

[17] *Id.*

[18] H. R. Rep. No. 22-460, at 1–2 (1832).

[19] *Id.* at 370.

[20] Congress Investigates, *supra* note 16, at 124–137.

[21] *Id.* at 130.

[22] *Id.* at 133–34

[23] Cong. Globe, 36th Cong., 1st Sess. 1100–09 (1861).

[24] McGrain v. Daugherty, 273 U.S. 135, 161–65 (1927).

seminal cases such as *Kilbourn v. Thompson*,[1] *In re Chapman*,[2] and *Marshall v. Gordon*[3] developed an enduring and essential limit on Congress's investigatory authorities: the principle that Congress's implied powers of investigation, being derived from the express delegation of legislative power to Congress, extend only to those inquiries that can be said to "aid the legislative function" or that serve a "legislative purpose."[4]

The 1880 case of *Kilbourn v. Thompson* represents the Court's first and arguably most restrictive assessment of Congress's general investigatory powers. *Kilbourn* involved a contempt action arising from a private citizen's refusal to testify before a special House committee established to investigate the bankruptcy of a company to which the government was a creditor.[5] In addition to placing certain limits on Congress's exercise of its contempt power,[6] the opinion also contained the Court's first discussion of Congress's authority to compel the attendance of witnesses during an investigation.[7] The opinion connected that power to the exercise of other constitutional powers. The Court noted that the House and Senate had an "undoubted right to examine witnesses and inspect papers" and "the right to compel the attendance of witnesses, and their answer to proper questions," either when exercising the powers of impeachment and removal or to judge the election and qualification of their own members.[8]

Outside those areas, however, the *Kilbourn* Court held that Congress could only compel production of testimony or documents when "required in a matter into which that House has jurisdiction to inquire."[9] With regard to the bankruptcy investigation at issue, the Court ruled that the House lacked jurisdiction, as neither house "possesses the general power of making inquiry into the private affairs of the citizen."[10] The Court viewed the committee's inquiry as a "fruitless investigation into the personal affairs of individuals" that could "result in no valid legislation on the subject to which the inquiry referred" and thus was not in aid of the legislative function.[11] Further evidence that the investigation was not legislative in nature, the Court reasoned, lay in the fact that any congressional investigation into purely private affairs with implications for private rights "assumed a power" that was "in its nature clearly judicial."[12]

Similarly, in *Marshall v. Gordon*, the Supreme Court held that a House committee had no legislative purpose in punishing, through contempt, a federal district attorney for writing and publishing a "defamatory and insulting" letter criticizing Congress.[13] The Court held that the contempt power extends only as far as is "necessary to preserve and carry out the legislative

[1] Kilbourn v. Thompson, 103 U.S. 168, 199 (1880) (delineating Congress's investigative powers as those that are "necessarily implied" from the Congress's "constitutional functions and duties").

[2] *In re* Chapman, 166 U.S. 661, 671 (1897).

[3] Marshall v. Gordon, 243 U.S. 521, 541 (1917) (describing Congress's implied power as that which is "necessary to preserve and carry out the legislative authority given").

[4] *See* McGrain v. Daugherty, 273 U.S. 135, 172, 175, 177 (1927).

[5] *Kilbourn*, 103 U.S. at 193–94.

[6] The Court held that the contempt power can "derive no support from the precedents and practices" of Parliament and any detention cannot extend beyond the end of the Congress. *Id.* at 189.

[7] *Id.* at 190.

[8] *Id.*

[9] *Id.* The Court left open the question of whether the House did, in fact, have that power. *Id.* at 189 (holding the proposition that the investigative power "exists as one necessary to enable either House of Congress to exercise successfully their function of legislation . . . is one which we do not propose to decide in the present case . . .)".

[10] *Id.*

[11] *Id.* at 195.

[12] *Kilbourn*, 103 U.S. at 192.

[13] Marshall v. Gordon, 243 U.S. 521, 532 (1917).

authority given."[14] This includes, the Court reasoned, responding to acts that "in and of themselves inherently obstruct or prevent the discharge of legislative duty" such as "refusing to obey orders to produce documents or give testimony which there was a right to compel."[15] An ill-tempered letter, on the other hand, did not sufficiently obstruct Congress's ability to exercise its powers to trigger contempt.[16]

The contempt actions that gave rise to *Anderson*, *Kilbourn,* and *Marshall* were undertaken pursuant to the House and Senate's implied authority to unilaterally punish contemptuous conduct.[17] These contempt proceedings took place before the House or Senate.[18] However, in order to enforce congressional investigatory powers "more effectually[,]" Congress had enacted a criminal provision in 1857 that made it a misdemeanor to willfully fail to comply with a congressional subpoena for testimony or documents.[19] Violations were certified to the Executive Branch for prosecution, rather than proceeded against within the Legislative Branch.

The Supreme Court upheld the contempt statute against a constitutional challenge in *In re Chapman* as "necessary and proper for carrying into execution the powers vested in Congress and in each House thereof."[20] The *Chapman* decision also contributed to development of the "legislative purpose" concept by clarifying that though some connection to the legislative function is necessary to justify exercising compulsory investigative powers, Congress is not required to specifically "declare in advance" the purpose of an inquiry at the outset.[21]

The inquiry into the Teapot Dome scandal that arose during the Administration of Warren G. Harding was one of Congress's most significant and wide ranging investigations.[22] The investigation involved both private and governmental conduct and allowed Congress to display the full panoply of its investigative tools. The inquiry began as a result of accusations that the Secretary of the Interior, in return for some pecuniary benefits, had made a secret arrangement to lease the Teapot Dome oil reserves in Wyoming to personal friends who led major private oil companies, without required competitive bidding.[23] The subsequent Senate investigation—running from 1922 to 1923—uncovered pervasive corruption throughout the highest levels of the Executive Branch, ultimately leading to the downfall of a variety of government officials and oil executives.[24] The Senate not only held hearings, issued subpoenas to compel the production of testimony and documents, and published reports, but also approved resolutions calling for the President to remove certain officials; confirmed the

[14] *Id.* at 541

[15] *Id.* at 543.

[16] *Id.* at 546 (concluding that the contempt was "not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject.").

[17] For a discussion of the differences between the implied or inherent contempt power and criminal contempt of Congress under 2 U.S.C. § 192, 194, see CRS Report RL34097, Congress's Contempt Power and the Enforcement of Congressional Subpoenas: Law, History, Practice, and Procedure, by Todd Garvey.

[18] *Id.* at 10.

[19] Act of January 24, 1857, ch. 19, 11 stat. 155 (codified as amended at 2 U.S.C. §§ 192, 194).

[20] *In re* Chapman, 166 U.S. 661, 671 (1897).

[21] *Id* at 670 (concluding that it is "not necessary that the resolutions should declare in advance what the Senate meditated doing when the investigation concluded").

[22] 1 Congress Investigates: A Critical and Documentary History 460–499.

[23] *Id.* at 462–63.

[24] *Id.* at 463–72.

appointment of a special counsel to investigate criminal wrongdoing independently; and referred matters to the Executive Branch for criminal prosecution.[25]

The Teapot Dome investigation also gave rise to the important decisions of *McGrain v. Daugherty* and *Sinclair v. United States*.[26] *McGrain* represents one of the Supreme Court's most significant and detailed discussions of the scope of Congress's investigatory powers and is likely the historical high-water mark of the judicial vision of Congress's power.[27] The decision was also the first time that the Court explicitly recognized each house's ability to compel testimony.[28] The case arose from a Senate investigation into the alleged failure of the Attorney General to prosecute certain federal violations uncovered by the preceding Teapot Dome investigation.[29] After Mallie Daugherty, the brother of the Attorney General and president of an Ohio bank, refused to comply with a subpoena for testimony, the Senate ordered him detained pursuant to its own contempt power. Daugherty's challenge to his detention ultimately was rejected by the Supreme Court, which upheld the chamber's authority to arrest and detain a witness in order to obtain information for legislative purposes. The *McGrain* opinion found "[t]he power of inquiry—with process to enforce it is an essential and appropriate auxiliary to the legislative function."[30] In support of its conclusion, the Court noted that such a power had been recognized by legislative bodies consistently through American history, from colonial and state legislatures before adoption of the Constitution to both the House and Senate after.[31] In an oft quoted passage, the Court reasoned that the practicalities of investigative inquiries sometimes require compulsion:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.[32]

The *McGrain* opinion also clearly established that Congress's oversight and informing functions are employed in aid of its legislative function, and thus represent legitimate justification for the exercise of compulsory investigative powers.[33] With regard to the informing function, the Court suggested there existed a "presumption" that an investigation is undertaken to aid the Congress in legislating, and also reaffirmed that an "express avowal" of the legislative goal "was not indispensable."[34] With regard to the oversight function, the Court gave its imprimatur to the general purpose of the committee investigation, that of overseeing "the administration of the Department of Justice," because the activities of Executive Branch

[25] *Id.* at 473–74.

[26] 273 U.S. 135 (1927); 279 U.S. 263 (1929).

[27] *See McGrain*, 273 U.S. at 177–78 (articulating the scope of Congress's investigatory power as extending to any "subject . . . on which legislation could be had . . . .").

[28] *Id.* at 160–75

[29] *Id.* at 152–53.

[30] *Id.* at 174.

[31] *Id.* at 160–68.

[32] *Id.* at 175.

[33] *McGrain*, 273 U.S. at 177–78.

[34] *Id.* at 178 ("The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object.").

agencies "are all subject to regulation by congressional legislation."[35] *McGrain* firmly and explicitly entrenched the investigatory powers that had been recognized and employed by the House and Senate since at least 1792.

The second opinion arising from the Teapot Dome investigation was *Sinclair v. United States*.[36] That case involved a prosecution for criminal contempt of Congress against an oil executive, who had received an illegal lease from the government, for his refusal to comply with a committee subpoena for testimony.[37] Like previous decisions, the case again centered on whether an investigation into private conduct could be "in aid of legislation."[38] Although the Court reaffirmed that neither house "possesses the general power of making inquiry into the private affairs of the citizen," it nevertheless upheld the contempt conviction and the Senate's exercise of its investigatory powers, holding that the authority to investigate extends to "matters affecting the United States . . . as well as to those having relation to the legislative function."[39] It was clear, the Court reasoned, that Congress had power to investigate how and to whom the Executive Branch leased oil reserves. The opinion distinguished *Kilbourn*, observing that Congress's inability to inquire into private conduct applies only when an investigation is not a matter of federal concern, but rather relates "merely or principally [a] personal or private affair."[40]

The Supreme Court's subsequent opinions further refined the legislative purpose requirement, generally in the direction of expanding Congress's realm of interest. For example, in *Barenblatt v. United States*, the Court observed that the legislative role requires attention to a "whole range of national interests," reflecting a corresponding power of inquiry that "is as penetrating and as far reaching as the potential power to enact and appropriate under the Constitution."[41] The Court has also generally deferred to Congress's articulated purpose, effectively creating a presumption in favor of congressional authority when an investigation is related to a constitutional purpose.[42] The Court, for example, will not inquire into "the motives which spurred the exercise of" the investigative power.[43] Even the existence of bad intent will not "vitiate" an otherwise valid investigation.[44] But, the Court has warned that because the exercise of investigative powers by a committee is based upon authority delegated to it by the parent body, the parent body should clarify those committee powers by articulating the committee's jurisdiction and purpose "with sufficient particularity."[45] As the Court has noted

[35] *Id.*

[36] 279 U.S. 263 (1929).

[37] *Id.* at 284–85.

[38] *Id.* at 291, 295.

[39] *Id.* at 294, 297 (noting that the "transaction purporting to lease to it the lands within the reserve cannot be said to be merely or principally the personal or private affair of appellant. It was a matter of concern to the United States").

[40] *Id.* at 294.

[41] Barenblatt v. United States, 360 U.S. 109, 111 (1959).

[42] *See McGrain*, 273 U.S. at 178.

[43] *Id.* at 132 ("So long as Congress acts in pursuance of its constitutional power, the Judiciary lacks authority to intervene on the basis of the motives which spurred the exercise of that power."); *Watkins*, 354 U.S. at 200 ("Their motives alone would not vitiate an investigation which had been instituted by a House of Congress if that assembly's legislative purpose is being served."); Wilkinson v. United States, 365 U.S. 399, 412 (1961) ("[I]t is not for us to speculate as to the motivations that may have prompted the decision of individual members of the subcommittee to summon the [witness].").

[44] Watkins v. United States, 354 U.S. 178, 200 (1957)

[45] *Id.* at 201 (noting that "instructions" to an investigating committee should "spell out that group's jurisdiction and purpose with sufficient particularity").

"the more vague the committee's charter, the greater becomes the possibility" that the committee will act outside the confines of a legislative purpose.[46]

ArtI.S8.C18.7.5 Congress's Investigation and Oversight Powers (1940–1970)

Article I, Section 8, Clause 18:

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

Whereas the Supreme Court's early cases on Congress's investigatory powers almost exclusively focused on the source and scope of Congress's implied authorities by requiring that a legislative purpose exist in any congressional inquiry, the 1950s and 1960s saw the Court develop two additional categories of limits on Congress's investigative powers. First, the Court began to enforce Congress's own self-imposed internal constraints, for example by requiring committees to stay within their delegated jurisdiction and comply with their own committee rules.[1] And second, the Court enforced constraints emanating from the personal rights of private citizens secured by the Bill of Rights.[2]

Many of the disputes that were ultimately heard by the Supreme Court during this time period stemmed from House and Senate investigations into "the threat of subversion of the United States Government," especially from communist infiltration and influence.[3] These investigations, and subsequent contempt actions, were generally initiated by the House Un-American Activities Committee (HUAC) or other committees targeting communist activity. Although the Court has characterized this period as a "new phase of legislative inquiry" involving "broad-scale intrusion into the lives and affairs of private citizens," it is clear that congressional inquiry into private conduct was not in and of itself a new development.[4] Nevertheless, perhaps because actions taken by Congress and its committees in this period clearly implicated individual constitutional rights such as the privilege against self-incrimination and free speech, the Court more heavily scrutinized Congress's use of its investigatory powers.[5]

The uptick in Supreme Court review of congressional inquiries from earlier periods may also have been partly due to an overall increase in investigative activity following enactment of the Legislative Reorganization Act of 1946.[6] The 1946 Act was the result of a report by the Joint Committee on the Reorganization of Congress that recommended that Congress abandon

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[46] *Id.* at 206 ("It is impossible in such a situation to ascertain whether any legislative purpose justifies the disclosures sought and, if so, the importance of that information to the Congress in furtherance of its legislative function.").

[1] *See, e.g.,* Yellin v. United States, 374 U.S. 109, 114 (1963); Gojack v. United States, 384 U.S. 702, 712 (1966); United States v. Rumely, 345 U.S. 41, 47 (1953).

[2] *See, e.g.*, Watkins v. United States, 354 U.S. 178, 195 (1957); Barenblatt v. United States, 360 U.S. 109, 112 (1959); Quinn v. United States, 349 U.S. 155, 161 (1955); Hutcheson v. United States, 369 U.S. 599, 607–13 (1962).

[3] *Watkins*, 354 U.S. at 195.

[4] *Id.*

[5] It must also be noted that a party subject to a congressional subpoena for testimony or evidence bears the risk of any refusal to comply with congressional demands on the ground the committee had violated either rules based, or constitutional limitations. The risk is especially acute for a witness called to provide testimony who "must decide at the time the questions are propounded whether or not to answer." *Id.* at 208. As the Court warned in *Watkins*, "an erroneous determination on his part, even if made in the utmost good faith, does not exculpate him if the court should later rule" that the claim was unfounded. *Id.*

[6] Legislative Reorganization Act of 1946, Pub. Law No. 79-601, 60 Stat. 812, 823–831(1946).

its long-standing practice of establishing special committees to carry out investigations and instead that all House and Senate standing committees "be directed and empowered to carry on continuing review and oversight of legislation and agencies within their jurisdiction" and be given subpoena power.[7] The Act ultimately veered slightly from the Joint Committee's recommendation, delegating subpoena power to all standing committees of the Senate, but only the Un-American Activities Committee in the House. The Act further mandated that each standing committee in both chambers "exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee."[8]

ArtI.S8.C18.7.6 Rules-Based Limits of Congress's Investigation and Oversight Powers

Article I, Section 8, Clause 18:

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

In exercising its investigatory powers, Congress is subject to its own rules and, in particular, rules defining committee jurisdictions. The Supreme Court has enforced House and Senate internal rules to limit the exercise of investigatory authority as shown by cases such as *Yellin v. United States*, *Gojack v. United States*, and *United States v. Rumely*.[1] These cases stand for the proposition that a congressional committee lacks authority to compel compliance with investigative demands when it acts outside its jurisdiction or fails to comply with its own rules.

In *Yellin*, the Supreme Court overturned a contempt conviction stemming from a witness's refusal to answer questions in a public hearing.[2] The witness had argued that the conviction was improper because the committee had failed to comply with its own rules regarding the availability of closed sessions.[3] Those rules expressly required that in considering whether to close a hearing, the committee consider the possible injury to the witness's reputation that may result from a public hearing.[4] The Court held that in exercising investigative powers, a committee may be "held to observance of its rules." Finding that the committee had not given due consideration to the witness's requests for a private hearing, the Court overturned the contempt conviction.[5] The Court reached a similar conclusion in *Gojack*.[6] There a HUAC rule required that all "major investigations" be initiated only with the majority approval of the

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[7] S. Rep. No. 79-1011, at 5 (1946). Ernest J. Eberling, Congressional Investigations: A Study of the Origin and Development of the Power of Congress to Investigate and Punish for Contempt 34 (1928) (noting that during its early history the House "sparingly . . . delegate[d] to its committees the right to send for persons and papers.").

[8] 60 Stat. at 830–31.

[1] Yellin v. United States, 374 U.S. 109, 114 (1963); Gojack v. United States, 384 U.S. 702, 712 (1966); United States v. Rumely, 345 U.S. 41, 47 (1953).

[2] *Yellin*, 374 U.S. at 111–12.

[3] *Id.* at 113–14.

[4] *Id.* at 114. The committee rule provided: "If a majority of the Committee or Subcommittee . . . believes that the interrogation of a witness in a public hearing might endanger national security or unjustly injure his reputation, or the reputation of other individuals, the Committee shall interrogate such witness in an Executive Session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing." *Id.* at 114–15.

[5] *Id.* at 114.

[6] *Gojack*, 384 U.S. at 703–04.

Committee.[7] The underlying investigation that gave rise to the contempt prosecution had not been authorized, and thus, the Court reversed the conviction.[8]

Nor may a committee exercise compulsory investigative powers in connection to matters outside its jurisdiction.[9] Committee jurisdiction acts as a fundamental limit on investigative activity as it is directly tied to the "source" of the committee's authority: the delegation from the parent body.[10] A congressional committee, the Supreme Court has declared "is restricted to the missions delegated to it by the parent body, and" "no witness can be compelled to make disclosures on matters outside that area."[11]

In *Rumely*, the Court affirmed a reversal of a contempt conviction of a defendant who had failed to comply with a House select committee's subpoena on the basis that the committee was operating outside the jurisdiction delegated to it by the House.[12] The defendant in *Rumely*, the secretary of an organization that published and sold books of "particular political tendentiousness," had refused to comply with a committee subpoena for the names of those persons or groups who made bulk purchases from the organizations.[13] The resolution establishing the select committee, which the Court viewed as "the controlling charter of the committee's powers," had authorized the committee to investigate "lobbying activities intended to influence . . . legislation."[14] The Court interpreted "lobbying activities" to extend only to "representation made directly to the Congress" and thus concluded that the committee had no authority to investigate or enforce a subpoena against a witness who had sought only to influence public opinion.[15] In adopting this interpretation of "lobbying activities," the Court expressly stated that it gave the committee's jurisdiction a "more restricted scope" in part so as to avoid the possibility that enforcement of the subpoena would violate the witness's First Amendment right to engage in political speech.[16] The Court has followed a similar approach in subsequent cases. At times, it has adopted a narrow interpretation of a committee's jurisdiction or the scope of a committee investigation to avoid the possibility of a constitutional conflict on the grounds that "[p]rotected freedoms should not be placed in danger in the absence of a clear determination by the House or the Senate that a particular inquiry is justified by a particular legislative need."[17]

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[7] *Id.* at 706.

[8] *Id.* at 712. The Court rejected claims that it should infer authorization for the investigations, holding instead that "the usual standards of the criminal law must be observed, including proper allegation and proof of all the essential elements of the offense." *Id.* at 707.

[9] See Watkins v. United States, 354 U.S. 178, 206 (1957) ("Plainly these committees are restricted to the missions delegated to them, *i.e.,* to acquire certain data to be used by the House or the Senate in coping with a problem that falls within its legislative sphere. No witness can be compelled to make disclosures on matters outside that area."). The Court referred to this principle as "a jurisdictional concept of pertinency drawn from the nature of a congressional committee's source of authority" and distinguished it from the "element of pertinency embodied in the" criminal contempt statute. *Id.*

[10] *Id.*

[11] *Id.*

[12] *Rumely*, 345 U.S. at 48.

[13] *Id.* at 42.

[14] *Id.* at 44.

[15] *Id.* at 47.

[16] *Id.* ("Certainly it does no violence to the phrase 'lobbying activities' to give it a more restricted scope. To give such meaning is not barred by intellectual honesty. So to interpret is in the candid service of avoiding a serious constitutional doubt.").

[17] *See Watkins*, 345 U.S. at 224. *But see* Barenblatt v. United States, 360 U.S. 109, 121 (1959) (rejecting the avoidance approach adopted in *Rumely* on the grounds that Congress had placed a clarifying "legislative gloss" on the meaning of the applicable committee rule).

ArtI.S8.C18.7.7 Constitutional Limits of Congress's Investigation and Oversight Powers

Article I, Section 8, Clause 18:

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

Congress's investigatory powers are limited by the constitutional protections accorded to individuals under the Bill of Rights. In *Watkins v. United States*, the Supreme Court observed that:

> It is unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas, to respect the dignity of the Congress and its committees and to testify fully with respect to matters within the province of proper investigation. This, of course, assumes that the constitutional rights of witnesses will be respected by the Congress as they are in a court of justice. The Bill of Rights is applicable to investigations as to all forms of governmental action.[1]

Because a congressional inquiry is part of "lawmaking," a congressional committee engaged in an investigation generally must observe applicable constitutional restrictions and respect validly asserted constitutionally-based privileges.[2] Although not all provisions of the Bill of Rights are directly relevant to a congressional investigation, it is apparent that many are, with the First and Fifth Amendments providing the principle limitations on Congress's exercise of it powers.[3]

The Court has clearly established that First Amendment protections apply to congressional investigations.[4] Compelling a witness to testify "against his will, about his beliefs, expressions, or associations is a measure of governmental interference" with the witness's free speech rights.[5] However, the actual application of these protections in a congressional investigation is an "arduous and delicate task" that involves balancing Congress's interest in obtaining information with the witnesses' interest in personal privacy.[6] In *Watkins*, the Court made clear that in considering a First Amendment challenge in a congressional inquiry "[t]he critical element is the existence of, and the weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness."[7] In short,

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[1] Watkins v. United States, 345 U.S. 178, 187–88 (1957) ("Congress, must exercises its own powers, including the power to investigate, subject to the limitations placed by the Constitution on governmental action.").

[2] *Id.* at 197 ("While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process.").

[3] Due in part to the unique nature of congressional proceedings, not all provisions of the Bill of Rights have been judicially determined to be applicable in the committee investigation context. For example, the D.C. Circuit has held that because of the "investigative" rather than "criminal" nature of committee hearings, the Sixth Amendment's individual criminal procedural guarantees; including a party's right to "present evidence on one's own behalf and to confront and cross examine one's accusers," do not apply in the congressional investigation setting. United States v. Fort, 443 F.2d 670, 678–81 (D.C Cir. 1970).

[4] *Watkins*, 345 U.S. at 197 ("Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly.").

[5] *Id.*

[6] *Id.* at 198.

[7] *Id.*

the extent to which the First Amendment can be used as a shield against a congressional inquiry depends on the strength of the committee's legislative purpose.[8]

This balancing test was put to use in *Barenblatt v. United States*.[9] The opinion, along with subsequent consistent decisions, suggests that a First Amendment defense to compulsory congressional process has generally had little success.[10] In *Barenblatt*, a college professor had been convicted of criminal contempt of Congress for his refusal to answer, on First Amendment grounds, questions before a HUAC subcommittee relating to his Communist Party involvement.[11] The Court disagreed with the professor's position, reasoning that the First Amendment does "not afford a witness the right to resist inquiry in all circumstances."[12] Instead, the Court reasoned, "[w]here First Amendment rights are asserted to bar government interrogation resolution of the issue always involved a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown." After determining that Congress has "wide power to legislate in the field of Communist activity in this Country," the Court characterized the government interest at play as one of "self-preservation" as one of the central tenets of the Communist Party was the violent overthrow of the American government.[13] In contrast, the opinion made little mention of the witnesses' First Amendment rights, but in weighing the competing interests, the *Barenblatt* opinion concluded that the balance "must be struck in favor of the government."[14]

Witnesses also have a right to invoke the Fifth Amendment privilege against self-incrimination during a congressional investigation.[15] The privilege's applicability was explicitly established in a group of cases released on the same day in 1955.[16] Each involved a witness who had refused to answer questions before the HUAC by relying on their Fifth Amendment privilege.[17] In each case, the privilege was rejected by the HUAC and the witness later prosecuted for criminal contempt of Congress. The Court overturned all three convictions, simultaneously establishing important foundational principles for the scope of the privilege in a congressional proceeding as well as standards for invocation and waiver of the privilege.[18]

In pertinent part, the Fifth Amendment establishes that "no person . . . shall be compelled in any criminal case to be a witness against himself . . . "[19] Although the Amendment's protection expressly refers to "criminal cases[s]," the Court has nevertheless found the

[8] *See Barenblatt*, 360 U.S. at 127 ("The first question is whether this investigation was related to a valid legislative purpose, for Congress may not constitutionally require an individual to disclose his political relationships or other private affairs except in relation to such a purpose.").

[9] *Id.* at 126–27.

[10] *Id.* at 134; Wilkinson v. United States, 365 U.S. 399, 414–15 (1961) (following *Barenblatt* and concluding that the subcommittee had an "overbalancing interest" because it "had reasonable ground to suppose that the petitioner was an active Communist Party member, and that as such he possessed information that would substantially aid it in its legislative investigation").

[11] *Barenblatt*, 360 U.S. at 113–14.

[12] *Id.* at 126.

[13] *Id.* at 144.

[14] *Id.* at 134 "(We conclude that the balance between the individual and the governmental interests here at stake must be struck in favor of the latter, and that therefore the provisions of the First Amendment have not been offended.").

[15] *See Quinn*, 349 U.S. at 160–62 ("Still further limitations on the power to investigate are found in the specific individual guarantees of the Bill of Rights, such as the Fifth Amendment's privilege against self-incrimination which is in issue here.").

[16] Quinn v. United States, 349 U.S. 155 (1955); Emspak v. United States, 349 U.S. 190 (1955); Bart v. United States, 349 U.S. 219 (1955).

[17] *Quinn*, 349 U.S. at 157–58; *Emspak*, 349 U.S. at 192; *Bart*, 349 U.S. at 219.

[18] *Quinn*, 349 U.S. at 170; *Emspak*, 349 U.S. at 202; *Bart*, 349 U.S. at 223.

[19] U.S. Const. amend. V.

privilege against self-incrimination to be available to a witness appearing before a congressional committee.[20] Once properly invoked, the privilege protects a witness from being compelled to provide Congress with statements that may directly or indirectly furnish evidence which could be used against the witness in a subsequent criminal prosecution or from being punished for their refusal to respond to committee inquiries.[21] The Court has recognized the potential consequences of such a broad protection, but has repeatedly confirmed that the Fifth Amendment must be regarded as "a privilege of great value, a protection to the innocent though a shelter to the guilty, and a safeguard against heedless, unfounded or tyrannical prosecutions."[22]

In *Quinn v. United States*, the Court adopted a relatively lenient standard for determining whether the Fifth Amendment protection against self-incrimination was properly invoked during a congressional proceeding.[23] That opinion held that invocation "does not require any special combination of words."[24] Nor is any "ritualistic formula or talismanic phrase" essential to invoke the privilege.[25] Rather, "[i]f an objection to a question is made in any language that a committee may reasonably be expected to understand as an attempt to invoke the privilege, it must be respected [ ] by the committee . . . ."[26] So long as the witness's statement places the committee "on notice" of a potential claim of privilege, the invocation has been considered adequate.[27]

The Court's approach to invocation of the privilege in an investigative proceeding stems largely from the strong presumption against waiver of the privilege. This presumption was apparent in *Emspak v. United States* where after invoking the Fifth Amendment in response to questions from a committee relating to his alleged communist associations and affiliations, the witness was directly asked: "Is it your feeling that to reveal your knowledge . . . would subject you to criminal prosecution?"[28] The witness responded "No. I don't think this committee has a right to pry into my associations."[29] The government argued that the witness's assertion that he did not believe his response would lead to potential criminal liability constituted a waiver of the Fifth Amendment privilege, but the Court disagreed, noting that the witness's statement was not "sufficiently unambiguous to warrant finding a waiver . . . "[30] To hold otherwise, the Court concluded, would contravene "oft repeated admonition that the courts must 'indulge every reasonable presumption against waiver of fundamental constitutional rights."[31]

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[20] *See Quinn*, 349 U.S. at 160–62.

[21] The Court articulated the breadth of the protection in *Emspak*, holding:

> The protection of the Self-Incrimination Clause is not limited to admissions that 'would subject [a witness] to criminal prosecution'; for this Court has repeatedly held that 'Whether such admissions by themselves would support a conviction under a criminal statute is immaterial' and that the privilege also extends to admissions that may only tend to incriminate . . . ." To sustain the privilege,' this Court has recently held, '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.

Emspak, 349 U.S. at 197–98.

[22] *Quinn*, 349 U.S. at 162 (citing Twining v. New Jersey, 211 U. S. 78, 91 (1908).

[23] *Id.* at 162–65.

[24] *Id.* at 162.

[25] *Emspak*, 349 U.S. at 194.

[26] *Quinn*, 349 U.S. at 163.

[27] Moreover, the Court has stated that where a congressional committee is uncertain whether the witness is in fact invoking the privilege against self-incrimination or instead claiming some other basis for declining to answer, the committee should direct the witness to specify the objection. *Id.* at 167–70.

[28] Emspak, 349 U.S. at 195.

[29] *Id.* at 196.

[30] *Id.* at 198.

[31] *Id.* (citing Johnson v. Zerbst, 304 U. S. 458, 464 (1938)).

Finally, the requirements of the Due Process Clause of the Fifth Amendment,[32] in conjunction with the required elements of the criminal contempt statute,[33] limit Congress's ability to enforce compliance with subpoenas through contempt. Perhaps the leading case on what is known as the "pertinence" requirement is *Watkins v. United States*.[34] The *Watkins* opinion recognized the extraordinary breadth of the investigatory power, but also made clear that the power must accommodate the constitutionally guaranteed rights and privileges of witnesses, including those stemming from the Due Process Clause. In *Watkins*, the witness had been convicted of criminal contempt of Congress after refusing to answer questions before the HUAC on the grounds that the questions asked related to matters "outside the proper scope of [the] committee's activities."[35] In overturning the conviction, the Court noted that criminal defendants must be accorded the right, stemming from the Due Process Clause, to have adequate knowledge and notice—"through a sufficiently precise statute"—of the "standard of criminality" for any offense.[36] Under the criminal contempt statute, that standard of criminality includes the determination that the witness has refused to give an answer "pertinent to the question under inquiry."[37] Therefore, the witness must have knowledge of what subjects are pertinent to the committee inquiry with the degree of "explicitness and clarity that the Due Process Clause requires."[38] The Court found the HUAC authorizing resolution, the statements for the record made by the Chair and other HUAC members, and the "nature of the proceedings" all failed to establish with adequate clarity the scope of the matter under inquiry and the pertinence of the questions propounded thereto.[39] In such a scenario, the Court found that "fundamental fairness demands that no witness be compelled to make such a determination with so little guidance."[40]

ArtI.S8.C18.7.8 Watergate, Church, and Pike Investigations of Congress

Article I, Section 8, Clause 18:

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

The beginning of the modern era of congressional oversight is arguably marked by a pair of historically significant investigations into core components of Executive power. In 1973 the Senate approved a resolution establishing the Senate Select Committee on Presidential Campaign Activities to investigate various aspects of the 1972 presidential campaign

[32] U.S. CONST. amend. V.

[33] The Court has alluded to two separate pertinence requirements. Jurisdictional pertinence, which relates to whether the subject under inquiry is pertinent to the committee's jurisdiction, *see* Barry v. United States, 279 U.S. 597, 613 (1929) ("When evidence is taken by a committee, the pertinency of questions propounded must be determined by reference to the scope of the authority vested in the committee by the Senate.") "and statutory pertinence, embodied" in the terms of the criminal contempt of Congress statute. *See Watkins*, 354 U.S. at 206. The Court has suggested that the two principles are "not wholly different . . . nor unrelated . . . ." *Id.*

[34] *Id.* at 208–16 (discussing the "vice of vagueness" and the principle that a witness "is entitled to have knowledge of the subject to which the interrogation is deemed pertinent.").

[35] *Id.* at 185.

[36] *Id.* at 208.

[37] 2 U.S.C. § 192 (making the refusal to "answer any question pertinent to the question under inquiry" a misdemeanor offense).

[38] *Watkins*, 345 U.S. at 209.

[39] *Id.* at 209–15.

[40] *Id.* at 214.

including the break in of the Democratic National Committee headquarters at the Watergate Office Building.[1] The Senate Committee engaged in a series of hearings and received testimony from a number of President Richard Nixon's closest advisers.[2] These hearings uncovered the existence of a taping mechanism installed in the White House, which led to a major confrontation between the President, Congress, and the courts over appropriate access to confidential presidential communications.[3] The Senate investigation, in conjunction with an investigation spearheaded by the Watergate Special Prosecutor eventually led to an impeachment investigation in the House and, ultimately, President Nixon's resignation from office.[4]

The Watergate investigation was followed up by the 1975 House and Senate investigations into potential abuses by the U.S. intelligence community. The Senate Select Committee to Study Government Operations with Respect to Intelligence Activities (known as the Church Committee after its Chairman, Senator Frank Church)[5] and the House Select Intelligence Committee (known as the Pike Committee after its chairman, Congressman Otis Pike)[6] held both private and public hearings inquiring into a variety of secret programs, including some related to the potential assassination of foreign leaders, run by the Central Intelligence Agency, National Security Agency, and Federal Bureau of Investigation. The Committees' work had a significant influence on the Executive Branch, ultimately resulting in President Gerald Ford taking actions to reform and reorganize the Intelligence Community.

The Watergate, Church, and Pike investigations not only uncovered Executive Branch abuses, but also helped Congress inform itself for legislative enactments to correct problems that had been uncovered by the Committees. The experience of the Watergate investigation, for example, arguably led to campaign finance reform and the Ethics in Government Act, while the findings of the Church and Pike Committees led to enactment of Foreign Intelligence Surveillance Act.[7] Congress also made internal changes to increase legislative oversight of intelligence activities by establishing select committees on intelligence in both the House and Senate.[8]

ArtI.S8.C18.7.9 Congress's Investigatory Powers Generally

Article I, Section 8, Clause 18:

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

In 1975, the Supreme Court issued the first of only two opinions on Congress's investigatory powers in the modern era. In *Eastland v. United States Serviceman's Fund*, a

[1] S. Res. 60, 93rd Cong. (1973).

[2] *See* S. Rep. No. 93-981, at 1–95 (1974); 1 Congress Investigates: A Critical and Documentary History 886–904.

[3] *See* 1 Congress Investigates: A Critical and Documentary History 900–904; Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 729–33 (D.C. Cir. 1974).

[4] H. Rep. No. 93-1305 (1974).

[5] S. Res. 21, 94th Cong. (1974).

[6] H. Res. 591, 94th Cong. (1975).

[7] S. Rep. No. 93-981, at 1071 (making legislative recommendations); Ethics in Government Act, Pub. Law No. 95-521, 92 stat. 1824 (1978); Foreign Intelligence Surveillance Act, Pub. Law No. 95-511, 92 stat. 1783 (1978).

[8] S. Res. 400, 94th Cong. (1976) (establishing the Senate Select Committee on Intelligence); H. Res. 658, 95th Cong. (1977) (establishing the house Permanent Select Committee on Intelligence).

private nonprofit organization filed suit against the Chairman of a Senate subcommittee. The Court was asked to review an appellate court order enjoining a subpoena issued to a bank for the nonprofit's account information.[1] In reversing the appellate court, the Court reaffirmed the importance of the subpoena power and further concluded that the Speech or Debate Clause acts as a significant barrier to judicial interference in Congress's exercise of that power.[2] The Court began by noting that the "power to investigate and to do so through compulsory process" has "long been held to be a legitimate" and "indispensable ingredient of lawmaking," at least when an investigation "is related to and in furtherance of a legitimate task of Congress."[3]

The opinion went further, however, interpreting the Speech or Debate Clause, which provides that no Member of Congress may be "questioned in any other Place" for "any Speech or Debate in either House," to limit significantly the Court's ability to review a committee's exercise of its subpoena power.[4] The Court determined that because the issuance of a subpoena is a protected legislative act under the Clause, the act was "immune from judicial interference."[5] *Eastland* is generally cited for the proposition that the Speech or Debate Clause prohibits courts from entertaining direct pre-enforcement challenges to congressional subpoenas.[6] Instead, the recipient of a subpoena may refuse to comply, risk being cited for criminal contempt or becoming the subject of a civil enforcement lawsuit, and then present his or her defense in that subsequent action.[7]

While it is generally true that courts will not interfere in valid congressional attempts to obtain information, especially through the exercise of the subpoena power, the concurrence in *Eastland* clarified that judicial restraint is not absolute.[8] The Speech or Debate Clause does not, for example, bar indirect challenges to a subpoena brought against a third-party rather than against Congress itself.[9] These lawsuits generally arise when a committee issues a subpoena for documents not to the target of the investigation but rather to a third-party custodian of records. In such a scenario the party with a personal interest in the records is "not in a position to assert its claim of constitutional right by refusing to comply with a subpoena" and may instead bring suit against the neutral third party to block compliance with the subpoena.[10]

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[1] Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 493–97 (1975).

[2] *Id.* at 511 ("The Clause was written to prevent the need to be confronted by such 'questioning' and to forbid invocation of judicial power to challenge the wisdom of Congress's use of its investigative authority.").

[3] *Id.* at 504–06.

[4] U.S. Const. art. I, § 6, cl. 1.

[5] *Eastland*, 421 U.S. at 501.

[6] *In re* Grand Jury, 821 F.2d 946, 957 (3d Cir. 1987) ("The Supreme Court has held analogously that the Speech or Debate Clause shields Congressmen from suit to block a Congressional subpoena because making the legislators defendants 'creates a distraction and forces Members [of Congress] to divert their time, energy, and attention from their legislative tasks to defend the litigation.'") (citing *Eastland*, 421 U.S. at 503.).

[7] *See* United States v. Ryan, 402 U.S. 530, 532 (1971) (noting that in the judicial context that "one who seeks to resist the production of desired information [has a] choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal").

[8] *Eastland*, 421 U.S. at. 513 (Marshall, J., concurring).

[9] *See, e.g.*, Trump v. Mazars, 140 S. Ct. 2019 (2020) (third party subpoena suit brought against bank and accounting firm); United States v. AT&T, 567 F.2d 121, (D.C. Cir. 1977) (third party subpoena suit brought against telecommunications company).

[10] United States v. AT&T, 567 F.2d 121, 129 (D.C. Cir. 1977).

ArtI.S8.C18.7.10 Congress's Investigatory Powers and the President

Article I, Section 8, Clause 18:

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

The Supreme Court appears to be less deferential to Congress when Congress uses its investigatory powers to examine activities of the President. In *Trump v. Mazars*,[1] President Donald Trump brought suit in his personal capacity to block his banks and accounting firm from complying with various committee subpoenas for his personal financial records primarily on the ground that the committees had no valid legislative purpose to seek his personal financial information.[2] Applying the deferential legislative purpose standard used by the Court in cases like *McGrain* and *Barenblatt*, the opinions below upheld the committee subpoenas.[3] On appeal to the Supreme Court, *Mazars* presented the Court with its first opportunity to directly consider the authority of Congress to investigate the President.[4]

The Court's opinion in *Mazars* established that the Constitution does not make Presidents immune from investigation,[5] but it also clarified that, in the context of congressional investigations, the separation of powers requires that the President be treated somewhat differently from others.[6] The opinion described the courts below as having mistakenly "treated [this case] much like any other," applying standards and principles established in "precedents that do not involve the President's papers."[7] Subpoenas for the President's personal records, the Court determined, involve significant separation of powers concerns that trigger a different, more scrutinizing approach to the scope of Congress's power. But the Court also rejected as inappropriate invitations to import the heightened "demonstrated, specific need" or "demonstrably critical" standards that had been used in prior cases involving Executive privilege—a privilege not at issue in *Mazars* due to the personal nature of the documents sought.[8] Instead, Chief Justice John Roberts's opinion for the Court charted a middle course by identifying at least four "special considerations" to help lower courts to appropriately balance the "legislative interests of Congress" with "the 'unique position' of the President."[9]

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[1] 140 S. Ct. 2019 (2020).

[2] The challenged subpoenas were issued as part of different ongoing committee investigations. *See generally*, Todd Garvey, Cong. Rsch. Serv., LSB10517, Trump v. Mazars: Implications for Congressional Oversight (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10517.

[3] *Mazars*, 140 S. Ct. at 2028–29.

[4] Although the case was technically brought by President Trump in his private rather than official capacity, the Court chose to treat the conflict as one between the branches. *Mazars*, 140 S. Ct. at 2028, 2034 ("The interbranch conflict here does not vanish simply because the subpoenas seek personal papers or because the President sued in his personal capacity.").

[5] *Id.* at 2033 ("Legislative inquiries might involve the President in appropriate cases; as noted, Congress's responsibilities extend to 'every affair of government.'").

[6] *Id.* at 2026. *See also*, United States v. Burr, 25 F. Cas. 30, 192 (CC Va. 1807) (No. 14,692d) (noting that the court would not "proceed against the president as against an ordinary individual"). The *Mazars* opinion also treated a congressional investigation as "different" from a "judicial proceeding." *Mazars*, 140 S. Ct. at 2026.

[7] *Mazars*, 140 S. Ct. at 2033.

[8] *Id.* at 2032. ("We disagree that these demanding standards apply here. . . . We decline to transplant that protection root and branch to cases involving nonprivileged, private information, which by definition does not implicate sensitive Executive Branch deliberations."). The Court also rejected the House's proposed approach, which it characterized as failing to "take adequate account of the significant separation of powers issues raised by congressional subpoenas for the President's information." *Id.* at 2033.

[9] *Id.* at 2035.

First, a reviewing court should "carefully assess whether the asserted legislative purpose warrants the significant step of involving the President and his papers."[10] Second, courts "should insist on a subpoena no broader than reasonably necessary to support Congress's legislative objective."[11] Third, "courts should be attentive to the nature of the evidence offered by Congress to establish that a subpoena advances a valid legislative purpose."[12] Fourth, "courts should be careful to assess the burdens imposed on the President by a subpoena."[13]

Mazars' "special considerations" were tailored to Presidential records. To view the case otherwise—for example, to apply the "special considerations" to congressional subpoenas issued as part of a more typical oversight investigation into agency activity—would put the opinion in tension with previous precedent, including the principles established in *McGrain*.[14] Nothing in the *Mazars* opinion appears to signal that the majority intended to alter previously established principles in congressional investigations not involving the President.

Conspicuously absent from the Court's oversight jurisprudence is any evaluation of Executive privilege. Despite the sometimes prevalent role played by executive privilege in congressional investigations of the Executive Branch, the Court has never issued an opinion addressing such a dispute.[15] Even the lower federal courts have only rarely taken on interbranch oversight disputes involving Executive privilege.[16] Recent changes in Congress's approach to the enforcement of its own investigatory powers, however, suggest that the traditionally limited judicial role in interbranch oversight disputes—including those involving Executive privilege—may be evolving. In recent years, the House has increasingly relied on the courts as a means to enforce committee subpoenas issued to members of the Executive Branch.[17] In these instances, committees have obtained authorization from the House to file a civil claim in federal court, seeking a court order directing compliance with a committee subpoena.[18] Although these subpoena enforcement cases have not reached the Supreme Court, lower federal courts, including the U.S. Court of Appeals for the D.C. Circuit have generally

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[10] The Court elaborated that Congress's "interests are not sufficiently powerful to justify access to the President's personal papers when other sources could provide Congress the information it needs." *Id. at 2036.*

[11] Specific demands, the High Court reasoned, are less likely to "intrude" on the operation of the Presidency. *Id.*

[12] To this end, Congress's position is strengthened when a congressional committee can provide "detailed and substantial evidence" of its legislative purpose. *Id.*

[13] Here the Court reasoned that in comparison to the burdens imposed by judicial subpoenas, the burdens imposed on the President by congressional subpoenas "should be carefully scrutinized, for they stem from a rival political branch that has an ongoing relationship with the President and incentives to use subpoenas for institutional advantage." *Id.*

[14] *McGrain*, 273 U.S. at 178 ("The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object.").

[15] *United States v. Nixon*, the Court's most significant decision on Executive privilege, involved a criminal trial subpoena. 418 U.S. 683, 687–88 (1974). The Court explicitly disclaimed any attempt to assess the application of Executive privilege in a congressional investigation, noting that "we are not here concerned with the balance between the President's generalized interest in confidentiality . . . and congressional demands for information." *Id.* at 712 n. 19.

[16] *See, e.g.,* Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F. 2d 725, 729–33 (D.C. Cir. 1974) (evaluating President Nixon's Executive privilege claims in the face of a congressional subpoena) and United States v. AT&T, 567 F. 2d 121, 130–133 (D.C. Cir. 1977) (entertaining an action by the Justice Department to enjoin AT&T from complying with a congressional subpoena to provide telephone records that might compromise national security matters); Comm. on Oversight & Gov't Reform v. Lynch, 156 F. Supp. 3d 101, 112–14 (D.D.C. 2016) (finding that a congressional Committees need for deliberative materials outweighed the Executive Branch's interest in confidentiality).

[17] See Civil Enforcement of Congressional Authorities: Hearing before the H. Comm. on the Judiciary, Subcomm. on Courts, Intellectual Property, and the Internet, 117th Cong., (2021) (statement of Todd Garvey) (describing House subpoena enforcement lawsuits).

[18] *Id.*

found these claims to be justiciable.[19] As a result, the Judiciary's role in resolving information access disputes between Congress and the Executive Branch may become more significant.

ArtI.S8.C18.8 Immigration

ArtI.S8.C18.8.1 Overview of Congress's Immigration Powers

Article I, Section 8, Clause 18:

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

Long-standing Supreme Court precedent recognizes Congress as having "plenary" power over immigration, giving it almost complete authority to decide whether foreign nationals ("aliens," under governing statutes and case law) may enter or remain in the United States.[1] But while Congress's power over immigration is well established, defining its constitutional underpinnings is more difficult. The Constitution does not mention immigration, but parts of the Constitution address related subjects. The Supreme Court has sometimes relied upon Congress's powers over naturalization (the term and conditions in which an alien becomes a U.S. citizen),[2] foreign commerce,[3] and, to a lesser extent, upon the Executive Branch's implied Article II foreign affairs power,[4] as sources of federal immigration power.[5] While these powers continue to be cited as supporting the immigration power, since the late nineteenth century, the Supreme Court has described the power as flowing from the Constitution's establishment of a federal government.[6] The United States government possesses all the powers incident to a

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[19] *See, e.g.,* Comm. on the Judiciary v. McGahn, 968 F.3d 755, 760–61 (D.C. Cir. 2020); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 3 (D.D.C. 2013) ("The fact that this case arises out of a dispute between two branches of government does not make it non-justiciable . . . ."); Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53, 56, 65–99 (D.D.C. 2008).

[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. Immigration & Naturalization Serv., 387 U.S. 118, 123 (1967)); Oceanic 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.").

[2] *See* U.S. Const. art. I, § 8, cl. 4 (Naturalization Clause); Arizona v. United States, 567 U.S. 387, 394–95 (2012); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 940 (1983); *but see Arizona*, 567 U.S. at 422 (Scalia, J., concurring in part and dissenting in part) ("I accept [federal immigration law] as a valid exercise of federal power—not because of the Naturalization Clause (it has no necessary connection to citizenship)").

[3] *See* U.S. Const. art. I, § 8, cl. 3 (Foreign Commerce Clause); Toll v. Moreno, 458 U.S. 1, 10 (1982); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 290 (1904) (citing Foreign Commerce Clause as a source of immigration power).

[4] *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (relying on foreign affairs power as source of executive power to exclude aliens).

[5] Discussions of the source of congressional immigration power sometimes also mention the power to declare war, U.S. Const. art. I, § 8, cl. 11, and the Migration and Importation Clause, *id.* § 9, cl. 1; which barred Congress from outlawing the slave trade before 1808. *See* Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 Iowa L. Rev. 707, 726 n.95 (1996).

[6] Ping v. United States, 130 U.S. 581, 609 (1889) (upholding law that prohibited the return to the United States of Chinese laborers who had been issued, before their departure from the United States and under a prior law, certificates entitling them to return, and recognizing "[t]he power of exclusion of foreigners" as "an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution").

sovereign, including unqualified authority over the Nation's borders and the ability to determine whether foreign nationals may come within its territory.[7] The Supreme Court has generally assigned the constitutional power to regulate immigration to Congress, with executive authority mainly derived from congressional delegations of authority.[8]

In exercising its power over immigration, Congress can make laws concerning aliens that would be unconstitutional if applied to citizens.[9] The Supreme Court has interpreted that power to apply with most force to the admission and exclusion of nonresident aliens abroad seeking to enter the United States.[10] The Court has further upheld laws excluding aliens from entry on the basis of ethnicity,[11] gender and legitimacy,[12] and political belief.[13] It has also upheld an Executive Branch exclusion policy, premised on a broad statutory delegation of authority, that some evidence suggested was motivated by religious animus.[14] But the immigration power has proven less than absolute when directed at aliens already physically present within the United States.[15] Even so, the Supreme Court's jurisprudence reflects that Congress retains broad power to regulate immigration and that the Court will accord substantial deference to the government's immigration policies, particularly those that implicate matters of national security.

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[7] *See* Trump v. Hawaii, No. 17-965, slip op. at 30 (U.S. June 26, 2018) ("For more than a century, this Court has recognized that the admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments.'") (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("[T]he power to admit or exclude aliens is a sovereign prerogative."); *Mandel*, 408 U.S. at 765 (relying upon "ancient principles of the international law of nation-states"); Harisiades v. Shaughnessy, 342 U.S. 580, 588–89 (1952) (the "traditional power of the Nation over the alien" is "a power inherent in every sovereign state"); Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892) ("It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."); *see also Arizona*, 567 U.S. at 394–95 (relying upon the Naturalization Clause and the "inherent power as sovereign to control and conduct relations with foreign nations"); *Ex rel. Turner*, 194 U.S. at 290 (relying on "the accepted principle of international law, that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions," and upon the foreign commerce power).

[8] *See* Galvan v. Press, 347 U.S. 522, 530 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process. 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.") (internal citations omitted).

[9] 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.").

[10] *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*, 430 U.S. at 792; 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").

[11] Ping v. United States, 130 U.S. 581, 609 (1889) (upholding law that excluded "Chinese laborer[s]").

[12] *Fiallo*, 430 U.S. at 798–99 (upholding law that excluded individuals linked by an illegitimate child-to-natural father relationship from eligibility for certain immigration preferences).

[13] *See Mandel*, 408 U.S. at 767 (suggesting that law rendering communists ineligible for visas did not exceed Congress's immigration powers).

[14] Trump v. Hawaii, No. 17-965, slip op. at 22–23, 39 (U.S. June 26, 2018).

[15] *See Zadvydas*, 533 U.S. at 690 (observing that "[a] statute permitting indefinite detention of an alien would raise a serious constitutional problem").

ArtI.S8.C18.8.2 English Common Law on Immigration

Article I, Section 8, Clause 18:

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

Before the Constitution was ratified, the English common law recognized that the monarchy had authority to bar aliens from entering the country and expel those who had entered, although the expulsion power may have been subject to limitations.[1] William Blackstone, writing in 1765, reviewed the law of nations and summarized the basis of the monarch's exclusion and expulsion powers as follows:

> [I]t is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coasts by necessity, or by any cause that deserves pity or compassion. . . . [S]o long as their nation continues at peace with ours, and they themselves behave peaceably, [foreigners] are under the king's protection; though liable to be sent home whenever the king sees occasion.[2]

Blackstone was an authority "most familiar to the Framers,"[3] and his endorsement of the principle that sovereigns possessed power to exclude or expel aliens from their territories was widely shared by scholars of the law of nations in the eighteenth and nineteenth centuries.[4] Many of these scholars, however, concluded that the proper exercise of the exclusion power required the sovereign to state good reasons for the decision to deny entry to an alien.[5] Scholars also debated the extent of the expulsion power, with some arguing that expulsion of resident aliens required special justification.[6]

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[1] *See* Peter L. Markowitz, *Deportation Is Different*, 13 U. Pa. J. Const. L. 1299, 1309 (2011) ("Legal historians agree that the . . . power[ ] to exclude or prevent entry[ ] could be exercised by the king alone without any criminal process. In regard to the power to expel noncitizens from within England, there is some disagreement, as a theoretical matter, as to whether the power could be exercised through civil administrative fiat or solely through the criminal process.As a practical matter, however, the historical record demonstrates that expulsion was exercised exclusively as a common form of criminal punishment in England (imposed on both citizens and noncitizens) as early as the thirteenth century."); *see also* Fong Yue Ting v. United States, 149 U.S. 698, 709 (1893) ("In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the king without the consent of parliament."); *id.* at 757 (Field, J., dissenting) (arguing that "deportation from the realm has not been exercised in England since Magna Charta, except in punishment for crime, or as a measure in view of existing or anticipated hostilities").

[2] 1 William Blackstone, Commentaries on the Laws of England 251–52 (1765).

[3] Sessions v. Dimaya, No. 15-1498, slip op. at 14 (U.S. Apr. 17, 2018) (Thomas, J., dissenting) (quoting Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power Over Foreign Affairs*, 111 Yale L.J. 231, 253 (2001)).

[4] *See* 1 Emer de Vattel, The Law of Nations ch. XIX, § 230, at 107 (Joseph Chitty ed., T. & J.W. Johnson & Co. 1844) (1758) ("[T]he sovereign may forbid the entrance of his territory either to foreigners in general or in particular cases, or to certain persons or for certain particular purposes, according as he may think it advantageous to the state. There is nothing in all this that does not flow from the rights of domain and sovereignty."); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 15, 83 (2002) ("International law commentators generally viewed authority over foreign nationals as deriving from international rules regarding commerce or the state's right to self-preservation. With respect to exclusion, principles of sovereignty and territoriality provided that states had authority to protect themselves from undesirable aliens seeking entry, but this power was not absolute.") (footnotes omitted).

[5] Cleveland, *supra* note 4, at 83–85.

[6] *Id.* at 86–87.

ArtI.S8.C18.8.3 Colonial Period, Constitutional Convention, and Immigration

Article I, Section 8, Clause 18:

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

At the Constitutional Convention, James Madison, in a debate on a length of citizenship requirement for the House of Representatives, described immigration as essential to the new country's prospects: "He [Madison] wished to invite foreigners of merit and republican principles among us. America was indebted to emigration for her settlement and prosperity. That part of America which had encouraged them most had advanced most rapidly in population, agriculture, and the arts."[1] Madison's open attitude towards immigration has been taken as representative of the Framers' "general feeling at the time."[2] But the Constitution that they produced did not contain any provision explicitly addressing the Federal Government's power to admit, exclude, or expel aliens (unless one counts the compromise over delayed prohibition of the slave trade reflected in the Migration or Importation Clause contained in Article I, Section 9).[3]

During the colonial period, the laws of some colonies had restricted the entry of particular categories of immigrants, including paupers and criminals.[4] England had power to override these restrictions, however, and engaged in a consistent practice of transporting convicts to the American colonies over colonial protest.[5] That practice resulted in the transportation of 50,000 convicts from England to the United States between 1718 and 1775, accounting for one quarter of all British immigrants during that period.[6] In 1788, after the Constitutional Convention but before ratification, the Congress of the Confederation recommended by resolution that the individual states enact laws to prohibit the transportation of convicts from foreign countries into the United States.[7]

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[1] James Madison, Debates on the Adoption of the Federal Constitution 411 (Elliot ed., 1845).

[2] S. Doc. No. 61-758, pt. 21, at 5 (1911); *see also* Madison, *supra* note 1, at 233 (statement of Charles Pinckney) ("[I]n a new country, possessing immense tracts of uncultivated lands, where every temptation is offered to emigration, and where industry must be rewarded with competency there will be few poor"); *id.* at 389 ("Col. [George] MASON was for opening a wide door for emigrants; but did not choose to let foreigners and adventurers make laws for us and govern us. Citizenship for three years was not enough for ensuring that local knowledge which ought to be possessed by the representative."); *but see id.* at 310 (statement of Elbridge Gerry) ("There was a rage for emigration from the Eastern States to the western country, and [Gerry] did not wish those remaining behind to be at the mercy of the emigrants. Besides, foreigners are resorting to that country, and it is uncertain what turn things may take there.").

[3] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 15, 81–82 (2002); *see also* Arizona v. United States, 567 U.S. 387, 422 (2012) (Scalia, J., concurring in part and dissenting in part) (arguing that because of the acceptance of exclusion power as an incidence of sovereignty at the time of the framing, "there was no need to set forth control of immigration as one of the enumerated powers of Congress, although an acknowledgment of that power (as well as of the States' similar power, subject to federal abridgment) was contained in" the Migration or Importation Clause).

[4] Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum. L. Rev. 1833, 1841 (1993); Edward P. Hutchinson, Legislative History of American Immigration Policy 1798–1965, at 396–404 (1981).

[5] *See* Peter L. Markowitz, *Straddling the Civil-Criminal Divide: A Bifurcated Approach to Understanding the Nature of Immigration Removal Proceedings*, 43 Harv. C.R. - C.L. L. Rev. 289, 323–25 (2008); Neuman, *supra* note 4, at 1841–43.

[6] Markowitz, *supra* note 5, at 323–24.

[7] Neuman, *supra* note 4, at 1842.

ArtI.S8.C18.8.4 Early Federal Laws on Immigration

Article I, Section 8, Clause 18:

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

From ratification of the Constitution until 1875, Congress took little action with respect to immigration.[1] However, one major outlier to Congress's inactivity during this period—contained in the group of laws enacted in 1798 commonly known as the as the Alien and Sedition Acts—generated intense debate over whether the Constitution gave Congress power to regulate immigration.[2] The Alien Friends Act empowered the President "to *order* all such *aliens* as he shall judge dangerous to the peace and safety of the United States . . . to depart out of the territory of the United States."[3] The Naturalization Act of 1798 imposed registration requirements on "all white aliens residing or arriving" in the United States.[4] Federalist proponents of these laws defended their constitutionality by drawing from the law of nations literature to argue that inherent principles of sovereignty gave Congress power to regulate immigration, including by providing for the expulsion of aliens.[5] The party of John Adams and Alexander Hamilton, the Federalists, pointed to various constitutional provisions, including the Article I provision giving Congress power to declare war, that they argued incorporated the sovereignty principles into the constitutional system.[6] Opponents of the laws, Thomas Jefferson and James Madison among them, argued that the power to expel aliens did not fit within any of Congress's enumerated powers, that Congress did not possess any unenumerated or inherent powers, and that the law of nations (to the extent it was relevant) only permitted the expulsion of enemy aliens.[7] The federal judiciary never resolved the

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[1] Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 15, 99 (2002) ("Federal legislation was adopted [in 1799, 1816, and the 1840s] to ensure the health and safety of passengers and to grant duty-free admission to their personal and professional possessions. No meaningful federal restrictions on immigration were imposed [during the pre-Civil War period].") (footnotes omitted); Edward P. Hutchinson, Legislative History of American Immigration Policy 1798–1965, at 45–46 (1981) (reviewing all immigration-related federal legislation in the pre-Civil War era, including naturalization and steerage laws, and explaining that "Congress was not yet ready to take action" on "complaints about the coming of foreign paupers, criminals, and other undesirables"); *cf.* Steerage Act of 1819, ch. 46, 3 Stat. 488 (restricting the number of passengers an owner of a vessel could carry on board without being subjected to fines and other penalties). On naturalization—in contrast to immigration—Congress established a federal system from the outset. *See* Naturalization Act of 1790, ch. 3, § 1, 1 Stat. 103 (providing that "free white persons" who resided in the United States for at least two years could be granted citizenship if they showed good moral character and swore allegiance to the Constitution). Decades later, in 1870, Congress extended naturalization eligibility to "aliens of African nativity and to persons of African descent." Naturalization Act of 1870, ch. 254, § 7, 16 Stat. 254.

[2] *See* Cleveland, *supra* note 1, at 15, 87–98; Gerald L. Neuman, *The Lost Century of American Immigration Law (1776–1875)*, 93 Colum. L. Rev. 1833, 1880–82 (1993).

[3] *Compare* Alien Friends Act ("An Act Concerning Aliens"), ch. 58, § 1, 1 Stat. 571 (1798) *with* Alien Enemy Act ("An Act respecting Alien Enemies"), ch. 66, § 1, 1 Stat. 577 (1798) (applicable only in wartime and providing that "all natives, citizens, denizens, or subjects of the hostile nation or government, being males of the age of fourteen years and upwards, who shall be within the United States, and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies"). The Alien Friends Act was modeled after a 1793 English law that "similarly gave the King unfettered discretion to expel aliens as he 'shall think necessary for the publick Security.'" Sessions v. Dimaya, No. 15-1498, slip op. at 7 (U.S. Apr. 17, 2018) (Thomas, J., dissenting) (citing 33 Geo. III, ch. 4, § 18, *in* 39 Eng. Stat. at Large 16).

[4] Act of June 18, 1798, ch. 54, § 1,1 Stat. 566. The Act also extended the minimum residence requirement for naturalization from five to fourteen years. *Id.*

[5] Cleveland, *supra* note 1, at 89–92.

[6] *Id.*

[7] *Id.* at 93–97.

constitutionality of the laws.[8] The Alien Friends Act expired on its own terms in 1800; its registration requirements, which appear not to have been enforced, were repealed in the Naturalization Act in 1802.[9]

Aside from the short-lived deportation and registration provisions in the Alien and Sedition Acts, few federal statutes pertained to immigration before 1875.[10] During this period, however, some state laws following in the colonial tradition provided for the exclusion or expulsion of convicts, paupers, and people with contagious diseases.[11] Some states, primarily but not exclusively in the South, also provided for the exclusion and in some cases expulsion of free Blacks, regardless of their national origin.[12] A subset of these laws required that Black seamen be detained or quarantined while their vessels were in port.[13] Yet state immigration restrictions during this period did not impose numerical limits on immigration and, as such, did not resemble the regime of limited immigration that has existed under federal law since 1921.[14]

ArtI.S8.C18.8.5 Immigration Jurisprudence (1837–1889)

Article I, Section 8, Clause 18:

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

While there was little federal immigration regulation before 1875, the Supreme Court initially recognized state immigration powers before building tepidly to the conclusion that the Foreign Commerce Clause of Article I bestowed exclusive authority to regulate immigration on Congress. In the 1837 case *Mayor, Aldermen & Commonalty of City of New York v. Miln*, the Court upheld a New York statute requiring masters of vessels arriving from foreign or out-of-state ports to provide passenger manifests.[1] The Court reasoned that power over alien entry fell within the states' general police powers.[2] The opinion did not express a view as to whether the Federal Government also had power to exclude aliens.[3]

The 1849 *Passenger Cases*, however, chipped away at the state power recognized in *Miln* when the Court voted 5-4 to strike down as unconstitutional New York and Massachusetts

[8] *Id.* at 98.

[9] *Id.*; Neuman, *supra* note 2, at 1881–83.

[10] Hutchinson, *supra* note 1, at 45–46.

[11] *See generally* Neuman, *supra* note 2, at 1841–65; Hutchinson, *supra* note 1, at 397–401 ("[T]he dominant concern of the [state] legislators was that immigrants would add to the burden of poor relief, and there was strong suspicion at the time that Europe was deliberately exporting its human liabilities."); *see also Sessions*, No. 15-1498, slip op. at 10 (Thomas, J., dissenting) (noting that "[t]he States enacted their own removal statutes" during the 1800s).

[12] *See* Neuman, *supra* note 2, at 1866–73; Cleveland, *supra* note 1, at 98–99.

[13] *See* Neuman, *supra* note 2, at 1873–74.

[14] *See id.* at 1834 ("Neither Congress nor the states attempted to impose quantitative limits on immigration [before the 1870s and 1880s].").

[1] 36 U.S. (11 Pet.) 102 (1837).

[2] *Id.* at 161 ("On the same principle by which a state may prevent the introduction of infected persons or goods, and articles dangerous to the persons or property of its citizens, it may exclude paupers who will add to the burdens of taxation, or convicts who will corrupt the morals of the people, threatening them with more evils than gunpowder or disease. The whole subject is necessarily connected with the internal police of a state.").

[3] *Id.*

statutes that imposed head taxes on foreign passengers arriving by sea.[4] The *Passenger Cases* did not produce a majority opinion.[5] The five Justices in the majority, each writing separately, agreed that the state head tax statutes encroached impermissibly on federal policy to encourage immigration. But the Justices did not agree as to the source of the federal immigration power—the separate opinions pointed variously to the Commerce, Taxation, and Naturalization powers, the Importation and Migration Clause, and inherent principles of sovereignty—or about whether that power was exclusive.[6]

Finally, in the 1875 case *Henderson v. New York*, the Court overcame these earlier disagreements and embraced unanimously the Foreign Commerce Clause as the source of an exclusive federal immigration power.[7] "[T]he transportation of passengers from European ports to those of the United States," the Court reasoned, "has become a part of our commerce with foreign nations, of vast interest to this country, as well as to the immigrants who come among us to find a welcome and a home within our borders."[8] Accordingly, "[a] law or a rule emanating from any lawful authority, which prescribes terms or conditions on which alone [a] vessel can discharge its passengers, is a regulation of commerce; and, in case of vessels and passengers coming from foreign ports, is a regulation of commerce with foreign nations."[9] *Henderson* and its companion case *Chy Lung v. Freeman* struck down New York, Louisiana, and California statutes that required vessel masters to post bond for some foreign passengers.[10]

Thereafter, the Court reaffirmed the principle that the Foreign Commerce Clause gives Congress, not the states, power to regulate immigration in the 1883 case of *New York v. Compagnie Generale Transatlantique*.[11] There, the Court struck down a New York statute that imposed taxes on ship owners for the inspection of foreign passengers.[12] And in the 1884 *Head Money Cases*,[13] the Court upheld a federal statute that did much the same thing as the state statute invalidated in *Transatlantique*.[14] The *Transatlantique* and the *Head Money Cases* appeared to cement the Supreme Court's commerce-based immigration doctrine, but five years after the *Head Money Cases* the Court would alter course and hold in the *Chinese Exclusion Case* that the power was based instead on inherent principles of sovereignty.[15]

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[4] Smith v. Turner, 48 U.S. (7 How.) 283, 283 (1849).

[5] *Id.*

[6] *See* Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 Tex. L. Rev. 1, 15, 103–04 (2002).

[7] 92 U.S. 259, 270 (1875); *see generally* Jennifer Gordon, *Immigration as Commerce: A New Look at the Federal Immigration Power and the Constitution*, 93 Ind. L.J. 653, 671 (2018).

[8] *Henderson*, 92 U.S. at 270.

[9] *Id.* at 271.

[10] *Id.*; Chy Lung v. Freeman, 92 U.S. 275, 276 (1875) (describing the statutes at issue in the two cases as follows: "[t]he statute of California, unlike those of New York and Louisiana, does not require a bond for all passengers landing from a foreign country, but only for classes of passengers specifically described, among which are 'lewd and debauched women'").

[11] 107 U.S. 59 (1883).

[12] *Id.* at 60 ("[S]uch a tax as this is a regulation of commerce with foreign nations, confided by the constitution to the exclusive control of congress.").

[13] 112 U.S. 580 (1884).

[14] *Id.* at 596 ("We are clearly of opinion that, in the exercise of its power to regulate immigration, and in the very act of exercising that power, it was competent for congress to impose this contribution on the ship-owner engaged in that business.").

[15] *See* Ping v. United States, 130 U.S. 581, 589, 609 (1889).

ArtI.S8.C18.8.6 Immigration Jurisprudence (1889–1900)

Article I, Section 8, Clause 18:

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

Federal regulation of immigration began just as the Supreme Court was solidifying its short-lived doctrine that the Foreign Commerce Clause supplied the basis for exclusive federal power over the subject. In 1875, Congress passed the Page Act, which, among other things, barred the entry of aliens with criminal convictions and women "imported for the purposes of prostitution."[1] Then, in 1882, Congress restricted the entry of "any convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge."[2] In that same year, Congress passed the Chinese Exclusion Act, which generally barred the entry of "Chinese laborers" into the United States.[3] And in 1891, Congress expanded the categories of excludable aliens to include "[a]ll idiots, insane persons, paupers or persons likely to become a public charge, persons suffering from a loathsome or a dangerous contagious disease, persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude, polygamists, and also any persons whose ticket or passage is paid for with the money of another or who is assisted by others to come."[4] Thus, by the late 1800s, Congress had established a statutory regime governing the admission of aliens.

The Supreme Court set the foundation for its doctrine that inherent principles of sovereignty give Congress plenary power to regulate immigration in the *Chinese Exclusion Case* of 1889. In this historic case, the Court upheld a federal law that expanded upon the Chinese Exclusion Act by prohibiting Chinese laborers from returning to the United States even if they had received, before their departures from the United States, certificates allowing their return issued under the earlier Chinese Exclusion Act.[5] In a break from earlier cases relying on the Foreign Commerce Clause as the basis for the federal immigration power, the Court reasoned that the power to exclude aliens was "an incident of sovereignty belonging to the government of the United States," and that—without exception—this sovereign power could be "exercise[d] at any time when, in the judgment of the government, the interests of the country require it."[6]

Three years later, in 1892, the Supreme Court held that Congress's inherent immigration power, as recognized in the *Chinese Exclusion Case*, foreclosed an alien's challenge to his exclusion from the United States pursuant to the Immigration Act of 1891. In *Nishimura Ekiu v. United States*, the Court determined that "[i]t is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and Executive Branches of the National Government."[7] Instead, the Court declared, "the

[1] Page Act of 1875, ch. 141, § 5, 18 Stat. 477.

[2] Immigration Act of 1882, ch. 376, § 2, 22 Stat. 214.

[3] Chinese Exclusion Act, ch. 126, 22 Stat. 58 (1882).

[4] Immigration Act of 1891, ch. 551, 26 Stat. 1084.

[5] Ping v. United States, 130 U.S. 581, 609 (1889).

[6] *Id.*

[7] 142 U.S. 651, 660 (1892).

decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law" for aliens who seek to enter the United States.[8]

By the end of the nineteenth century, the Supreme Court construed Congress's broad immigration power as covering not only the exclusion of foreign nationals seeking entry into the United States, but also the expulsion of aliens already within the territorial boundaries of this country.[9] For example, in 1896 in *Fong Yue Ting v. United States*, the Court upheld the deportation of Chinese nationals residing in the United States following their failure to obtain "certificates of residence" under the Chinese Exclusion Act.[10] The Court determined that "[t]he right of a nation to expel or deport foreigners who have not been naturalized, or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country."[11] Thus, based on the Supreme Court's early jurisprudence, Congress, and by extension, the Executive Branch, had virtually unlimited authority to exclude and deport aliens from the United States with little judicial intervention.

ArtI.S8.C18.8.7 Plenary Power

ArtI.S8.C18.8.7.1 Overview of Immigration Plenary Power Doctrine

Article I, Section 8, Clause 18:

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

Upon the advent of the twentieth century, the Supreme Court began to establish some outer limits on Congress's seemingly unfettered power over immigration, particularly with respect to aliens physically present within the United States. But the Court's jurisprudence repeatedly recognized that Congress retains broader power with respect to aliens seeking to enter this country.

ArtI.S8.C18.8.7.2 Aliens in the United States

Article I, Section 8, Clause 18:

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

In 1903, the Court in the *Japanese Immigrant Case* reviewed the legality of deporting an alien who had lawfully entered the United States, clarifying that "an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population" could not be deported without an "opportunity to be heard upon the questions involving his

[8] *Id.*; *see also* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 543 (1950) ("[I]t is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government to exclude a given alien.").

[9] *See* Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893); Wong Wing v. United States, 163 U.S. 228, 236–38 (1896).

[10] *Fong Yue Ting*, 149 U.S. at 732.

[11] *Id.* at 707; *but see Wong Wing*, 163 U.S. at 237 (holding that, while the government could summarily expel aliens already residing within the country, it could not subject such aliens to criminal punishment on account of their unlawful presence without due process).

right to be and remain in the United States."[1] In the decades that followed, the Supreme Court maintained the notion that "once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders."[2]

Eventually, the Supreme Court extended these constitutional protections to *all aliens* within the United States, including those who entered unlawfully, declaring 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."[3] The Court reasoned that aliens physically present in the United States, regardless of their legal status, are recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments.[4] Thus, the Court determined, "[e]ven one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection."[5] Accordingly, notwithstanding Congress's indisputably broad power to regulate immigration, fundamental due process requirements notably constrained that power with respect to aliens within the territorial jurisdiction of the United States.[6]

Yet the Supreme Court has also suggested that the extent of due process protection "may vary depending upon [the alien's] status and circumstance."[7] In various opinions, the Court has suggested 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.[8] Thus, while the Court has recognized that due process

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[1] Yamataya v. Fisher, 189 U.S. 86, 100–01 (1903); *see also* Low Wah Suey v. Backus, 225 U.S. 460, 468 (1912) (observing requirement of "fairly conducted" hearings in cases involving the expulsion of aliens from the United States); United States *ex rel.* Tisi v. Tod, 264 U.S. 131, 132 (1924) (recognizing admitted alien's right to notice and opportunity to be heard); United States *ex rel.* Vajtauer v. Comm'r of Immigration at Port of N.Y., 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.").

[2] Kwong Hai Chew v. Colding, 344 U.S. 590, 596 n.5 (1953) (quoting Bridges v. Wixon, 326 U.S. 135, 161 (1945) (Murphy, J., concurring)); *see also* 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. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.").

[3] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); *see also* Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law."); Plyler v. Doe, 457 U.S. 202, 215 (1982) (holding that unlawfully present aliens were entitled to both due process and equal protection under the Fourteenth Amendment).

[4] *Plyler*, 457 U.S. at 210 (citing *Mezei*, 345 U.S. at 212; Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[5] *Mathews*, 426 U.S. at 77; *see also* Zadvydas v. Davis, 533 U.S. 678, 693 (2001) (explaining that the Due Process Clause applies "to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").

[6] *See Kwong Hai Chew*, 344 U.S. at 596–97 (explaining that a lawful permanent resident "may not be deprived of his life, liberty or property without due process of law," and thus cannot be deported without "notice of the nature of the charge and a hearing at least before an executive or administrative tribunal").

[7] *See Zadvydas*, 533 U.S. at 694.

[8] *See* Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161, slip op. at 2 (U.S. June 25, 2020) (stating that "aliens who have established connections in this country have due process rights in deportation proceedings"); 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*, 459 U.S. at 32 ("[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."); *Kwong Hai Chew*, 344 U.S. at 596 n.5 ("But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by

considerations may constrain the Federal Government's exercise of its immigration power, there is some uncertainty regarding the extent to which these constraints apply with regard to aliens within the United States.

ArtI.S8.C18.8.7.3 Aliens Seeking to Enter the United States

Article I, Section 8, Clause 18:

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

While the Supreme Court has generally recognized that due process considerations provide some constraint on the procedures employed to remove aliens from the United States, the Court has repeatedly affirmed the plenary nature of the immigration power with respect to aliens seeking *to enter* the country. In particular, the Court has reasoned that, while aliens who have entered the United States—even unlawfully—may not be deported without due process, an alien "on the threshold of initial entry stands on a different footing" because he or she is theoretically outside the United States and typically beyond the veil of constitutional protection.[1]

For example, in *United States ex rel. Knauff v. Shaughnessy*, the German wife of a U.S. citizen challenged her exclusion without a hearing under the War Brides Act.[2] The German national was detained at Ellis Island during her proceedings, and, therefore, technically within United States territory.[3] Nevertheless, the Supreme Court held that the 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."[4]

Similarly, in *Shaughnessy v. United States ex rel. Mezei*, an alien detained on Ellis Island argued that the government's decision to deny admission without a hearing violated due process.[5] Citing "the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments," the Court determined that the Executive was authorized to deny entry without a hearing, and that the decision was not subject to judicial review.[6] Further, the Court held, although the alien had "temporary

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the Constitution to all people within our borders."); 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."); Yamataya v. Fisher, 189 U.S. 86, 101 (1903) ("[I]t is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States.").

[1] Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); *see also* Kaplan v. Tod, 267 U.S. 228, 230 (1925) (construing an alien seeking admission at the border as a person who "was still in theory of law at the boundary line and had gained no foothold in the United States") (citing Nishimura Ekiu v. United States, 142 U.S. 651, 661 (1892)). This distinction is known as the "entry fiction doctrine." Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("The distinction between an alien who has effected an entry into the United States and one who has never entered runs throughout immigration law. . . . It is well established that certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders.").

[2] 338 U.S. 537, 539–40 (1950).

[3] *Id.* at 539.

[4] *Id.* at 544.

[5] *Mezei*, 345 U.S. at 207–09.

[6] *Id.* at 210–12.

harborage" inside the United States pending his exclusion proceedings, he had not effected an "entry" for purposes of immigration law, and could be indefinitely detained and "treated as if stopped at the border."[7]

The Supreme Court, however, has held that Congress's largely unencumbered power over the entry of aliens does not extend to lawful permanent residents (LPRs) who return from trips abroad.[8] In *Kwong Hai Chew v. Colding*, the Court ruled that an LPR returning from a five-month voyage as a crewman on a U.S. merchant ship was entitled to a hearing upon being detained by immigration officers because he retained the same constitutional rights that he had enjoyed prior to leaving the United States.[9] Subsequently, in *Rosenberg v. Fleuti*, the Court reaffirmed that an LPR "is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him, a holding which supports the general proposition that a resident alien who leaves this country is to be regarded as retaining certain basic rights."[10] Thus, unlike aliens seeking initial admission into the United States, aliens who have resided in the United States as LPRs are fully vested with constitutional protections upon their return from trips abroad.[11]

ArtI.S8.C18.8.8 Modern Era

ArtI.S8.C18.8.8.1 Overview of Modern Immigration Jurisprudence

Article I, Section 8, Clause 18:

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

Since the latter part of the twentieth century, the Supreme Court has distinguished between aliens who have entered the United States and aliens who have gained no legal foothold into this country in shaping the scope of Congress's immigration power.[1] Generally,

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[7] *Id.* at 212–15 (citations omitted).

[8] *See* Landon v. Plasencia, 459 U.S. 21, 33 (1982); Rosenberg v. Fleuti, 374 U.S. 449, 460 (1969)); Kwong Hai Chew v. Colding, 344 U.S. 590, 600–02 (1953).

[9] *Kwong Hai Chew*, 344 U.S. at 596, 600–01. Specifically, the Court stated that "[f]or purposes of the constitutional right to due process, we assimilate [a returning LPR's] status to that of an alien continuously residing and physically present in the United States." *Id.* at 596.

[10] *Fleuti*, 374 U.S. at 460; *see also Landon*, 459 U.S. at 33 ("Any doubts that Chew recognized constitutional rights in the resident alien returning from a brief trip abroad were dispelled by *Rosenberg v. Fleuti*."). Moreover, the Court in *Fleuti* held that an LPR cannot be construed as making an "entry" into the United States for immigration purposes following "an innocent, casual, and brief excursion" outside the country. *Fleuti*, 374 U.S. at 462. Eventually, Congress in 1996 amended the Immigration and Nationality Act (INA) to provide that a returning LPR is not considered an "applicant for admission" except in certain enumerated circumstances. 8 U.S.C. § 1101(a)(13)(C); Vartelas v. Holder, 566 U.S. 257, 261 (2012). But even in those circumstances, an LPR is entitled to a hearing with respect to his admissibility before he can be excluded from the United States. *See* 8 U.S.C. §§ 1225(b)(1)(C), 1252(e)(2)(C); 8 C.F.R. § 235.3(b)(5).

[11] *See Landon*, 459 U.S. at 32 (recognizing that LPR had the right to due process upon returning to the United States).

[1] *See* Trump v. Hawaii, No. 17-965, slip op. at 30 (U.S. June 26, 2018) ("[T]he admission and exclusion of foreign nationals is a 'fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control.'") (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)); Castro v. U.S. Dep't of Homeland Sec., 835 F.3d 422, 443 (3d Cir. 2016) (noting that "*Knauff* and *Mezei* essentially restored the political branches' plenary power over aliens at the border seeking initial admission. And since these decisions, the Court has continued to signal its commitment to the full breadth of the plenary power doctrine, at least as to aliens at the border seeking initial admission to the country").

the Court's jurisprudence has been based on the notion that nonresident aliens outside the United States have no constitutional or statutory rights with respect to entry and therefore no legal basis to challenge their exclusion.[2]

Supreme Court precedent establishes that inherent principles of sovereignty give Congress "plenary power" to regulate immigration. Notwithstanding the implicit nature of this authority, the Court has described the immigration power as perhaps the most complete that Congress possesses.[3] The core of this power—the part that has proven most impervious to judicial review—is the authority to determine which aliens may enter the United States and under what conditions. The Court has also established that the Executive Branch, when enforcing the laws concerning alien entry, has broad authority to do so mostly free from judicial oversight. While the Court has recognized that aliens present within the United States generally have more robust constitutional protections than aliens seeking entry into the country, the Court has upheld federal statutes impacting the rights of aliens within the United States in light of Congress's unique immigration power, though the degree to which the immigration power is constrained by these constitutional protections remains a matter of continuing uncertainty.

ArtI.S8.C18.8.8.2 Exclusion of Aliens

Article I, Section 8, Clause 18:

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

In *Boutilier v. Immigration & Naturalization Service*, the Court rejected an alien's constitutional vagueness challenge to a statute that barred the admission of homosexuals (who had been interpreted by immigration authorities to fall under the prohibition on the admission of "persons afflicted with psychopathic personality"), observing that "[i]t has long been held that the Congress has plenary power to make rules for the admission of aliens and to exclude those who possess those characteristics which Congress has forbidden."[1]

In a similar vein, in 1972, the Supreme Court in *Kleindienst v. Mandel* rejected a First Amendment challenge to the application of a statute that barred the admission of aliens who advocated communism.[2] Notably, in *Mandel*, the Court considered a constitutional challenge to the exclusion of an alien that was not brought by the alien himself, but by a group of professors who had invited the alien to speak at their universities.[3] Recognizing that "plenary

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[2] *See* Kerry v. Din, 576 U.S. 86 (2015) (Scalia, J.) ("[A]n unadmitted and nonresident alien . . . has no right of entry into the United States, and no cause of action to press in furtherance of his claim for admission."); Landon v. Plasencia, 459 U.S. 21, 32 (1982) ("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.").

[3] Fiallo v. Bell, 430 U.S. 787, 792 (1977) ("This Court has repeatedly emphasized that 'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)); Fong Yue Ting v. United States, 149 U.S. 698, 707 (1893) ("The right of a nation to expel or deport foreigners . . . is as absolute and unqualified, as the right to prohibit and prevent their entrance into the country.").

[1] Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 123 (1967).

[2] Kleindienst v. Mandel, 408 U.S. 753, 769–70 (1972).

[3] *Id.* at 762. Indeed, the Court observed that "Mandel personally, as an unadmitted and nonresident alien, had no constitutional right of entry to this country as a nonimmigrant or otherwise." (citing United States *ex rel.* Turner v. Williams, 194 U.S. 279, 292 (1904); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); Galvan v. Press, 347 U.S. 522, 530–32 (1954).

congressional power to make policies and rules for exclusion of aliens has long been firmly established," the Court held that it 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.[4] Thus, even when reviewing constitutional challenges brought by U.S. citizens, the Court has adopted a highly deferential standard for reviewing the decision to exclude an alien.

The Supreme Court in 1977 maintained this deferential posture in *Fiallo v. Bell*, a case in which a group of U.S. citizens and lawful permanent residents (LPRs) brought an 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.[5] Noting at the outset "the limited scope of judicial inquiry into immigration legislation," the Court upheld the statute in view of Congress's "exceptionally broad power to determine which classes of aliens may lawfully enter the country."[6] Importantly, the Court explained that "it is not the judicial role in cases of this sort to probe and test the justifications" for Congress's legislative policy distinctions between classes of aliens.[7]

ArtI.S8.C18.8.8.3 Kerry v. Din and Trump v. Hawaii

Article I, Section 8, Clause 18:

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

The Supreme Court's recognition of Congress's broad power to exclude aliens was further illustrated in its 2015 decision in *Kerry v. Din*. In that case, a U.S. citizen (Fauzia Din) challenged the State Department's denial of her husband's visa application, claiming that the agency failed to adequately explain the basis for the denial.[1] The Supreme Court rejected Din's challenge in a 5-4 decision, but without a majority opinion.[2] Justice Antonin Scalia, writing for a plurality of three Justices, determined that Din did not have a 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.[3]

However, in a concurring opinion joined by Justice Samuel Alito, Justice Anthony Kennedy determined that the government had shown a facially legitimate and bona fide reason for Din's exclusion by citing the Immigration and Nationality Act's provision barring the issuance of

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[4] *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.*

[5] Fiallo v. Bell, 430 U.S. 787, 788–89, 791 (1977); *see* 8 U.S.C. § 1101(b)(1)(D), (b)(2) (1977).

[6] *Fiallo*, 430 U.S. at 792–94, 798–800.

[7] *Id.* at 798–99. Although the *Fiallo* Court relied on Mandel in reaching its decision, it did not identify a "facially legitimate or bona fide reason" for the challenged statute. *Id.* at 794–95. Instead, the Court determined that Congress may have excluded illegitimate children and their natural fathers from preferential immigration status "because of a perceived absence in most cases of close family ties as well as a concern with the serious problems of proof that usually lurk in paternity determinations." *Id.* at 799; *see also* Miller v. Albright, 523 U.S. 420, 444–45 (1998) (upholding statutory requirement that children born abroad and out of wedlock to U.S. citizen fathers, but not to U.S. citizen mothers, obtain formal proof of paternity by age 18 in order to establish citizenship).

[1] Kerry v. Din, 576 U.S. 86, 88 (2015).

[2] *Id.*

[3] *Id.* at 100.

visas to aliens who engage in terrorist activities.[4] Justice Kennedy reasoned that, even if Din's rights were burdened by the denial of her husband's visa, the government's reference to the statutory provision provided ample justification even if the denial did not disclose the facts underlying that decision.[5] At the same time, Justice Kennedy suggested that there may be circumstances where a court could "look behind" the government's stated reason for a visa denial if the plaintiff makes "an affirmative showing of bad faith" on the part of the government.[6] Nevertheless, because Din had not "plausibly alleged with sufficient particularity" that the government acted in bad faith, Justice Kenney declined to look beyond the government's stated reason for the visa denial.[7]

The Supreme Court reaffirmed that *Mandel* and its progeny permit courts to conduct only a limited review of Executive decisions to exclude aliens abroad in the 2018 case *Trump v. Hawaii*.[8] The case concerned a presidential proclamation that provided for the indefinite exclusion of specified categories of nonresident aliens from seven countries, subject to some waivers and exemptions.[9] Five of the seven countries covered by the proclamation were Muslim-majority countries.[10] The proclamation, like two earlier executive orders that imposed entry restrictions of a similar nature, became known colloquially as the "Travel Ban" or "Muslim Ban."[11] The stated purpose of the proclamation was to protect national security by excluding aliens who could not be properly vetted due to the deficient information-sharing practices of their governments or the conditions in their countries.[12] U.S. citizens and other challengers argued that the actual purpose of the proclamation was to exclude Muslims from the United States and that it therefore violated the Establishment Clause of the First Amendment.[13] They based this argument primarily upon extrinsic evidence—that is, evidence outside of the four corners of the proclamation—including statements that the President had made as a candidate calling for a "total and complete shutdown of Muslims entering the United States."[14]

A five-Justice majority of the Supreme Court rejected the Establishment Clause challenge and upheld the proclamation.[15] Writing for the majority, Chief Justice Roberts reiterated the holdings from *Mandel* and *Fiallo* that matters concerning the admission or exclusion of aliens are "largely immune from judicial control" and are subject only to "highly constrained" judicial

[4] *Id.* at 101–02 (Kennedy, J., concurring in the judgment); *see also* 8 U.S.C. § 1182(a)(3)(B) (providing that aliens who engage in terrorist activities are inadmissible to the United States).

[5] *Din*, 576 U.S. at 103–04 (Kennedy, J., concurring in the judgment).

[6] *Id.* at 105. Justice Kennedy, however, did not explain what an "affirmative showing" would require to allow a court to probe beyond the government's stated rationale for a visa denial.

[7] *Id.*

[8] No. 17-965, slip op. at 32 (U.S. June 26, 2018).

[9] *Id.* at 2–6 (describing Proclamation No. 9645, Enhancing Vetting Capabilities and Processes for Detecting Attempted Entry into the United States by Terrorists or Other Public-Safety Threats).

[10] Proclamation No. 9645, 82 Fed. Reg. 45,161, 45,165–67 (Sept. 24, 2017). The proclamation originally applied to nationals of eight countries: Chad, Iran, Libya, North Korea, Syria, Venezuela, Yemen, and Somalia. *Id.* The President terminated the restrictions on nationals of Chad, however, after determining that their government "had made sufficient improvements to its identity-management protocols." *Hawaii*, No. 17-965, slip op. at 14.

[11] *See Hawaii*, No. 17-965, slip op. at 12; *id.* at 78 (Sotomayor, J., dissenting); *id.* at 2 (Breyer, J., dissenting).

[12] Proclamation No. 9645, 82 Fed. Reg. at 45,161–62; *see Hawaii*, No. 17-965, slip op. at 34 ("The Proclamation is expressly premised on . . . preventing entry of nationals who cannot be adequately vetted and inducing other nations to improve their practices.").

[13] *Hawaii*, No. 17-965, slip op. at 6–7.

[14] *Id.* at 27 (quoting record).

[15] *Id.* at 38. The Court also rejected statutory challenges to the proclamation. *Id.* at 22–24.

inquiry when exclusion "allegedly burdens the constitutional rights of a U.S. citizen."[16] But the Court did not decide whether the narrow scope of this inquiry barred consideration of extrinsic evidence of the proclamation's purpose.[17] Much of the litigation in the lower courts had turned on this issue. A majority of judges on the U.S. Court of Appeals for the Fourth Circuit, citing Justice Kennedy's concurrence in *Din*, deemed it appropriate to consider the campaign statements and other extrinsic evidence of anti-Muslim animus and relied on that evidence to hold that the proclamation likely violated the First Amendment.[18] Dissenting Fourth Circuit judges, by contrast, reasoned that *Mandel* and the other exclusion cases prohibited consideration of the extrinsic evidence.[19] Instead of resolving this disagreement, the Supreme Court assumed without deciding that it could consider the extrinsic evidence when reviewing the proclamation under a "rational basis" standard to determine "whether the entry policy is plausibly related to the Government's stated objective to protect the country and improve vetting processes."[20] The Court explained that the government "hardly ever" loses cases under the rational basis standard unless the laws at issue lack any purpose other than a "bare . . . desire to harm a politically unpopular group."[21] Applying this standard, the Court held that the proclamation satisfied it mainly because agency findings about deficient information-sharing by the governments of the seven covered countries established a "legitimate grounding in national security concerns, quite apart from any religious hostility."[22]

ArtI.S8.C18.8.8.4 Federal Laws Relating to Aliens

Article I, Section 8, Clause 18:

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

The line of exclusion cases from *Kleindienst v. Mandel* to *Trump v. Hawaii* makes clear that claims brought by U.S. citizens against the exclusion of aliens abroad are governed by a narrow standard of review under which the government has never lost before the Supreme Court, not even when extrinsic evidence has suggested that the Executive may have acted for an unconstitutional purpose.[1] Yet even with respect to aliens *within* the United States—a group that, as noted above, enjoys more constitutional protections than aliens seeking entry—the

[16] *Id.* at 28–32 (quoting Fiallo v. Bell, 430 U.S. 787, 792 (1977)).

[17] *Id.* at 32–33.

[18] Int'l Refugee Assistance Project v. Trump, 883 F.3d 233, 264 (4th Cir. 2018) (en banc) ("Justice Kennedy's concurrence in *Din* elaborated on [*Mandel*'s] 'bona fide' requirement. An action is not considered 'bona fide' if Plaintiffs make an 'affirmative showing of bad faith,' which they must 'plausibly allege[ ] with sufficient particularity.' Upon such a showing, a court may 'look behind' the Government's proffered justification for its action.") (quoting Kerry v. Din, No. 13-1402, slip op. at 57 (U.S. June 15, 2015) (Kennedy, J., concurring in the judgment).

[19] *Id.* at 364 (Niemeyer, J., dissenting) ("[J]ust as the Court in *Mandel* rejected the plaintiffs' challenge because, even assuming a constitutional violation lurked beneath the surface of the Executive's implementation of its statutory authority, the reasons the Executive had provided were 'facially legitimate and bona fide,' so must we reject this similar challenge today."); Int'l Refugee Assistance Project v. Trump, 857 F.3d 554, 648 (4th Cir. 2017) (Niemeyer, J., dissenting) ("*Mandel*, *Fiallo*, and *Din* have for decades been entirely clear that courts are not free to look behind these sorts of exercises of executive discretion [to exclude aliens] in search of circumstantial evidence of alleged bad faith.").

[20] *Trump v. Hawaii*, No. 17-965, slip op. at 32–33.

[21] *Id.* (quoting U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (ellipses in original).

[22] *Id.* at 34 ("The Proclamation . . . reflects the results of a worldwide review process undertaken by multiple Cabinet officials and their agencies. Plaintiffs seek to discredit the findings of the review. . . . But as the Proclamation explains, in each case the determinations were justified by the distinct conditions in each country.").

[1] *See* Trump v. Hawaii, No. 17-965, slip op. at 3234 (U.S. June 26, 2018).

Court has deferred to Congress's policy judgments. For example, in *Mathews v. Diaz*, the Supreme Court in 1976 upheld a federal statute that restricted eligibility for participation in a federal medical insurance program to U.S. citizens or lawful permanent residents (LPRs) who had continuous residence in the United States for five years.[2] In *Mathews*, a group of aliens who had been lawfully admitted to the United States, but failed to meet the federal statute's eligibility requirements, challenged the statute on equal protection grounds.[3] The Court observed that, "in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens," and that, based on that power, Congress could, as a matter of policy, decide which classes of aliens would be entitled to the benefits that are available to U.S. citizens.[4] Therefore, the Court determined, "it is unquestionably reasonable for Congress to make an alien's eligibility depend on both the character and the duration of his residence."[5]

On the other hand, in *Zadvydas v. Davis*, the Supreme Court in 2001 ruled that the indefinite detention of lawfully admitted aliens who had been ordered removed from the United States following formal removal proceedings "would raise a serious constitutional problem."[6] The Court reasoned that, although Congress has broad authority over immigration, "that power is subject to important constitutional limitations."[7] Noting that "[f]reedom from imprisonment . . . lies at the heart of the liberty that [the Due Process] Clause protects," the Court determined that the government failed to show a "sufficiently strong special justification" for the indefinite detention of aliens that outweighed their constitutionally protected liberty interest.[8] In addition, the Court emphasized the "critical distinction" between aliens who have entered the United States and those who have not entered the country, observing that "certain constitutional protections available to persons inside the United States are unavailable to aliens outside of our geographic borders."[9] Accordingly, the Court held that the federal statute that authorized the detention of aliens in the United States pending their removal had to be construed as limiting the detention to "a period reasonably necessary to secure removal."[10]

But more recently, in *Department of Homeland Security v. Thuraissigiam*, the Supreme Court in 2020 held that an alien apprehended after entering the United States unlawfully, who was subject to an "expedited removal" process applicable to aliens apprehended at or near the border, could not raise a due process challenge to a federal statute limiting judicial review of those proceedings.[11] Although the alien was twenty-five yards inside the United States when

[2] Mathews v. Diaz, 426 U.S. 67, 77–84 (1976); *see* 42 U.S.C. § 1395o(2).

[3] *Mathews*, 426 U.S. at 69–71.

[4] *Id.* at 79–80.

[5] *Id.* at 82–83.

[6] Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

[7] *Id.* at 695.

[8] *Id.* at 690–92.

[9] *Id.* at 693–94.

[10] *Id.* at 699. But a few years later, in *Demore v. Kim*, the Supreme Court in 2003 considered a due process challenge to a federal statute that required the detention of criminal aliens during the pendency of their removal proceedings, and the Court held that "[d]etention during removal proceedings is a constitutionally permissible part of that process" because such detention is generally shorter in duration, and serves the purpose of preventing criminal aliens from absconding during their proceedings. 538 U.S. 510, 527–28, 531 (2003); *see also* Jennings v. Rodriguez, No. 15-1204, slip op. at 12–14, 19–24, 28 (U.S. Feb. 27, 2018) (holding that the Department of Homeland Security has statutory authority to indefinitely detain aliens during the pendency of their formal removal proceedings, but not deciding whether such prolonged detention is constitutional); Reno v. Flores, 507 U.S. 292, 315 (1993) (upholding regulation generally providing for the release of detained alien juveniles only to parents, close relatives, or legal guardians during pendency of deportation proceedings).

[11] Dep't of Homeland Sec. v. Thuraissigiam, No. 19-161, slip op. at 34–36 (U.S. June 25, 2020).

apprehended, the Court reasoned that its "century-old" precedent holding that aliens seeking initial entry to the United States have no constitutional rights regarding their applications for admission "would be meaningless if it became inoperative as soon as an arriving alien set foot on U.S. soil."[12] The Court determined that the alien essentially remained "'on the threshold'" of entry and could be "'treated' for due process purposes 'as if stopped at the border.'"[13] To conclude otherwise, the Court declared, "would undermine the 'sovereign prerogative' of governing admission to this country and create a perverse incentive to enter at an unlawful rather than a lawful location."[14]

ArtI.S8.C18.8.8.5 Immigration-Related State Laws

Article I, Section 8, Clause 18:

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

While the Supreme Court has generally shown deference to Congress's authority over aliens, the Court has shown less deference to state government regulation of aliens. In *Graham v. Richardson*, the Supreme Court in 1971 held that state laws denying welfare benefits to noncitizens, or conditioning such benefits on a long period of residence, violated equal protection.[1] Recognizing that both U.S. citizens and aliens were entitled to the equal protection of the laws of their state of residence, the Court determined that a state's desire to preserve limited welfare benefits for its citizens was not a sufficient justification for denying benefits to aliens.[2] The Court, moreover, observed that only Congress had the power to formulate policies with respect to the admission of aliens and the conditions of their residence in the United States, and concluded that by denying welfare benefits to aliens, the state laws "conflict[ed] with these overriding national policies in an area constitutionally entrusted to the Federal Government."[3]

Similarly, in *Plyler v. Doe*, the Supreme Court in 1982 struck down a Texas statute that withheld funds for the education of children who were not "legally admitted" into the United

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[12] *Id.* at 34–35 (citing Landon v. Plasencia, 459 U.S. 21, 32 (1982); Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950); Nishimura Ekiu v. United States, 142 U.S. 651, 659–60 (1892)).

[13] *Thuraissigiam*, slip op. at 34–36 (quoting *Mezei*, 345 U.S. at 212, 215).

[14] *Id.* at 35–36 (quoting *Plasencia*, 459 U.S. at 32). The Court indicated that aliens who "established connections" to the United States would have greater due process protections in the event that the government sought to remove them, but the Court did not go further to assess the nature of those "established connections." *Id.* at 2–4. Nevertheless, in describing the limited constitutional protections for aliens seeking entry into the United States, the Court cited its statement in *Nishimura Ekiu* that it is not within the province of the judiciary to order that "foreigners who have never been naturalized, nor acquired any domicile or residence within the United States, nor even been admitted into the country pursuant to law," shall be permitted to enter, in opposition to the constitutional and lawful measures of the Legislative and Executive Branches of the National Government. *Id.* at 34–36; *see also Nishimura Ekiu*, 142 U.S. at 660. The Court's reference to this language suggests that the extent to which an alien establishes connections may turn, at least in part, on whether the alien has been lawfully admitted to the country. On the other hand, the language could suggest that an alien who entered the country unlawfully, but had "acquired . . . domicile or residence" within the country, could establish connections to be accorded due process protections in removal proceedings.

[1] Graham v. Richardson, 403 U.S. 365, 374–80 (1971).

[2] *Id.* at 374–75.

[3] *Id.* at 376–78; *see also* Sugarman v. Dougall, 413 U.S. 634, 646 (1973) (holding that New York statute excluding aliens from permanent positions in the competitive class of the state civil service violated equal protection).

States, and a school district policy that denied enrollment to such children.[4] The Court noted that aliens present within the United States, even unlawfully, "have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."[5] Thus, the Court held, the plaintiffs challenging the state law and school district policy that denied them a basic education were entitled to equal protection.[6] The Court concluded that, because the state failed to show that its school enrollment policies advanced a substantial state interest, those policies could not survive constitutional scrutiny.[7] Further, the Court observed that Congress uniquely had the power to create "a complex scheme governing admission to our Nation and status within our borders," and that the state's policy of restricting access to education for aliens "d[id] not operate harmoniously within the federal program."[8] But the Court suggested that the state's policy would have been permissible if it had advanced an "identifiable congressional policy" to limit access to education for unlawfully present aliens.[9]

Although the Federal Government has the exclusive power to regulate immigration, not every state law that pertains to aliens is necessarily a regulation of immigration that is "per se preempted" by that federal power.[10] But state laws that conflict with or pose an obstacle to the federal regulatory scheme are preempted.[11] For example, in *Arizona v. United States*, the Supreme Court in 2012 held that Arizona laws that made it a misdemeanor to fail to comply with federal alien-registration requirements, that made it a misdemeanor for an unlawfully present alien to seek or engage in employment in the state, and that authorized police officers to arrest aliens on the grounds that they were potentially removable were preempted by federal law.[12] Citing the Federal Government's "broad, undoubted power over the subject of immigration and the status of aliens," the Court determined that the Arizona provisions intruded into areas that Congress already regulated, and conflicted with Congress's existing statutory framework governing aliens.[13]

The Supreme Court's greater scrutiny of state laws reveals an important "distinction between the constitutional limits on state power and the constitutional grant of power to the Federal Government" with respect to immigration.[14] The Court's jurisprudence suggests that the Court is willing to give more deference to Congress's policy choices in the immigration context because "it is the business of the political branches of the Federal Government, rather

[4] Plyler v. Doe, 457 U.S. 202, 226–30 (1982).

[5] *Id.* at 210 (citing Shaughnessy v. United States *ex rel.* Mezei, 345 U.S. 206, 212 (1953); Wong Wing v. United States, 163 U.S. 228, 238 (1896); Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

[6] *Id.* at 215.

[7] *Id.* at 227–30.

[8] *Id.* at 225–26.

[9] *Id.* at 225.

[10] DeCanas v. Bica, 424 U.S. 351, 355 (1976), *superseded by statute*, Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359, *as recognized in* Arizona v. United States, 567 U.S. 387, 404–05 (2012).

[11] *See Arizona*, 567 U.S. at 399 (recognizing that "the States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance," and that, additionally, "state laws are preempted when they conflict with federal law"); Hines v. Davidowitz, 312 U.S. 52, 66–67 (1941) ("And where the federal government, in the exercise of its superior authority in this field, has enacted a complete scheme of regulation and has therein provided a standard for the registration of aliens, states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations.").

[12] *Arizona*, 567 U.S. at 404–07.

[13] *Id.* at 394, 400–10; *but see* Kansas v. Garcia, No. 17-834, slip op. 14–19 (U.S. Mar. 3, 2020) (holding that federal laws setting forth the terms and conditions in which aliens may work in the United States did not preempt state laws that allowed criminal prosecutions against aliens who provided false Social Security numbers on their tax withholding forms when they obtained employment, because the state laws only regulated the fraudulent use of tax forms and did not purport to regulate the employment of aliens in the United States).

[14] Mathews v. Diaz, 426 U.S. 67, 85 (1976).

than that of either the States or the Federal Judiciary, to regulate the conditions of entry and residence of aliens."[15] Conversely, the Court is willing to exercise less judicial restraint when the constitutional challenge in question involves the relationship between aliens and states rather than aliens and the Federal Government, especially if the state's policy encroaches upon the Federal Government's authority.[16]

Section 9—Powers Denied Congress

Clause 1—Migration or Importation

ArtI.S9.C1.1 Restrictions on the Slave Trade

Article I, Section 9, Clause 1:

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

This sanction for the importation of slaves by the states for twenty years after the adoption of the Constitution, when considered with the section requiring escaped slaves to be returned to their masters, Article IV, Section 1, Clause 3, was held by Chief Justice Roger Taney in *Scott v. Sandford*[1] to show conclusively that such persons and their descendants were not embraced within the term "citizen" as used in the Constitution. Today this ruling is interesting only as a historical curiosity.

Clause 2—Habeas Corpus

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

Article I, Section 9, Clause 2:

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

This Clause is the only place in the Constitution in which the Great Writ is mentioned, a strange fact in the context of the regard with which the right was held at the time the Constitution was written[1] and stranger in the context of the role the right has come to play in the Supreme Court's efforts to constitutionalize federal and state criminal procedure.[2]

Only the Federal Government and not the states, it has been held obliquely, is limited by the Clause.[3] The issue that has always excited critical attention is the authority in which the Clause places the power to determine whether the circumstances warrant suspension of the

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[15] *Id.* at 84. In *Mathews*, the Supreme Court explained that the Federal Government is uniquely entrusted with the responsibility of "regulating the relationship between the United States and our alien visitors," and that because the Federal Government's role in that respect implicates foreign relations and "changing political and economic circumstances," the Federal Government's immigration decisions are "frequently of a character more appropriate to either the Legislature or the Executive than to the Judiciary." *Id.* at 81.

[16] *Id.* at 84–85.

[1] 60 U.S. (19 How.) 393, 411 (1857).

[1] R. Walker, The American Reception of the Writ of Liberty (1961).

[2] *See* ArtIII.S1.6.9 Habeas Review.

[3] Gasquet v. Lapeyre, 242 U.S. 367, 369 (1917).

privilege of the Writ.[4] The Clause itself does not specify, and although most of the clauses of Section 9 are directed at Congress not all of them are.[5] At the Convention, the first proposal of a suspending authority expressly vested "in the legislature" the suspending power,[6] but the author of this proposal did not retain this language when the matter was taken up,[7] the present language then being adopted.[8] Nevertheless, Congress's power to suspend was assumed in early commentary[9] and stated in dictum by the Court.[10] President Abraham Lincoln suspended the privilege on his own motion in the early Civil War period,[11] but this met with such opposition[12] that he sought and received congressional authorization.[13] Three other suspensions were subsequently ordered on the basis of more or less express authorizations from Congress.[14]

When suspension operates, what is suspended? In *Ex parte Milligan*,[15] the Court asserted that the Writ is not suspended but only the privilege, so that the Writ would issue and the issuing court on its return would determine whether the person applying can proceed, thereby passing on the constitutionality of the suspension and whether the petitioner is within the terms of the suspension.

Restrictions on habeas corpus placed in the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) have provided occasion for further analysis of the scope of the Suspension Clause. AEDPA's restrictions on successive petitions from state prisoners are "well within the compass" of an evolving body of principles restraining "abuse of the writ," and hence do not amount to a suspension of the Writ within the meaning of the Clause.[16] Interpreting IIRIRA so as to avoid what it viewed as a serious constitutional problem, the Court in another case held that Congress had not evidenced clear intent to eliminate federal court habeas corpus jurisdiction to determine whether the Attorney General retained discretionary authority to

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[4] In form, of course, Clause 2 is a limitation of power, not a grant of power, and is in addition placed in a section of limitations. It might be argued, therefore, that the power to suspend lies elsewhere and that this Clause limits that authority. This argument is opposed by the little authority there is on the subject. 3 The Records of the Federal Convention of 1787, at 213 (Max Farrand ed., 1937); *Ex parte* Merryman, 17 F. Cas. 144, 148 (No. 9487) (C.C.D. Md. 1861); *but cf.* 3 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 464 (Edmund Randolph, 2d ed. 1836). At the Convention, Gouverneur Morris proposed the language of the present Clause: the first section of the Clause, down to "unless" was adopted unanimously, but the second part, qualifying the prohibition on suspension was adopted over the opposition of three states. 2 Farrand, *supra*, at 438. It would hardly have been meaningful for those states opposing any power to suspend to vote against this language if the power to suspend were conferred elsewhere.

[5] *Cf.* Clauses 7, 8.

[6] 2 Records of the Federal Convention of 1787, at 341 (Max Farrand ed., 1937).

[7] *Id.* at 438.

[8] *Id.*

[9] 3 Joseph Story, Commentaries on the Constitution of the United States 1336 (1833).

[10] *Ex parte* Bollman, 8 U.S. (4 Cr.) 75, 101 (1807).

[11] *Cf.* J. Randall, Constitutional Problems Under Lincoln 118–39 (rev. ed. 1951).

[12] Including a finding by Chief Justice Roger Taney on circuit that the President's action was invalid. *Ex parte* Merryman, 17 F. Cas. 144 (No. 9487) (C.C.D. Md. 1861).

[13] Act of March 3, 1863, 1, 12 Stat. 755. *See* George Sellery, *Lincoln's Suspension of Habeas Corpus as Viewed by Congress*, 1 U. Wis. History Bull. 213 (1907).

[14] The privilege of the Writ was suspended in nine counties in South Carolina in order to combat the Ku Klux Klan, pursuant to Act of April 20, 1871, 4, 17 Stat. 14. It was suspended in the Philippines in 1905, pursuant to the Act of July 1, 1902, 5, 32 Stat. 692. *Cf.* Fisher v. Baker, 203 U.S. 174 (1906). Finally, it was suspended in Hawaii during World War II, pursuant to a section of the Hawaiian Organic Act, 67, 31 Stat. 153 (1900). *Cf.* Duncan v. Kahanamoku, 327 U.S. 304 (1946). For the problem of de facto suspension through manipulation of the jurisdiction of the federal courts, *see* discussion under Article III, ArtIII.S1.5.1 Overview of Congressional Control Over Judicial Power.

[15] 71 U.S. (4 Wall.) 2, 130–131 (1866).

[16] Felker v. Turpin, 518 U.S. 651 (1996).

waive deportation for a limited category of resident aliens who had entered guilty pleas before IIRIRA repealed the waiver authority.[17] "[At] the absolute minimum," the Court wrote, "the Suspension Clause protects the writ as it existed in 1789. At its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest."[18]

Building on its statement concerning the "minimum" reach of the Suspension Clause, the Court, in *Department of Homeland Security v. Thuraissigiam*, explored what the habeas writ protected, as it existed in 1789.[19] *Thuraissigiam* involved a Suspension Clause challenge to a provision in IIRIRA limiting when an asylum seeker could seek habeas review to challenge a removal decision and stay in the United States.[20] Proceeding on the assumption that the Suspension Clause only prohibited limitations on the common-law habeas writ,[21] the Court concluded that the Writ at the time of the Founding "simply provided a means of contesting the lawfulness of restraint and securing release."[22] The asylum seeker in *Thuraissigiam* did not ask to be released from United States custody, but instead sought vacatur of his removal order and a new opportunity to apply for asylum, which if granted would enable him to remain in the United States.[23] The Court concluded that such relief fell outside the scope of the common-law habeas writ.[24] As a consequence, the Court held that, at least with respect to the relief sought by the respondent, Congress did not violate the Suspension Clause by limiting habeas relief for asylum seekers in IIRIRA.[25]

The question remains as to what aspects of habeas are aspects of this broader habeas are protected against suspension. Noting that the statutory writ of habeas corpus has been expanded dramatically since the First Congress, the Court has written that it "assume[s] . . . that the Suspension Clause of the Constitution refers to the writ as it exists today, rather than

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[17] INS v. St. Cyr, 533 U.S. 289 (2001).

[18] 533 U.S. at 301 (internal quotation marks and citation omitted).

[19] 140 S. Ct. 1959, 1968–69 (2020).

[20] In relevant part, IIRIRA limited the review that an alien in expedited removal proceedings could obtain through a habeas petition by allowing habeas review of three matters: (1) whether the petitioner was an alien; (2) whether the petitioner was "ordered removed"; and (3) whether the petitioner had already been granted entry as a lawful permanent resident, refugee, or asylee. *See* 8 U.S.C. § 1252(e)(2)(A)–(C). The asylum seeker in *Thuraissigiam* challenged these jurisdictional limits, arguing they precluded review of a determination that he lacked a credible fear of persecution in his home country, of which an affirmative finding would enable him to enter the United States. *Thuraissigiam*, 140 S. Ct. at 1966–68.

[21] The respondent in *Thuraissigiam* stated "there is no reason" for the Court to consider anything beyond whether the writ of habeas corpus, as it existed in 1789, encompassed the relief sought. *Thuraissigiam*, 140 S. Ct. at 1969 & n.12.

[22] *Id.* at 1969 (discussing the views of William Blackstone and Justice Joseph Story, among others).

[23] *Id.* at 1969–71.

[24] In so concluding, the Court rejected the argument that three bodies of case law—(1) "British and American cases decided prior to or around the time of the adoption of the Constitution;" (2) decisions from the Court during the so-called "finality era" from the late nineteenth to the mid-twentieth century; and (3) two more recent cases—suggested that the Suspension Clause "guarantees a broader habeas right" than the right to contest the lawfulness of restraint and seek release. *Id.* at 1971–82. With regard to the early British and American cases, the *Thuraissigiam* Court viewed those cases to suggest that the habeas writ could only be used to secure a "simple release" from government custody. *Id.* at 1971–76. With respect to the finality-era case law, the Court viewed those cases, including *Nishimura Ekiu v. United States,* 142 U.S. 651 (1892), as simply interpreting the scope of the then-existing habeas statute and not what limitations the Suspension Clause imposes on Congress. *Thuraissigiam*, 140 S. Ct. at 1976–81. Finally, the Court distinguished two more recent cases, *Boumediene v. Bush,* 553 U.S. 723 (2008) and *INS v. St. Cyr,* 533 U.S. 289 (2001), holding that the former case did not pertain to immigration and that the latter case involved using habeas as a vehicle to seek the release of aliens who were in custody pending deportation proceedings. *Thuraissigiam*, 140 S. Ct. at 1981–82.

[25] *Thuraissigiam*, 140 S. Ct. at 1963–64.

as it existed in 1789."[26] This statement, however, appears to be in tension with the theory of congressionally defined habeas found in *Bollman*, unless one assumes that a habeas right, once created, cannot be diminished. The Court, however, in reviewing provisions of the Antiterrorism and Effective Death Penalty Act[27] that limited habeas, passed up an opportunity to delineate Congress's permissive authority over habeas, finding that none of the limitations to the writ in that statute raised questions of constitutional import.[28]

In *Boumediene v. Bush*,[29] in which the Court held that Congress's attempt to eliminate all federal habeas jurisdiction over "enemy combatant" detainees held at Guantanamo Bay[30] violated the Suspension Clause. Although the Court did not explicitly identify whether the underlying right to habeas that was at issue arose from statute, common law, or the Constitution itself, it did decline to infer "too much" from the lack of historical examples of habeas being extended to enemy aliens held overseas.[31] In *Boumediene*, the Court instead emphasized a "functional" approach that considered the citizenship and status of the detainee, the adequacy of the process through which the status determination was made, the nature of the sites where apprehension and detention took place, and any practical obstacles inherent in resolving the prisoner's entitlement to the writ.[32]

In further determining that the procedures afforded to the detainees to challenge their detention in court were not adequate substitutes for habeas, the Court noted the heightened due process concerns when a detention is based principally on Executive Branch proceedings—here, Combatant Status Review Tribunals (CSRTs)—rather than proceedings before a court of law.[33] The Court also expressed concern that the detentions had, in some cases, lasted as long as six years without significant judicial oversight.[34] The Court further noted the limitations at the CSRT stage on a detainee's ability to find and present evidence to challenge the government's case, the unavailability of assistance of counsel, the inability of a detainee to access certain classified government records which could contain critical allegations against him, and the admission of hearsay evidence. While reserving judgment as to whether the CSRT process itself comports with due process, the Court found that the

[26] Felker v. Turpin, 518 U.S. 651, 663–64 (1996). *See* INS v. St. Cyr, 533 U.S. 289, 300–01 (2001) (leaving open the question of whether post-1789 legal developments are protected); Swain v. Pressley, 430 U.S. 372 (1977) (finding "no occasion" to define the contours of constitutional limits on congressional modification of the writ).

[27] Pub. L. No. 104-132, §§ 101–08, 110 Stat. 1214, 1217–26, amending, *inter alia*, 28 U.S.C. §§ 2244, 2253, 2254, 2255, and Fed. R. App. P. 22.

[28] Felker v. Turpin, 518 U.S. 651 (1996).

[29] 128 S. Ct. 2229 (2008).

[30] In *Rasul v. Bush*, 542 U.S. 466 (2004), the Court found that 28 U.S.C. § 2241, the federal habeas statute, applied to these detainees. Congress then removed all court jurisdiction over these detainees under the Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1) (providing that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay)." After the Court decided in *Hamdan v. Rumsfeld,* 548 U.S. 557 (2006), that the Detainee Treatment Act did not apply to detainees whose cases were pending at the time of enactment, it was amended by the Military Commissions Act of 2006, Pub. L. No. 109-366, to also apply to pending cases where a detainee had been determined to be an enemy combatant.

[31] 128 S. Ct. at 2251.

[32] 128 S. Ct. at 2258, 2259.

[33] Under the Detainee Treatment Act, Pub. L. No. 109-148, Title X, Congress granted only a limited appeal right to determination made by the Executive Branch as to "(I) whether the status determination of [a] Combatant Status Review Tribunal . . . was consistent with the standards and procedures specified by the Secretary of Defense . . . and (ii) to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to make the determination is consistent with the Constitution and laws of the United States." § 1005(e)(2)(C).

[34] 128 S. Ct. at 2263, 2275.

appeals process for these decisions, assigned to the United States Court of Appeals for the District of Columbia, did not contain the means necessary to correct errors occurring in the CSRT process.[35]

Clause 3—Nullification

ArtI.S9.C3.1 Historical Background on Bills of Attainder

Article 1, Section 9, Clause 3

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

A bill of attainder is legislation that imposes punishment on a specific person or group of people without a judicial trial.[1] The term has its roots in English law before the Founding. As the Supreme Court has explained:

> The bill of attainder, a parliamentary act sentencing to death one or more specific persons, was a device often resorted to in sixteenth, seventeenth and eighteenth century England for dealing with persons who had attempted, or threatened to attempt, to overthrow the government.[2]

A related sanction, known as a "bill of pains and penalties," historically referred to legislation imposing extrajudicial punishments less severe than death, such as banishment or deprivation of political rights.[3] Bills of attainder and bills of pains and penalties were legal in England at the time of the Founding, and state legislatures in the United States also enacted bills of attainder and bills of pains and penalties during the Revolution.[4] However, two separate clauses of the Constitution, Article I, Sections 9 and 10, respectively banned enactment of bills of attainder by the Federal Government and the states.[5]

The Framers adopted the constitutional prohibitions on bills of attainder unanimously and without debate.[6] However, sources from around the time of the Founding outline key concerns underlying the Bill of Attainder Clauses. In the *Federalist No. 44*, James Madison noted that

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[35] The Court focused in particular on the inability of the reviewing court to admit and consider relevant exculpatory evidence that was not introduced in the prior proceeding. The Court also listed other potential constitutional infirmities in the review process, including the absence of provisions empowering the D.C. Circuit to order release from detention, and not permitting petitioners to challenge the President's authority to detain them indefinitely.

[1] *See, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977). In construing an analogous constitutional provision prohibiting the States from enacting bills of attainder, U.S. Const. art. I § 10 cl. 1, the Supreme Court has held that the clause "is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts." Frank v. Magnum, 237 U.S. 309, 344 (1915). *Accord* Ross v. Oregon, 227 U.S. 150, 161 (1913).

[2] United States v. Brown, 381 U.S. 437, 441 (1965). A bill of attainder also resulted in forfeiture of the target's property, including the right of the person's heirs to inherit it. *Id.* ("In addition to the death sentence, attainder generally carried with it a 'corruption of blood,' which meant that the attainted party's heirs could not inherit his property.").

[3] *Id.* at 441–42.

[4] *Id.* at 442. As one notable example, in 1778, Thomas Jefferson drafted, and the Virginia House of Delegates enacted, a bill of attainder targeting a man accused of offenses including treason, murder, and arson. 2 The Papers of Thomas Jefferson 189 (J. Boyd ed., 2018).

[5] For the prohibition on state bills of attainder, see U.S. Const. art. I, § 10, cl. 1. *See also* ArtI.S10.C1.4 State Bills of Attainder. The Supreme Court appears to have interpreted the federal and state prohibitions as having the same scope. *See, e.g.*, *Ex parte* Garland, 71 U.S. 333, 377–78 (1866) ("In [Cummings v. Missouri, 71 U.S. 277 (1866)] we have had occasion to consider [the state Bill of Attainder Clause] . . . A like prohibition is contained in the Constitution against enactments of this kind by Congress; and the argument presented in that case against certain clauses of the constitution of Missouri is equally applicable to the act of Congress under consideration in this case."); *Nixon*, 433 U.S. at 468–76 (citing *Cummings* in case applying federal Bill of Attainder Clause).

[6] *Brown*, 381 U.S. at 441.

many states had enacted constitutional provisions banning bills of attainder.[7] Observing that bills of attainder "are contrary to the first principles of the social compact, and to every principle of sound legislation," he opined that it was appropriate for the Framers also to ban the practice in the federal constitution, "add[ing] this constitutional bulwark in favor of personal security and private rights."[8] Joseph Story's *Commentaries* explained that bills of attainder undermine both separation of powers and the individual right to a judicial trial.[9]

ArtI.S9.C3.2 Bills of Attainder Doctrine

Article 1, Section 9, Clause 3

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

Supreme Court cases have given "broad and generous meaning to the constitutional protection against bills of attainder" by interpreting it to ban not only legislation imposing a death sentence, as the term was used at English common law, but also legislation that imposes other forms of punishment on specific persons without trial.[1] However, the Court has emphasized that legislation does not violate the Bill of Attainder Clause simply because it places legal burdens on a specific individual or group.[2] Rather, as discussed in more detail below, a bill of attainder must also inflict *punishment*.[3] Another key feature of a bill of attainder is that it applies retroactively: the Supreme Court has held that the Bill of Attainder Clause does not apply to legislation that "is intended to prevent future action rather than to punish past action."[4] The Court has also held that the prohibition on bills of attainder does not safeguard the states against allegedly punitive federal legislation[5] and does not protect U.S. citizens who commit crimes abroad and face trial in other jurisdictions.[6] Overall, the Supreme Court's decisions suggest that the Court has applied the Bill of Attainder Clause to prevent legislatures from circumventing the courts by punishing people without due process of law.

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[7] The Federalist No. 44 (James Madison).

[8] *Id.*

[9] 3 Joseph Story, Commentaries on the Constitution of the United States § 1338 (1833) (In bill of attainder cases, "the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence, or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discretion, being governed solely by what it deems political necessity or expediency, and too often under the influence of unreasonable fears, or unfounded suspicions.").

[1] *Nixon*, 433 U.S. at 469; *see also* Fletcher v. Peck, 10 U.S. 87, 138 (1810) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.").

[2] *Id.* at 470–71.

[3] *Id.* at 472–73; *see also* Trop v. Dulles, 356 U.S. 86, 95–96 (1958) ("Each time a statute has been challenged as being in conflict with the constitutional prohibitions against bills of attainder and ex post facto laws, it has been necessary to determine whether a penal law was involved, because these provisions apply only to statutes imposing penalties." (footnotes omitted)).

[4] American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 414 (1950). The Bill of Attainder Clause is one of several constitutional provisions that limit the ability of the Federal Government and the states to legislate retroactively. *See* Landgraf v. USI Film Prods., 511 U.S. 244, 266 (1994).

[5] South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966) ("[C]ourts have consistently regarded the Bill of Attainder Clause of Article I and the principle of the separation of powers only as protections for individual persons and private groups, those who are peculiarly vulnerable to non-judicial determinations of guilt. . . . Nor does a State have standing as the parent of its citizens to invoke these constitutional provisions against the Federal Government, the ultimate parens patriae of every American citizen." (internal citations omitted)).

[6] Neely v. Henkel, 180 U.S. 109, 122 (1901) (holding that constitutional provisions including the Bill of Attainder Clause "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country").

The Supreme Court applied the constitutional prohibitions on bills of attainder in a pair of Reconstruction-era cases, *Ex parte Garland*[7] and *Cummings v. Missouri*.[8] *Garland* concerned a federal statute, while *Cummings* involved a post-Civil War amendment to the Missouri constitution, but both of the challenged provisions required persons engaged in certain professions to swear an oath that they had never been disloyal to the United States.[9] In both cases, the Court held that the effect of the challenged provisions was to punish a group of individuals who had been disloyal to the United States, and the punishment they faced was effective exclusion from the covered professions.[10]

Based on that holding, the Supreme Court invalidated the provisions as unconstitutional bills of attainder.[11] In *Cummings*, the Court noted that the challenged state constitutional provisions did not expressly "define any crimes, or declare that any punishment shall be inflicted, but they produce[d] the same result upon the parties, against whom they are directed, as though the crimes were defined and the punishment was declared."[12] The provisions "aimed at past acts, and not future acts," and were "intended to operate by depriving such persons of the right to hold certain offices and trusts, and to pursue their ordinary and regular avoications."[13] The Court held that this deprivation constituted a punishment, and that the purported option to avoid the restriction by swearing a loyalty oath did not make it less so:

> The framers of the constitution of Missouri knew at the time that whole classes of individuals would be unable to take the oath prescribed. To them . . . the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act.[14]

In *Garland*, the Court applied its reasoning in *Cummings* to strike down the similar federal law.[15]

In the 1946 case *United States v. Lovett*, the Supreme Court struck down as a bill of attainder an appropriations bill cutting off the pay of certain named federal employees accused of being "subversives."[16] The Court explained that the challenged legislation effectively declared specific persons guilty of the crime of subversive activities "without the safeguards of

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[7] 71 U.S. 333 (1866).

[8] 71 U.S. 277 (1866).

[9] *See Garland*, 71 U.S. at 334–35 (federal statute required attorneys practicing in federal court to swear an oath that they had never voluntarily borne arms against the United States or "given . . . aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto"); *Cummings*, 71 U.S. at 280 (state constitutional provision required members of the clergy and others to swear, "I have always been truly and loyally on the side of the United States against all enemies thereof, foreign and domestic").

[10] *See Garland*, 71 U.S. at 377 ("The statute is directed against parties who have offended in any of the particulars embraced by these clauses [related to past disloyalty]. And its object is to exclude them from the profession of the law, or at least from its practice in the courts of the United States."); *Cummings*, 71 U.S. at 320 (The oath requirement "was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.").

[11] *Cummings*, 71 U.S. at 325–29; *Garland*, 71 U.S. at 380.

[12] *Cummings*, 71 U.S. at 327.

[13] *Id.*

[14] *Id.*

[15] *Garland*, 71 U.S. at 377–78.

[16] 328 U.S. 303, 315 (1946).

a judicial trial."[17] The legislation further permanently barred those persons from government service, which qualified as "punishment . . . of a most severe type."[18] Similarly, in the 1965 case *United States v. Brown*, the Court held that a federal statute making it a crime for a member of the Communist Party to serve as an officer of a labor union was a bill of attainder.[19] The *Brown* Court eschewed a rigid historical view of the Bill of Attainder Clause, explaining that the clause

> was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function, or more simply-trial by legislature.[20]

The Court concluded that Congress had "exceeded the authority granted it by the Constitution" in enacting the challenged statute because, rather than creating generally applicable rules for courts to apply, the statute "designate[d] in no uncertain terms the persons who possess . . . feared characteristics and therefore cannot hold union office without incurring criminal liability—members of the Communist Party."[21] By contrast, in roughly contemporaneous cases, the Supreme Court rejected bill of attainder challenges to a decision of the Secretary of Health, Education and Welfare terminating old-age insurance benefits of an individual who had been deported[22] and an order of the Subversive Activities Control Board requiring the Communist Party of the United States to register as a "Communist-action organization."[23]

The Supreme Court articulated the current test for whether a law is a bill of attainder in the 1977 case *Nixon v. Administrator of General Services*.[24] In that case, former President Richard M. Nixon challenged provisions of a federal statute that directed the Administrator of General Services to take custody of and preserve his presidential papers and tape recordings.[25] The Court held that a statute constitutes a bill of attainder only if it both applies with specificity and imposes punishment without trial.[26] With respect to the legislation before it, the Supreme Court acknowledged "the Act's specificity—the fact that it refer[red] to [President Nixon] by name."[27] However, the Court rejected the proposition that an individual or defined group is subject to a bill of attainder "whenever he or it is compelled to bear burdens which the individual or group dislikes."[28] Instead, the Court explained, Congress may in some

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[17] *Id.* at 317. *See also* Bigelow v. Forrest, 76 U.S. 339, 345 (1869) ("[The] limitation upon *bills of attainder* does not apply to proceedings in courts, in individual cases, where there are regular trials and formal proceedings in which the individual has full opportunity to defend.").

[18] *Id.* at 313, 316.

[19] 381 U.S. 437, 440 (1965).

[20] *Id.* at 442.

[21] *Id.* at 450.

[22] Flemming v. Nestor, 363 U.S. 603, 617 (1960) (holding that "the mere denial of a noncontractual governmental benefit" was not sufficently punitive to constitute a bill of attainder).

[23] Communist Party of U.S. v. Subversive Activities Control Bd., 367 U.S. 1, 86 (1961) (registration requirement was not a bill of attainder because "[i]t attache[d] not to specified organizations but to described activities in which an organization may or may not engage," the registration requirement applied only "after full administrative hearing, subject to judicial review," and the law was not retroactive since parties subject to it could "escape regulation merely by altering the course of their own present activities").

[24] 433 U.S. 425 (1977).

[25] *Id.* at 429.

[26] *Id.* at 471–73.

[27] *Id.* at 471–72.

[28] *Id.* at 470.

circumstances regulate "a legitimate class of one."[29] If such a law applies with specificity but does not impose punishment, it will not be struck down as a bill of attainder.[30]

The *Nixon* Court then proceeded to lay out three tests for assessing whether a law imposes punishment: (1) historical, (2) functional, and (3) motivational. The historical test looks to "[t]he infamous history of bills of attainder" to determine whether the law was one of a limited set of legislative actions that were deemed to be bills of attainder before the Founding and in prior Supreme Court cases.[31] Those historical punishments included pre-Founding legislation imposing death sentences, imprisonment, and banishment, as well as the employment bans that were struck down in *Cummings*, *Lovett*, and *Brown*.[32] The functional test considers "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes."[33] The motivational test looks to legislative history to determine "whether the legislative record evinces a congressional intent to punish."[34] Finding that none of the three tests were satisfied in *Nixon*, the Supreme Court concluded that the law requiring the transfer and preservation of the presidential records did not qualify as a punishment under any of these three tests.[35]

The Court has continued to apply the *Nixon* framework in its rare Bill of Attainder cases since 1977. In *Selective Service System v. Minnesota Public Interest Research Group*, the Supreme Court rejected a bill of attainder challenge to a federal statute that denied student financial assistance to male students who failed to register for the draft.[36] After holding that the statute did not single out a specific group based on past actions because "those failing to register timely can qualify for aid by registering late," the Court concluded that none of the *Nixon* tests suggested that the law was punitive.[37]

ArtI.S9.C3.3 Ex Post Facto Laws

ArtI.S9.C3.3.1 Overview of Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

Separate provisions of the Constitution ban enactment of ex post facto laws by the Federal Government and the states, respectively.[1] The Supreme Court has cited cases interpreting the

[29] *Id.* at 472.

[30] *Id.*

[31] *Id.* at 473.

[32] *Id.* at 474–75.

[33] *Id.* at 475–76. *See also* Trop v. Dulles, 356 U.S. 86, 96 (1958) ("If [a] statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.").

[34] *Id.* at 478. "[O]nly the clearest proof could suffice to establish the unconstitutionality of a statute" based on punitive intent. Flemming v. Nestor, 363 U.S. 603, 617 (1960).

[35] *Id.* at 484. In *Local 28 of Sheet Metal Workers' Int'l Ass'n v. Equal Employment Opportunity Com'n*, the Supreme Court rejected as without merit the argument that a construction of Title VII of the Civil Rights Act of 1964 allowing a court to impose an affirmative action plan on an entity that violated Title VII had "the effect of making the Civil Rights Act an unconstitutional bill of attainder, visiting upon white persons the sins of past discrimination by others." 478 U.S. 421, 481 n.50 (1986).

[36] 468 U.S. 841, 856 (1984).

[37] *Id.* at 850–56.

[1] U.S. Const. art. I, § 9, cl. 3; art. I, § 10, cl. 1. While there are two Ex Post Facto Clauses, only one of the two can apply to any given piece of legislation. Courts and commentators at times distinguish between the federal Ex Post

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federal Ex Post Facto Clause in challenges under the state clause, and vice versa, implying that the two clauses have the same scope.[2] The Court has construed both clauses to ban legislatures from enacting laws that impose criminal liability or increase criminal punishment retroactively.[3] The constitutional prohibitions of ex post facto laws are closely related to the prohibitions of bills of attainder—legislative actions that determine guilt or impose criminal punishment on specific persons or groups without a judicial trial.[4] In some cases, the Court has held that a single legislative action may violate both the ex post facto and bill of attainder prohibitions.[5]

Some ex post facto cases involve facial challenges—claims that the challenged laws are invalid in all circumstances.[6] Many, however, involve claims that the Ex Post Facto Clauses bar applying laws to specific offenses that were committed before the laws' enactment.[7] The Supreme Court has denied ex post facto claims when it has found that a law is not ex post facto as applied to the challenger, even when the law might be ex post facto as applied to others not before the Court.[8]

The Supreme Court has held that the constitutional prohibitions on ex post facto laws do not apply to crimes committed outside the jurisdiction of the United States against the laws of a foreign country.[9]

ArtI.S9.C3.3.2 Historical Background on Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

An ex post facto law, named using the Latin phrase for "after the fact," is a law that imposes criminal liability or increases criminal punishment retroactively.[1] Two separate clauses of the Constitution, Article I, Sections 9 and 10, respectively ban enactment of ex post facto laws by the Federal Government and the states.[2]

Facto Clause and the state Ex Post Facto Clause, but also sometimes use the singular "Ex Post Facto Clause" without explicitly distinguishing between the two. *E.g.*, Dorsey v. United. States 567 U.S. 260, 275 (2012) ("Although the Constitution's Ex Post Facto Clause, Art. I, § 9, cl. 3, prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties.").

[2] *See, e.g.*, Peugh v. United States, 569 U.S. 530, 532–33 (2013) (case construing federal clause citing case construing state clause); Reetz v. Michigan, 188 U.S. 505, 510 (1903) (case construing state clause citing case construing federal clause).

[3] *See*, *e.g.*, *Calder*, 3 U.S. at 389; *Peugh*, 569 U.S. at 532–33; Baltimore and Susquehanna R.R. v. Nesbit, 51 U.S. 395, 401 (1850) (a state can enact a retroactive law that is not punitive and does not impair the obligation of contracts). *See also* Fletcher v. Peck, 10 U.S. 87, 138 (1810) ("An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed."); Locke v. New Orleans, 71 U.S. 172, 173 (1867); Orr v. Gilman, 183 U.S. 278, 285 (1902).

[4] *E.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 537–38 (1977).

[5] *E.g.*, Cummings v. Missouri, 71 U.S. 277 (1866); *Ex parte* Garland, 71 U.S. 333 (1866).

[6] *See, e.g.*, *Garland*, 71 U.S. at 382; *cf.* Jaehne v. New York, 128 U.S. 189, 194 (1888) (challenger argued that a law was facially invalid because it could be ex post facto in some cases).

[7] *See, e.g.*, Lindsey v. Washington, 301 U.S. 397, 398 (1937); Weaver v. Graham, 450 U.S. 24, 28–33 (1981).

[8] *Jaehne*, 128 U.S. at 194 (law that might be void as applied to pre-enactment offenses was not void as applied to post-enactment offenses); Bugajewitz v. Adams, 228 U.S. 585, 608–09 (1913).

[9] Neely v. Henkel, 180 U.S. 109, 123 (1901).

[1] *E.g.*, Locke v. New Orleans, 71 U.S. 172, 173 (1867).

[2] For the prohibition on state ex post facto laws, see U.S. Const. art. I, § 10, cl. 1. *See also* ArtI.S10.C1.5 State Ex Post Facto Laws.

In the *Federalist No. 44*, James Madison asserted that ex post facto laws "are contrary to the first principles of the social compact, and to every principle of sound legislation."[3] In the *Federalist No. 84*, Alexander Hamilton further justified prohibitions on ex post facto laws by arguing:

> The creation of crimes after the commission of the fact, or . . . punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.[4]

The prohibition on ex post facto laws seeks "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed" and "restricts governmental power by restraining arbitrary and potentially vindictive legislation."[5] The Supreme Court has further stated that the prohibition is based on

> the notion that laws . . . which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act . . . should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.[6]

At the Constitutional Convention, multiple delegates expressed disapproval of ex post facto laws. However, some believed that an explicit constitutional prohibition of ex post facto laws was unnecessary because such laws were clearly invalid. One delegate "contended that there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves."[7] Others asserted that including the prohibition could do harm by "proclaim[ing] that we are ignorant of the first principles of Legislation, or are constituting a Government which will be so" or "implying an improper suspicion of the National Legislature."[8] Other delegates responded that an express prohibition was necessary because some state legislatures had previously passed ex post facto laws, and state constitutional bans of such laws had been invoked to oppose them.[9]

There was also discussion at the Convention as to whether the prohibition on ex post facto laws applied only to retroactive criminal laws or also forbade retroactive civil laws.[10] The delegates rejected a suggestion that would have altered the federal Ex Post Facto Clause to state expressly that it applied to civil laws, but they did not clearly resolve the question.[11] Soon after ratification, in the 1798 case *Calder v. Bull*, the Supreme Court construed the constitutional prohibition on ex post facto laws to prohibit only retroactive criminal laws.[12]

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[3] The Federalist No. 44, at 278–79 (James Madison). Madison further noted that several state constitutions expressly banned ex post facto laws and that in any case such laws were "prohibited by the spirit and scope of these fundamental charters." *Id.*

[4] The Federalist No. 84, at 511 (Alexander Hamilton).

[5] Weaver v. Graham, 450 U.S. 24, 28–29 (1981).

[6] Beazell v. Ohio, 269 U.S. 167, 170 (1925). By contrast, the Supreme Court has held that retroactive criminal statutes that do not disadvantage criminal defendants are not ex post facto laws. *See* ArtI.S9.C3.3.5 Increasing Punishment and Ex Post Facto Laws.

[7] 2 The Records of the Federal Convention of 1787, at 376 (Max Farrand ed., 1911).

[8] *Id.*

[9] *Id.*

[10] *Id.* at 448–49, 617.

[11] *Id.* at 617. *See also id.* at 440 (considering amendment to the state Ex Post Facto Clause that would instead have prohibited enactment of "retrospective laws").

[12] 3 U.S. 386, 389 (1798). *See also* 3 Joseph Story, Commentaries on the Constitution of the United States § 1339 (1833).

ArtI.S9.C3.3.3 Retroactivity of Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

As the phrase "ex post facto" ("after the fact") suggests, the Ex Post Facto Clauses apply only to legislation that imposes or increases a punishment *retroactively*.[1] The Ex Post Facto Clauses are related to other constitutional provisions that limit retroactive government action, including the federal and state Bill of Attainder Clauses, the Contract Clause, and the Due Process Clauses.[2]

In ex post facto cases, the relevant point in time for determining whether a law applies retroactively is the time the offense was committed: the Supreme Court has explained that people must have notice of the possible criminal penalties for their actions at the time they act.[3]

A key consideration in ex post facto cases is whether the specific individuals challenging the law had notice of all the legal consequences of their actions at the time they committed their offenses. The Supreme Court has rejected ex post facto challenges to laws that might apply retroactively in some circumstances but applied only prospectively to the challengers before the Court.[4] The Court has also held that statutes are not retroactive if they apply to past conduct that was also prohibited under a prior statute. For instance, in *Harisiades v. Shaughnessy*, the Court considered ex post facto claims from several resident aliens who had been ordered deported under a 1940 statute based on their pre-1940 membership in the Communist Party.[5] The Court stated that "[a]n impression of retroactivity results from reading as a new and isolated enactment what is actually a continuation of prior legislation."[6] However, the Court noted that membership in organizations such as the Communist Party had been grounds for deportation since 1920. Thus, the challengers "were not caught unawares by a change of law. There can be no contention that they were not adequately forewarned both that their conduct was prohibited and of its consequences."[7]

The Supreme Court has denied ex post facto challenges to laws that impose legal consequences based not solely on past conduct but rather on an ongoing condition that began in the past. In a late nineteenth century case, *Murphy v. Ramsey*, the Court rejected an ex post facto challenge to a law that disenfranchised bigamists and polygamists, holding that the law did not retroactively impose a penalty for a crime.[8] Although bigamy and polygamy were criminal offenses, the Court observed that the criminal offense was the unlawful marriage itself and was subject to a three-year statute of limitations following the marriage, so that a person subject to disenfranchisement might be "a bigamist or a polygamist, and yet guilty of no criminal offense."[9]

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[1] *See, e.g.*, Calder v. Bull, 3 U.S. 386, 391 (1798).

[2] *See, e.g.*, Fletcher v. Peck, 10 U.S. 87, 138–39 (1810).

[3] *See, e.g.*, Weaver v. Graham, 450 U.S. 24, 30 (1981) ("Critical to relief under the Ex Post Facto Clause is . . . the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.").

[4] Jaehne v. New York, 128 U.S. 189, 194 (1888) (law that might be void as applied to pre-enactment offenses was not void as applied to post-enactment offenses); Bugajewitz v. Adams, 228 U.S. 585, 608–09 (1913).

[5] 342 U.S. 580, 581–82 (1952).

[6] *Id.* at 593.

[7] *Id.*

[8] 114 U.S. 15, 36 (1885).

[9] *Id.* at 43.

In *United States v. Trans-Missouri Freight Association*, the Court rejected an ex post facto challenge to the application of an 1890 antitrust law to an agreement begun in 1889.[10] The Court explained that the law did not apply to past conduct but rather to an ongoing violation: even if the agreement was lawful when entered into, "the continuation of the agreement, after it has been declared to be illegal, becomes a violation of the act. . . . There is nothing of an ex post facto character about the act."[11] Similarly, in *Samuels v. McCurdy*, the Court rejected an ex post facto challenge to a law that prohibited the possession of liquor that was legal when purchased.[12] The Court held that the law did not "provide a punishment for a past offense" by penalizing the owner "for having become possessed of the liquor," but instead imposed a penalty for "continuing to possess the liquor after the enactment of the law."[13]

The Supreme Court has rejected multiple ex post facto challenges to repeat offender statutes on the ground that such statutes do not penalize past conduct.[14] In *McDonald v. Massachusetts*, the Court rejected an ex post facto challenge to a "habitual criminal" statute that imposed an increased penalty for post-enactment offenses based on the defendant's previous, pre-enactment criminal convictions.[15] While the defendant argued that the law amounted to an additional punishment for his prior offenses, the Court concluded that the "statute, imposing a punishment on none but future crimes, is not ex post facto."[16] The Court likewise approved the consideration of pre-enactment offenses under a repeat offender statute in *Gryger v. Burke*.[17] The Court explained that the sentence for a habitual criminal "is not to be viewed as . . . additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one."[18]

In *Johnson v. United States*, the Court denied an ex post facto challenge to a statute authorizing courts to impose an additional term of supervised release following the reimprisonment of persons who violate the conditions of an initial term of supervised release.[19] The Court declined to construe the statute to apply retroactively and therefore concluded that "the ex post facto question does not arise."[20]

In *Kansas v. Hendricks*, the Court rejected an ex post facto challenge to a statute allowing for civil commitment of "sexually violent predators," in part because the statue was not retroactive.[21] The Court held that the law allowed for involuntary confinement "based upon a determination that the person currently both suffers from a 'mental abnormality' or

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[10] 166 U.S. 290, 342 (1897).

[11] *Id. See also* Chicago & Alton R.R. v. Tranbarger, 238 U.S. 67, 73 (1915) ("[P]laintiff in error is subjected to a penalty not because of the manner in which it originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act . . ., but because after that time it maintained the embankment in a manner prohibited by that act.").

[12] 267 U.S. 188, 191 (1925).

[13] *Id.* at 193.

[14] *Cf.* Graham v. West Virginia, 224 U.S. 616, 623 (1912) (upholding repeat offender law against non-ex post facto challenges, holding: "The propriety of inflicting severer punishment upon old offenders has long been recognized in this country and in England. They are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted.").

[15] 180 U.S. 311, 311 (1901).

[16] *Id.* at 313.

[17] 334 U.S. 728, 729 (1948).

[18] *Id.* at 732.

[19] 529 U.S. 694, 696 (2000).

[20] *Id.* at 702.

[21] 521 U.S. 346, 371 (1997). The Court also held that the statute was not punitive. *See* ArtI.S9.C3.3.5 Increasing Punishment and Ex Post Facto Laws.

'personality disorder' and is likely to pose a future danger to the public."[22] The Court explained that, under the statute, past behavior was permissably used "solely for evidentiary purposes."[23]

ArtI.S9.C3.3.4 Ex Post Facto Law Prohibition Limited to Penal Laws

Article I, Section 9, Clause 3:

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

Since the 1798 case *Calder v. Bull*, the Supreme Court has interpreted the Ex Post Facto Clauses to apply only to laws that are criminal or penal in nature, not to civil laws.[1] The Court has explained, however, that "the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."[2] In *Calder*, the Court enumerated four ways in which a legislature may violate the Ex Post Facto Clauses' prohibition on imposing retroactive criminal liability: (1) making criminal an action taken before enactment of the law that was lawful when it was done; (2) increasing the severity of an offense after it was committed; (3) increasing the punishment for a crime after it was committed; and (4) altering the rules of evidence after an offense was committed so that it is easier to convict an offender.[3]

Supreme Court decisions from the nineteenth century suggested that a legislature might violate the Ex Post Facto Clauses in ways that do not fit within any of the four categories recognized in *Calder*.[4] However, in the 1990 case *Collins v. Youngblood*, the Court rejected that reasoning and held that the scope of the prohibition on ex post facto laws is "defined by the *Calder* categories."[5]

[22] *Id.*

[23] *Id.*

[1] Calder v. Bull, 3 U.S. 386, 389 (1798); *see also, e.g.*, Watson v. Mercer, 33 U.S. 88, 110 (1834) ("The constitution of the United States does not prohibit the states from passing retrospective laws generally; but only ex post facto laws. Now it has been solemnly settled by this court, that the phrase, ex post facto laws, is not applicable to civil laws, but to penal and criminal laws."). For additional discussion of certain categories of laws that have generally been held to be non-penal in nature, see ArtI.S9.C3.3.10 Retroactive Taxes and Ex Post Facto Laws and ArtI.S9.C3.3.12 Ex Post Facto Laws, Deportation, and Related Issues. For discussion of other constitutional provisions that apply exclusively to penal laws, see ArtI.S9.C3.1 Historical Background on Bills of Attainder, ArtI.S10.C1.4 State Bills of Attainder, and Amdt5.3.1 Overview of Double Jeopardy Clause.

[2] Burgess v. Salmon, 97 U.S. 381, 385 (1878); *see also* Cummings v. Missouri, 71 U.S. 277, 278 (1866).

[3] *Calder*, 3 U.S. at 390. *Cf.* Trop v. Dulles 356 U.S. 86, 95 (1958) ("In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc., it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose. The Court has recognized that any statute decreeing some adversity as a consequence of certain conduct may have both a penal and a nonpenal effect.") (footnotes omitted).

[4] Kring v. Missouri, 107 U.S. 221, 228 (1883), *overruled by* Collins v. Youngblood, 497 U.S. 37 (1990); *cf.* Thompson v. Utah, 170 U.S. 343, 352 (1898) (same).

[5] 497 U.S. 37, 47 (1990).

ArtI.S9.C3.3.5 Increasing Punishment and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

The Supreme Court has denied ex post facto challenges to changes to trial procedures and sentences that do not disadvantage criminal defendants.[1] For instance, in *Dobbert v. Florida*, the Court rejected an ex post facto challenge to a state law that changed the role of the jury in capital cases.[2] The sentencing regime in place at the time the challenger committed his offenses provided for a death sentence upon conviction of a capital felony, unless a majority of the jury chose to depart from the presumption and instead recommended a life sentence. The revised procedure allowed the jury to render a non-binding advisory opinion on whether a death sentence was warranted; the judge then considered aggravating and mitigating circumstances and determined whether to impose a death sentence. A death sentence had to be supported by written findings by the judge and was subject to expedited appellate review.[3] The Supreme Court held that the new regime was not ex post facto, in part because it was "on the whole ameliorative," providing increased procedural protections for defendants.[4]

In *Malloy v. South Carolina*, the Court rejected an ex post facto challenge to a statute that changed the method of execution from hanging to electrocution for persons previously sentenced to death.[5] The change was based on a determination that electrocution was more humane.[6] The Court explained that the law did not change the applicable death sentence, "but only the mode of producing this, together with certain nonessential details in respect of surroundings. The punishment was not increased, and some of the odious features incident to the old method were abated."[7] Similarly, in *Holden v. Minnesota*, the Court held that a statute changing the time of executions and limiting who could attend executions was not ex post facto.[8]

By contrast, the Supreme Court has held that statues that retroactively increase the severity of a criminal sentence are ex post facto laws. Another provision of the statute at issue in *Holden* mandated solitary confinement pending execution.[9] The Court held that such a provision "may be deemed ex post facto, if applied to offenses committed before its passage."[10]

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[1] *See, e.g.*, Dobbert v. Florida, 432 U.S. 282, 294 (1977) ("It is axiomatic that for a law to be ex post facto it must be more onerous than the prior law.").

[2] *Id.* at 284.

[3] *Id.* at 290.

[4] *Id.* at 292. The Court explained, "The Florida Legislature enacted the new procedure specifically to provide the constitutional procedural protections required by [Furman v. Georgia, 408 U.S. 238 (1972)], thus providing capital defendants with more, rather than less, judicial protection." *Id.* at 294–95. Other aspects of the *Dobbert* decision are discussed later in this section and in the section *Procedural Changes*.

[5] 237 U.S. 180, 183 (1915).

[6] *Id.* at 185.

[7] *Id. See also* Rooney v. North Dakota, 196 U.S. 319, 326–27 (1905) (statute increasing the term of imprisonment prior to execution "did not alter the situation to the material disadvantage of the criminal, and, therefore, was not ex post facto when applied to his case in the particulars mentioned"); Dorsey v. United States, 567 U.S. 260, 275 (2012) ("Although the Constitution's Ex Post Facto Clause . . . prohibits applying a new Act's higher penalties to pre-Act conduct, it does not prohibit applying lower penalties.").

[8] 137 U.S. 483, 491 (1890).

[9] *Id.* at 491.

[10] *Id.* The Court ultimately denied the ex post facto claim because it concluded there was no evidence that the prisoner challenging the law was actually being held in solitary confinement. *Id.* at 491–92.

In *In re Medley*, the Court held that a statute that required a previously convicted death row inmate to be held in solitary confinement until execution and not informed of his execution date was ex post facto.[11]

In considering ex post facto challenges to the length of prison sentences, the Court has held that a law may be impermissible if it increases the sentencing range for a past offense, even if it is not certain that the defendant received a higher sentence than he would have under the previous regime. In *Lindsey v. Washington*, criminal defendants challenged as ex post facto a statute that imposed a mandatory *minimum* sentence equal to what had been the *maximum* sentence at the time they committed their offense.[12] The Supreme Court held that the law was ex post facto as applied to pre-enactment offenses. The Court observed that "[t]he effect of the new statute is to make mandatory what was before only the maximum sentence."[13] While acknowledging that the challengers might have received the new mandatory minimum sentence under the prior regime, the Court emphasized that "the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed."[14] Thus, in *Miller v. Florida*, the Court held that new state sentencing guidelines could not be applied retroactively to offenses that had been commited when a lower presumptive sentencing range was in place.[15] Similarly, in *Peugh v. United States*, the Court held that it violated the federal Ex Post Facto Clause when a defendant was sentenced under a new version of the U.S. Sentencing Guidelines promulgated after he committed his offense that provided a higher sentencing range—even though the Guidelines were only advisory and courts were free to impose sentences outside the range.[16]

The Supreme Court has held that statutes that canceled or reduced release credits earned by prisoners were ex post facto laws. In *Weaver v. Graham*, the Court held that a statute reducing credits for good behavior that counted towards early release was ex post facto as applied to a prisoner whose offense occurred before the statue was enacted.[17] In another case, *Lynce v. Mathis*, the Court heard an ex post facto challenge from a prisoner whose early release credits were canceled after he had been released, causing him to be rearrested and returned to prison.[18] The Court held that the retroactive cancellation of credits increased punishment because "it made ineligible for early release a class of prisoners who were previously eligible—including some, like petitioner, who had actually been released."[19]

On the other hand, statutes decreasing the frequency of parole hearings do not necessarily violate the Ex Post Facto Clauses. In *California Department of Corrections v. Morales*, the Supreme Court held that a state law that changed the frequency of parole hearings for certain offenders from annual to every three years did not violate the state Ex Post Facto Clause as applied to prisoners who committed their offenses before its enactment.[20] In *Garner v. Jones*, the Court considered a state parole board rule that increased the time between parole hearings

[11] 134 U.S. 160, 167–73 (1890).

[12] 301 U.S. 397, 398 (1937).

[13] *Id.* at 400.

[14] *Id.* at 401.

[15] 482 U.S. 423, 435–36 (1987). The *Miller* Court explained that "one is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old." *Id.* at 432 (quoting Dobbert v. Florida, 432 U.S. 282, 300 (1977)).

[16] 569 U.S. 530, 533 (2013).

[17] 450 U.S. 24, 28–33 (1981).

[18] 519 U.S. 433, 446–47 (1997).

[19] *Id.* at 447.

[20] 514 U.S. 499, 501–02 (1995).

from three years to as much as eight years.[21] The Court emphasized that the parole board had broad discretion over whether a prisoner was released, and opined that procedural changes within a system that had always allowed such discretion might not undermine the interest in "actual or constructive notice to the criminal before commission of the offense of the penalty for the transgression."[22] The Court explained that the key question in its ex post facto analysis was whether the amended rule "creates a significant risk of prolonging [the challenger's] incarceration."[23] On the record before it, the Court could not conclude the change lengthened his actual time of imprisonment.[24]

ArtI.S9.C3.3.6 Imposing Criminal Liability and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

Congress and state legislatures sometimes enact temporary statutes that apply until a fixed expiration date. In *United States v. Powers*, the Supreme Court held that a legislature may extend a temporary criminal statute before it expires, and that, following the extension, the government may prosecute pre-extension conduct—that is, conduct that occurred while the temporary law was in effect and expected to expire as initially planned—without violating the Ex Post Facto Clause.[1] The Court explained that, due to the extension at issue in that case, "the Act has never ceased to be in effect. No new law was created; no old one was repealed. Without hiatus of any kind, the original Act was given extended life."[2]

In *Dobbert v. Florida*, a prisoner sentenced to death raised a claim that "there was no 'valid' death penalty in effect in Florida as of the date of his actions" because the state had made subsequent changes to sentencing procedures to satisfy newly articulated constitutional requirements.[3] The prisoner committed two murders between December 1971 and April 1972. In July 1972, the Florida Supreme Court found that the state's death penalty statute was inconsistent with the requirements laid out *Furman v. Georgia*.[4] Florida enacted new death penalty procedures in late 1972, and the challenger was convicted and sentenced under the new regime. The prisoner argued that the death penalty statute in effect at the time of his crimes had been struck down, and that applying the new statute to his conduct was ex post facto. The Supreme Court rejected that claim, holding that despite its procedural flaws, the old statute had "clearly indicated Florida's view of the severity of murder and of the degree of punishment" appropriate to that crime.[5]

By contrast, the Supreme Court has held that a legislature may not retroactively reimpose criminal liability after it has lapsed. Many criminal laws contain statutes of limitations that bar prosecution once a certain amount of time passes after an offense is committed. In *Stogner v. California*, the Court held that "a law enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously

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[21] 529 U.S. 244, 247 (2000).

[22] *Id.* at 253.

[23] *Id.* at 251.

[24] *Id.* at 256. The Court remanded the case to the lower federal courts for further consideration of that question. *Id.* at 257.

[1] 307 U.S. 214, 216 (1939).

[2] *Id.* at 217.

[3] 432 U.S. 282, 297 (1977).

[4] 408 U.S. 238 (1972).

[5] *Dobbert*, 432 U.S. at 297.

time-barred prosecution."[6] The Court explained that a law extending a statute of limitations after it had lapsed falls within the second category of ex post facto laws laid out in *Calder*, a "law that aggravates a crime, or makes it greater than it was, when committed," because it "inflict[s] punishments, where the party was not, by law, liable to any punishment."[7]

ArtI.S9.C3.3.7 Civil Commitment, Sex Offender Registration, and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

The Supreme Court has rejected ex post facto challenges to sex offender registration laws and laws imposing civil commitment for "sexually violent predators," holding that such laws are not penal in nature. For instance, in *Kansas v. Hendricks*, the Court rejected an ex post facto challenge to a statute allowing for civil commitment of "sexually violent predators," in part because the statue was not punitive.[1] The Court held that the civil commitment statute did "not implicate either of the two primary objectives of criminal punishment: retribution or deterrence." On the contrary, the Court stated, "measures to restrict the freedom of the dangerously mentally ill" constituted "a legitimate nonpunitive governmental objective" and a "classic example of nonpunitive detention."[2] In *Seling v. Young*, the Court rejected a claim that a civil commitment statute was punitive and thus ex post facto as applied to a particular individual.[3] In *Smith v. Doe*, the Court denied an ex post facto challenge to the Alaska Sex Offender Registration Act.[4] The Court relied in part on *Hendricks* to analyze whether the challenged law was punitive, concluding that the registration statute was civil and non-punitive in both purpose and effect.[5]

ArtI.S9.C3.3.8 Procedural Changes and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

The Supreme Court has often, but not universally, denied ex post facto challenges to laws changing procedures in criminal trials. At times, the Court has suggested that the application of the Ex Post Facto Clauses depends on whether a challenged law is substantive or procedural, and that a procedural change cannot be ex post facto.[1] More recently, however, the Court has rejected a rigid distinction between substance and procedure and instead focused on whether a law falls within the four categories identified in *Calder v. Bull*.[2] Thus, in *Collins v.*

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[6] 539 U.S. 607, 632–33 (2003).

[7] *Id.* at 614–615.

[1] 521 U.S. 346, 360–61 (1997). The Court also held that the statute was not retroactive. *See* ArtI.S9.C3.3.3 Retroactivity of Ex Post Facto Laws.

[2] *Id.* at 361–63.

[3] 531 U.S. 250, 263 (2001).

[4] 538 U.S. 84, 95–106 (2003).

[5] *Id.*

[1] *See, e.g.*, Dobbert v. Florida, 432 U.S. 282, 293 (1977) ("Even though it may work to the disadvantage of a defendant, a procedural change is not ex post facto."); *cf.* Thompson v. Missouri, 171 U.S. 380, 388 (1898) ("[T]he statute is to be regarded as one merely regulating procedure, and may be applied to crimes committed prior to its passage without impairing the substantial guaranties of life and liberty that are secured to an accused by the supreme law of the land.").

[2] 3 U.S. 386, 390 (1798).

Youngblood, the Court held that "by simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause."[3]

The Supreme Court has explained, "[t]he inhibition upon the passage of ex post facto laws does not give a criminal a right to be tried, in all respects, by the law in force when the crime charged was committed."[4] Rather, the legislature retains full authority to establish trial procedures, "subject only to the condition that [it] may not, under the guise of establishing modes of procedure and prescribing remedies, violate the accepted principles that protect an accused person against ex post facto enactments."[5] Thus, several Supreme Court cases have allowed the application of laws enacted after an offense that changed the place or mode of trial for that offense. For instance, in *Gut v. Minnesota*, the Court held that "[a]n ex post facto law does not involve, in any of its definitions, a change of the place of trial of an alleged offence after its commission."[6] In *Beazell v. Ohio*, the Court rejected an ex post facto challenge to a statute providing for criminal defendants jointly indicted for a felony to be tried jointly rather than separately.[7] In *Gibson v. Mississippi*, the Court rejected a challenge to a post-offense statute implementing new jury selection procedures.[8] In *Mallett v. North Carolina*, the Court denied an ex post facto challenge to a post-offense statute providing the state a right of appeal when a criminal defendant was granted a new trial.[9]

Under the fourth category identified in *Calder v. Bull*, a statute that alters the rules of evidence after an offense was committed so it is easier to convict an offender is ex post facto.[10] However, not every change to evidentiary procedures in criminal cases violates the Ex Post Facto Clauses. In *Thompson v. Missouri*, the Supreme Court rejected an ex post facto challenge to a post-offense statute that allowed prosecutors to introduce certain evidence related to the authenticity of a disputed letter in a murder trial.[11] The *Thompson* Court held that the statute did not fit within any of the *Calder* categories and was not "so unreasonable as materially to affect the substantial rights of one put on trial for crime."[12] In *Splawn v. California*, the Court rejected an ex post facto challenge to a post-offense statute that altered jury instructions related to the consideration of evidence in an obscenity trial.[13] The Court emphasized that the substantive criminal law governing the challenger's conduct "was in full force and effect at all times relevant to [the] conduct."[14] By contrast, the newly enacted statute did "not create any new substantive offense, but merely declare[d] what type of evidence may be received and

[3] 497 U.S. 37, 46 (1990).

[4] Gibson v. Mississippi, 162 U.S. 565, 590 (1896).

[5] *Id.*

[6] 76 U.S. 35, 38 (1870). *See also* Cook v. United States, 138 U.S. 157, 183 (1891); *cf.* Duncan v. Missouri, 152 U.S. 377, 382–83 (1894) (rejecting ex post facto challenge to state constitutional amendment separating the state supreme court into divisions and assigning certain cases to one division of the court).

[7] 269 U.S. 167, 169–70 (1925).

[8] 162 U.S. at 588–89.

[9] 181 U.S. 589, 593 (1901).

[10] 3 U.S. 386, 390 (1798).

[11] 171 U.S. 380, 381 (1898).

[12] *Id.* at 387. *See also id.* at 388 ("We cannot adjudge that the accused had any vested right in the rule of evidence which obtained prior to the passage of the Missouri statute, nor that the . . . statute entrenched upon any of the essential rights belonging to one put on trial for a public offense.").

[13] 431 U.S. 595, 599–600 (1977).

[14] *Id.* at 600.

considered."[15] Accepting a state court's conclusion that the new statute did not allow admission of previously inadmissible evidence, the Court held that the law was not ex post facto.[16]

Two cases about witness testimony illustrate the difference between laws that merely change trial procedures and those that alter the legal standards for conviction. In *Hopt v. Utah*, the Supreme Court denied an ex post facto challenge to a post-offense statute that allowed convicted felons to testify as witnesses in murder trials.[17] The Court held that the amendment did not fall within any of the *Calder* categories and that changes in the law that "only remove[ ] existing restrictions upon the competency of certain classes of persons as witnesses, relate to modes of procedure only, in which no one can be said to have a vested right."[18] The Court later distinguished *Hopt* in the 2000 case *Carmell v. Texas*.[19] In *Carmell*, the Court accepted an ex post facto challenge to a post-offense law that removed a requirement for corroborating evidence and authorized conviction of certain sexual offenses based on the victim's testimony alone.[20] Unlike in *Hopt*, the *Carmell* Court held that the challenged statute did not simply determine who was competent to testify but was instead "a sufficiency of the evidence rule" that lowered the burden to convict and thus fell within the fourth category of prohibited laws identified in *Calder*.[21]

ArtI.S9.C3.3.9 Employment Qualifications and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

The Supreme Court has heard multiple ex post facto challenges to laws that limit the ability of the challengers to engage in certain professions. The Court has struck down laws it deemed to impose employment bans as punishment for past conduct. For instance, in *Cummings v. Missouri*, the Court considered a challenge to a post-Civil War amendment to the Missouri Constitution that required persons engaged in certain professions to swear an oath that they had never been disloyal to the United States.[1] The Court held that the purpose and effect of the challenged amendment was to punish a group of individuals who had been disloyal to the United States, and the punishment they faced was effective exclusion from the covered professions.[2] The Court noted that some of the covered acts of disloyalty were crimes when they were committed, while some were not. The amendment violated the Ex Post Facto Clause in either case, whether by retroactively increasing the punishment for an existing offense or by imposing punishment for acts that were not offenses at the time they were committed.[3] The Court also held that the challenged provisions improperly "subvert[ed] the presumptions of innocence, and alter[ed] the rules of evidence" by "assum[ing] that the parties are guilty" and

[15] *Id.*

[16] *Id.* at 601.

[17] 110 U.S. 574, 589 (1884).

[18] *Id.* at 590.

[19] 529 U.S. 513, 531–53 (2000).

[20] *Id.* at 516.

[21] *Id.* at 545.

[1] 71 U.S. 277, 280–81 (1866).

[2] *Id.* at 320 (determining that the oath requirement "was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen").

[3] *Id.* at 327–28.

requiring them to "establish their innocence."[4] In *Ex parte Garland*, the Court relied on its reasoning in *Cummings* to strike down a similar federal law.[5]

By contrast, the Court has rejected ex post facto challenges to laws that it found imposed legitimate, non-punitive employment qualifications. In *Hawker v. New York*, the Court denied a challenge to a state statute that barred any person convicted of a felony from practicing medicine.[6] The Court concluded that the prohibition "is not to be regarded as a mere imposition of additional penalty, but as prescribing the qualifications for the duties to be discharged and the position to be filled."[7] The Court further explained that a state "may require both qualifications of learning and of good character" of those engaged in the practice of medicine, may determine "that one who has violated the criminal laws of the state is not possessed of sufficient good character," and "may make the record of a conviction conclusive evidence of the fact of the violation of the criminal law, and of the absence of the requisite good character."[8] For similar reasons, the Court in *Reetz v. Michigan* rejected an ex post facto challenge to a state law that imposed new professional registration requirements for doctors and prohibited the practice of medicine by unregistered persons.[9]

In *Garner v. Board of Public Works*, the Supreme Court considered ex post facto challenges to a provision of the Charter of the City of Los Angeles barring from public employment any person who within the last five years had been affiliated with a group that advocated the forceful overthrow of the government, and a city ordinance requiring public employees to state whether they had ever been members of the Communist Party.[10] The Court construed the challenged provisions to apply only after adoption of the Charter to "bar[ ] from the city's public service persons who . . . advise, advocate, or teach the violent overthrow of the Government or who are or become affiliated with any group doing so."[11] The Court held that "[t]he provisions operating thus prospectively were a reasonable regulation to protect the municipal service by establishing an employment qualification of loyalty to the State and the United States."[12] It further held that the provisions were not ex post facto because, assuming that being fired for failure to satisfy the requirements constituted punishment, the conduct covered by the oath had been unlawful for years prior to imposition of the oath requirement, so the provisions did not operate to "impose[ ] punishment for past conduct lawful at the time it was engaged in."[13]

[4] *Id.* at 328.

[5] 71 U.S. 333, 377–78 (1867). *Cf.* Pierce v. Carskadon, 83 U.S. 234, 237–39 (1873) (striking down a law making access to certain court proceedings contingent on an affidavit that, among other things, "such defendant never voluntarily bore arms against the United States, the reorganized government of Virginia, or the State of West Virginia").

[6] 170 U.S. 189, 190–193 (1898). *See also* De Veau v. Braisted, 363 U.S. 144, 160 (1960) (plurality opinion) (rejecting an ex post facto challenge to a state law that prevented any person who had been convicted of a felony and had not been pardoned from serving as an officer or agent for certain labor organizations).

[7] *Hawker*, 170 U.S. at 200.

[8] *Id.* at 191.

[9] 188 U.S. 505, 510 (1903).

[10] 341 U.S. 716, 718–19 (1951).

[11] *Id.* at 720.

[12] *Id.* at 720–21.

[13] *Id.* at 721.

ArtI.S9.C3.3.10 Retroactive Taxes and Ex Post Facto Laws

Article I, Section 9, Clause 3:

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

The Supreme Court has generally rejected ex post facto challenges to laws imposing retroactive tax liability.[1] In *Kentucky Union Co. v. Kentucky*, the Court emphasized that not all retroactive laws are ex post facto, as the prohibition on ex post facto laws applies only to retroactive criminal laws.[2] The majority further opined: "Laws of a retroactive nature, imposing taxes or providing remedies for their assessment and collection, and not impairing vested rights, are not forbidden by the Federal Constitution."[3]

The Court has made clear, however, that the question of whether a law is a non-penal tax, and thus outside the scope of the Ex Post Facto Clauses, depends on how the statute functions rather than its formal classification by the legislature. In *Burgess v. Salmon*, the Court held that the retroactive application of a tax law that was enforceable through a fine and imprisonment was invalid on ex post facto grounds.[4] The Court cautioned that "the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."[5]

ArtI.S9.C3.3.11 Ex Post Facto Prohibition and Judicial Decisions

Article I, Section 9, Clause 3:

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

Multiple Supreme Court decisions have held that the Ex Post Facto Clauses apply only to federal and state legislation (including state constitutional amendments), not to judicial decisions.[1] In *Ross v. Oregon*, the Court declined to apply the prohibition on ex post facto laws to a court decision that interpreted a statute that had been in place at the time of the offense to the disadvantage of the defendant.[2] In *Frank v. Mangum*, the Court rejected an ex post facto challenge to a judicial decision that allegedly departed from precedent.[3] The Court explained that the state Ex Post Facto Clause "is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts."[4] Similarly, in *Marks v. United States*, the Court held that the federal Ex Post Facto Clause "is a limitation upon the powers of the Legislature . . . and does not of its own force apply to the Judicial Branch of government."[5]

Although the Judicial Branch is not bound by the Ex Post Facto Clauses, the Court has held that the Due Process Clause might similarly prevent a defendant from being convicted for

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[1] *See, e.g.*, Carpenter v. Pennsylvania, 58 U.S. 456, 463 (1855) (law retroactively imposing a tax on certain devises in a will was not ex post facto); Bankers Trust Co. v. Blodgett, 260 U.S. 647, 652 (1923) (upholding a state statute retroactively imposing an estate tax and imposing a 2% penalty for non-payment, holding that the penalty "was not in punishment of a crime, and it is only to such that the constitutional prohibition applies"). In *Locke v. City of New Orleans*, the Supreme Court denied an ex post facto challenge to a tax law, holding both that the law was not retroactive and that the Ex Post Facto Clause did not apply to the non-penal tax at issue. 71 U.S. 172, 173 (1866).

[2] 219 U.S. 140, 152 (1911).

[3] *Id.* at 152–53.

[4] 97 U.S. 381, 381, 385 (1878).

[5] *Id.*

[1] *See generally* Cummings v. Missouri, 71 U.S. 277 (1866).

[2] 227 U.S. 150, 161 (1913).

[3] 237 U.S. 309, 344–45 (1914).

[4] *Id.* at 344.

[5] 430 U.S. 188, 191 (1977) (citation omitted).

conduct that would not have been criminal but for an intervening court decision.[6] In *Bouie v. City of Columbia*, the Supreme Court held that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law" and "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."[7] In *Rogers v. Tennessee*, the Court reiterated that while the Ex Post Facto Clause does not apply to the judiciary, "limitations on ex post facto judicial decisionmaking are inherent in the notion of due process."[8] However, the *Rogers* Court also held that the due process limitation on courts is not identical to the ex post facto prohibition that applies to legislation. The Court explained:

> The Ex Post Facto Clause, by its own terms, does not apply to courts. Extending the Clause to courts through the rubric of due process thus would circumvent the clear constitutional text. It also would evince too little regard for the important institutional and contextual differences between legislating, on the one hand, and common law decisionmaking, on the other.[9]

ArtI.S9.C3.3.12 Ex Post Facto Laws, Deportation, and Related Issues

Article I, Section 9, Clause 3:

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

Multiple Supreme Court cases have held that deportation proceedings are civil, not penal, in nature, and therefore are not subject to the federal Ex Post Facto Clause.[1] As one example, in *Harisiades v. Shaughnessy*, the Court considered ex post facto claims from several resident aliens who had been ordered deported based on their past membership in the Communist Party. The Court rejected the claims, holding in part:

> Deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal procedure. . . . 'Congress has power to order the deportation of aliens whose presence in the country it deems hurtful. The determination by facts that might constitute a crime under local law is not a conviction of crime, nor is the deportation a punishment; it is simply a refusal by the government to harbor persons whom it does not want.'[2]

In *Galvan v. Press*, the Court considered another ex post facto claim by a former Communist Party member challenging his deportation.[3] The Court acknowledged the severe

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[6] *See, e.g.*, United States v. Marcus, 560 U.S. 258, 263 (2010) (holding that if a criminal defendant was erroneously convicted based on noncriminal conduct that preceded enactment of the relevant law, he would have a due process claim rather than an ex post facto claim).

[7] 378 U.S. 347, 353–354, (1964). *See also* Marks v. United States, 430 U.S. 188, 195–96 (1977) (applying *Bouie*); *but see* Splawn v. California, 431 U.S. 595 (1977) (rejecting application of *Bouie* where there was no "change in the interpretation of the elements of the substantive offense").

[8] 532 U.S. 451, 456 (2000).

[9] *Id.* at 460.

[1] Bugajewitz v. Adams, 228 U.S. 585, 609 (1913); Mahler v. Eby, 264 U.S. 32, 39 (1924); Marcello v. Bonds, 349 U.S. 302, 314 (1955).

[2] 342 U.S. 580, 594 (1952) (quoting *Bugajewitz*, 228 U.S. at 591). The Court also held that the challenged statute did not apply retroactively. *See id.* at 593; *see* ArtI.S9.C3.3.3 Retroactivity of Ex Post Facto Laws.

[3] 347 U.S. 522, 523 (1954).

consequences of deportation—even likening its "intrinsic consequences" to punishment for a crime—but ultimately chose to follow "the unbroken rule of this Court that [the Ex Post Facto Clause] has no application to deportation."[4]

In *Flemming v. Nestor*, the Supreme Court rejected an ex post facto challenge to a statute terminating federal old-age, survivor, and disability insurance benefits for individuals deported on certain grounds.[5] The Court deemed the challenged sanction to be "the mere denial of a noncontractual governmental benefit" and held that Congress could have reasonable, non-punitive reasons for "the disqualification of certain deportees from receipt of Social Security benefits while they are not lawfully in this country."[6] While the challenger argued that Congress was actually motivated by a punitive purpose, the Court stated that "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground," and found no such proof with respect to the challenged statute.[7]

In *Johannessen v. United States*, the Supreme Court held that a statute providing for cancellation of United States citizenship obtained by fraud was not an ex post facto law.[8] The Court held that the "act imposes no punishment upon an alien who has previously procured a certificate of citizenship by fraud or other illegal conduct. It simply deprives him of his ill-gotten privileges."[9]

Clause 4—Direct Taxes

ArtI.S9.C4.1 Overview of Direct Taxes

Article I, Section 9, Clause 4:

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

Under Article I, Section 9, Clause 4 and Article I, Section 2, Clause 3[1] of the Constitution, direct taxes are subject to the rule of apportionment.[2] Though the Supreme Court has not clearly distinguished direct taxes from indirect taxes,[3] the Court has identified capitation taxes—a tax "paid by every person, 'without regard to property, profession, or any other

[4] *Id.* at 531.

[5] 363 U.S. 603, 604–05 (1960).

[6] *Id.* at 617.

[7] *Id.*

[8] 225 U.S. 227, 242–43 (1912).

[9] *Id.* at 242.

[1] U.S. Const. art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons."). The Fourteenth Amendment subsequently modified apportionment of Representatives. U.S. Const. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed.").

[2] U.S. Const. art. I, § 9, cl. 4 ("No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."); *Id.* art. I, § 2, cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .").

[3] Article I, Section 8, Clause 1 of the U.S. Constitution subjects duties, imposts, and excise taxes—collectively referred to as indirect taxes—to the rule of uniformity. U.S. Const. art. I, § 8, cl. 1. The rule of uniformity requires an indirect tax to operate in the same manner throughout the United States.

circumstance'"[4]—and taxes on real and personal property as direct taxes.[5] Under the rule of apportionment, Congress sets the total amount to be raised by a direct tax, then divides that amount among the states according to each state's population.[6] Thus, a state with one-twentieth of the Nation's population would be responsible for one-twentieth of the total amount of direct tax, without regard to that state's income or wealth levels.[7]

An 1861 federal tax on real property illustrates how the rule of apportionment operates.[8] Congress enacted a direct tax of $20 million.[9] After apportioning the direct tax among the states, territories, and the District of Columbia, the State of New York was liable for the largest portion of the tax, $2,603,918.67,[10] and the Territory of Dakota was liable for the least, $3,241.33.[11] The act called for the President to assign collection districts to states, territories, and the District of Columbia to apportion "to each county and State district its proper quota of direct tax"[12] and determine the amounts taxpayers in each collection district would be required to pay.[13]

The lack of clarity surrounding the meaning of a direct tax[14] and the Federal Government's desire for additional revenues ultimately contributed to the adoption in 1913 of the Sixteenth Amendment, which authorizes Congress to impose taxes on income without regard to the rule of apportionment.[15]

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[4] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012) [hereinafter NFIB] (emphasis omitted) (citing Hylton v. United States, 3 U.S. 171, 175 (1796) (opinion of Chase, J.)).

[5] Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895); Hylton v. United States, 3 U.S. 171 (1796); *see also NFIB*, 567 U.S. at 571 (holding that the individual mandate provision in the Patient Protection and Affordable Care Act was not a direct tax because it did "not fall within" any of the "recognized categor[ies]" of direct taxes, capitation taxes and taxes on real or personal property).

[6] *See*, *e.g.*, Act of Aug. 5, 1861, ch. 45, 12 Stat. 292; Act of Jan. 9, 1815, ch. 21, 3 Stat. 164.

[7] Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 Ariz. St. L.J. 1057, 1067 (2001). *See also Hylton*, 3 U.S. at 174.

[8] Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, 294; *see also* Act of Jan. 9, 1815, ch. 21, 3 Stat. 164.

[9] Act of Aug. 5, 1861, ch. 45, 12 Stat. 292, 294.

[10] *Id.* at 295 ("To the State of New York, two million six hundred and three thousand nine hundred and eighteen and two-third dollars.").

[11] *Id.* at 296 ("To the Territory of Dakota, three thousand two hundred and forty-one and one-third dollars.").

[12] *Id.* at 301.

[13] *Id.* at 296 ("That, for the purpose of assessing the above tax and collecting the same, the President of the United States be, and he is hereby authorized, to divide, respectively, the States and Territories of the United States and the District of Columbia into convenient collection districts, and to nominate and, by and with the advice of the Senate, to appoint an assessor and a collector for each such district, who shall be freeholders and resident within the same."); *id.* at 302 ("[T]he said assessors, respectively, shall make out lists containing the sums payable according to the provisions of this act upon every object of taxation in and for each collection district; which lists shall contain the name of each person residing within the said district, owning or having the care or superintendence of property lying within the said district which is liable to the said tax.").

[14] In *National Federation of Independent Business v. Sebelius*, the Court noted that "[e]ven when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a "head tax" or a "poll tax"), might be a direct tax." Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012). *See also* 2 Records of the Federal Convention 350 (Max Farrand ed., 1911) ("Mr. King asked what was the precise meaning of *direct* taxation? No one answered.")

[15] U.S. Const. amend. XIV. *See* Amdt14.1 Overview of Fourteenth Amendment, Equal Protection and Rights of Citizens.

ArtI.S9.C4.2 Historical Background on Direct Taxes

Article I, Section 9, Clause 4:

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

The Framers' principal motivation for granting Congress the power to tax in the Constitution was to provide the National Government with a mechanism to raise a "regular and adequate supply"[1] of revenue and pay its debts.[2] Under the predecessor Articles of Confederation, the National Government had no power to tax and could not compel states to raise revenue for national expenditures.[3] The National Government could requisition funds from states to place in the common treasury, but, under the Articles of Confederation, state requisitions were "mandatory in theory" only.[4] State governments resisted these calls for funds.[5] As a result, the National Government raised "very little" revenue through state requisitions,[6] inhibiting its ability to resolve immediate fiscal problems, such as repaying its Revolutionary War debts.[7]

By contrast, the Constitution provides Congress with broad authority to lay and collect taxes. Article I, Section 8, Clause 1 of the Constitution—commonly known as the Taxing and Spending Clause[8]—empowers Congress "To lay and collect Taxes, Duties, Impost and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States;

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[1] The Federalist No. 30 (Alexander Hamilton).

[2] Gillian E. Metzger, *To Tax, To Spend, To Regulate*, 126 Harv. L. Rev. 83, 89 (2012); *see* Veazie Bank v. Fenno, 75 U.S. 533, 540 (1869) ("The [National Government] had been reduced to the verge of impotency by the necessity of relying for revenue upon requisitions on the States, and it was a leading object in the adoption of the Constitution to relieve the government, to be organized under it, from this necessity, and confer upon it ample power to provide revenue by the taxation of persons and property."); Bruce Ackerman, *Taxation and the Constitution*, 99 Colum. L. Rev. 1, 6 (1999) ("The [Federalists] would never have launched their campaign against America's first Constitution, the Articles of Confederation, had it not been for its failure to provide adequate fiscal powers for the national government."); *see generally* The Federalist No. 30 (Alexander Hamilton) (advocating for a "General Power of Taxation").

[3] *See* Articles of Confederation of 1777, arts. II, VIII; Ackerman, *supra* 2, at 6 ("The Articles of Confederation stated that the 'common treasury . . . shall be supplied by the several States, in proportion to the value of all land within each State,' Articles of Confederation art. VIII (1781), but did not explicitly authorize the Continental Congress to impose any sanctions when a state failed to comply. This silence was especially eloquent in light of the second Article's pronouncement: 'Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by the confederation expressly delegated to the United States, in Congress assembled.'").

[4] Calvin H. Johnson, Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution, 15 (2005); *see* Articles of Confederation of 1777, art. VIII.

[5] Johnson, *supra* note 4, at 16 ("Some states simply ignored the requisitions. Some sent them back to Congress for amendment, more to the states' liking. New Jersey said it had paid enough tax by paying the tariffs or 'imposts' on goods imported through New York or Philadelphia and it repudiated the requisition in full.").

[6] Robert D. Cooter & Neil S. Siegel, *Not the Power to Destroy: An Effects Theory of the Tax Power*, 98 VA. L. REV. 1195, 1202 (2012); *see*, *e.g.*, Johnson, *supra* note 4, at 15 ("In the requisition of 1786—the last before the Constitution—Congress mandated that states pay $3,800,000, but it collected only $663."); *see* Metzger, *supra* note 2, at 89 ("Under the Articles of Confederation, states had failed to meet congressional requisitions on a massive scale and Congress was bankrupt.").

[7] Johnson, *supra* note 4, at 16–17 ("Congress's Board of Treasury had concluded in June 1786 that there was 'no reasonable hope' that the requisitions would yield enough to allow Congress to make payments on the foreign debts, even assuming that nothing would be paid on the domestic war debt. . . . Almost all of the money called for by the 1786 requisition would have gone to payments on the Revolutionary War debt. French and Dutch creditors were due payments of $1.7 million, including interest and some payment on the principal. Domestic creditors were due to be paid $1.6 million for interest only. Express advocacy of repudiation of the federal debt was rare, but with the failure of requisitions, payment was not possible. . . . Beyond the repayment of war debts, the federal goals were quite modest. The operating budget was only about $450,000 . . . . Without money, however, the handful of troops on the frontier would have to be disbanded and the Congress's offices shut."); *see* Cooter & Siegel, *supra* note 6, at 1204.

[8] *See, e.g.*, United States v. Richardson, 418 U.S. 166, 169–70 (1974).

but all Duties, Imposts and Excises shall be uniform throughout the United States."[9] The U.S. Supreme Court has described Congress's power to tax as "very extensive."[10] Supreme Court Chief Justice Salmon P. Chase famously described the taxing power in the *License Tax Cases*:

> It is given in the Constitution, with only one exception and only two qualifications. Congress cannot tax exports, and it must impose direct taxes by the rule of apportionment, and indirect taxes by the rule of uniformity. Thus limited, and thus only, it reaches every subject, and may be exercised at discretion.[11]

By proscribing direct taxes "unless in Proportion to the Census or enumeration herein" under Article I, Section 9, Clause 4, the Framers apportioned direct taxes consistent with how they apportioned representation in the House.[12] As James Madison noted in the *Federalist Papers*, linking tax liability to representation ensured that any advantage a state may have in enhancing its reported population size to increase its representation would be offset by its increased tax liability. Madison stated:

> As the accuracy of the census to be obtained by the Congress will necessarily depend, in a considerable degree on the disposition, if not the co-operation of the States, it is of great importance that the States should feel as little bias as possible, to swell or to reduce the amount of their numbers. Were their share of representation alone to be governed by this rule, they would have an interest in exaggerating their inhabitants. Were the rule to decide their share of taxation alone, a contrary temptation would prevail. By extending the rule to both objects, the States will have opposite interests, which will control and balance each other, and produce the requisite impartiality.[13]

ArtI.S9.C4.3 Early Jurisprudence on Direct Taxes

Article I, Section 9, Clause 4:

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

The Supreme Court first interpreted the Constitution's "direct tax" language shortly after the Nation's founding in *Hylton v. United States*.[1] *Hylton* presented the question of whether an

[9] U.S. Const. art. I, § 8, cl. 1; *see also id.* art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

[10] License Tax Cases, 72 U.S. 462, 471 (1866); *see also* United States v. Kahriger, 345 U.S. 22, 28 (1953) ("It is axiomatic that the power of Congress to tax is extensive and sometimes falls with crushing effect . . . . As is well known, the constitutional restraints on taxing are few."); Brushaber v. Union Pac. R. Co., 240 U.S. 1, 12 (1916) ("That the authority conferred upon Congress by § 8 of article 1 'to lay and collect taxes, duties, imposts and excises' is exhaustive and embraces every conceivable power of taxation has never been questioned or, if it has, has been so often authoritatively declared as to render it necessary only to state the doctrine."); Austin v. Aldermen, 74 U.S. (7 Wall.) 694, 699 (1869) ("The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy."); *see generally* Veazie Bank v. Fenno, 75 U.S. 533, 540 (1869) (explaining "[N]othing is clearer, from the discussions in the [Constitutional] Convention and the discussions which preceded final ratification [of the Constitution] by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of everything except exports, in its fullest extent.").

[11] *License Tax Cases*, 72 U.S. at 471.

[12] U.S. Const. art. I, § 2, Cl. 3 ("Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . .").

[13] The Federalist No. 54 (James Madison).

[1] *Hylton*, 3 U.S. 171.

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Early Jurisprudence on Direct Taxes

unapportioned tax on carriages was a "direct tax," and therefore unconstitutional.[2] In three separate opinions, the deciding justices[3] each held that the tax was not "direct" within the meaning of the Constitution and suggested that the term "direct taxes" applied only to a narrow class of taxes that includes (1) capitation taxes[4] and (2) taxes on "land."[5]

In *Hylton*, the Supreme Court adopted a functional approach to determine whether a tax is direct, focusing on whether the tax at issue can be apportioned and, if so, whether apportionment would produce significant inequities among taxpayers.[6] As Justice Samuel Chase stated in his opinion, "If [a tax] is proposed to tax any specific article by the rule of apportionment, and it would evidently create great inequality and injustice, it is unreasonable to say, that the Constitution intended such tax should be laid by that rule."[7] As the Court recently explained its holding in *Hylton*, the "Court upheld the tax, in part reasoning that apportioning such a tax would make little sense, because it would have required taxing carriage owners at dramatically different rates depending on how many carriages were in their home State."[8] The Court in *Hylton* did not, however, offer a comprehensive definition of the types of taxes that are "direct."[9]

The result of *Hylton* was not challenged until after the Civil War. A number of taxes imposed to meet the demands of that war were challenged as direct taxes. The Supreme Court, however, sustained successively as "excises" or "duties," a tax on an insurance company's receipts for premiums and assessments,[10] a tax on the circulating notes of state banks,[11] an inheritance tax on real estate,[12] and a general tax on incomes.[13] In the last case, *Springer v. United States,* the Court noted that it regarded the term "direct taxes" as meaning capitation taxes and taxes on land.[14] The Court stated: "Our conclusions are, that *direct taxes,* within the

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[2] *Id.* at 172. The tax at issue in *Hylton* imposed a specific yearly sum on carriages. Act of June 5, 1794, ch. 45, 1 Stat. 373, 374 (1794). The amount varied between one and ten dollars, depending on the type of carriage. *Id.* The tax exempted carriages used in husbandry or for the transportation of goods, wares, merchandise, produce, or commodities. *Id.*

[3] Only four of the six Justices who comprised the Supreme Court at the time participated in the *Hylton* argument—Associate Justices Samuel Chase, William Paterson, James Iredell, and James Wilson. Consistent with the Court's practice during that period, Justices Chase, Paterson, and Iredell each wrote a separate, or "seriatim," opinion holding the tax to be constitutional. *See Hylton*, 3 U.S. at 172–83; M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 Sup. Ct. Rev. 283, 303–11 (2007). Justice Wilson abstained from voting on the case because he had previously expressed an opinion on the issue while serving as a circuit court judge and because the unanimity of the remaining three participating Justices made his opinion unnecessary. *See Hylton*, 3 U.S. at 183–84.

[4] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 571 (2012) [hereinafter *NFIB*] (citing *Hylton*, 3 U.S. at 175 (opinion of Chase, J.)).

[5] *Hylton*, 3 U.S. at 174–75 (opinion of Chase, J.); *Id.* at 176–77 (opinion of Paterson, J.); *Id.* at 183 (opinion of Iredell, J.).

[6] *Id.* at 174 (opinion of Chase, J.); *Id.* at 179–80 (opinion of Paterson, J.); *Id.* at 181–83 (opinion of Iredell, J.).

[7] *Id.*

[8] *NFIB*, 567 U.S. at 570; *see Hylton*, 3 U.S. at 179 (opinion of Paterson, J.) ("A tax on carriages, if apportioned, would be oppressive and pernicious. How would it work? In some states there are many carriages, and in others but few. Shall the whole sum fall on one or two individuals in a state, who may happen to own and possess carriages? The thing would be absurd, and inequitable.").

[9] *Contra* Springer v. United States, 102 U.S. 586, 602 (1880) ("Our conclusions are, that *direct taxes, within the meaning of the Constitution, are only* capitation taxes, as expressed in that instrument, and taxes on real estate." (emphasis added)); *but see* Pollock v. Farmers' Loan & Trust Co., 157 U.S. 429 (1895) (holding taxes on personal property are also direct taxes).

[10] Pacific Ins. Co. v. Soule, 74 U.S. (7 Wall.) 433 (1869).

[11] Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533 (1869).

[12] Scholey v. Rew, 90 U.S. (23 Wall.) 331 (1875).

[13] Springer v. United States, 102 U.S. 586 (1881).

[14] *Id.* at 602.

meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate, and that the tax of which the plaintiff in error complains is within the category of an excise or duty."[15]

ArtI.S9.C4.4 Direct Taxes and the Sixteenth Amendment

Article I, Section 9, Clause 4:

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

In 1895, the Supreme Court expanded its interpretation of the meaning of direct taxes in its two decisions in *Pollock v. Farmers' Loan & Trust Co.*,[1] holding that taxes on real *and* personal property, and income derived from them, were direct taxes.[2] These decisions significantly altered the Court's direct tax jurisprudence. Considering whether an 1894 act that imposed unapportioned taxes on income derived from both real and personal property were direct taxes,[3] the Court adopted two primary holdings on the scope of the Constitution's "direct tax" clause. First, the Court held that taxes on real estate and personal property are direct taxes.[4] Second, the Court held that a tax on income *derived from* real or personal property—as opposed to income derived from employment or some other source[5]—is, in effect, a tax imposed directly on the property itself and is also a direct tax.[6] Applying these holdings, the Court held that the provisions before it were unconstitutional because they were unapportioned taxes on income derived from real and personal property.[7]

The *Pollock* Court concluded that its holding did not conflict with the Court's prior decisions interpreting the direct tax language.[8] The Court reasoned that each of those decisions had sustained unapportioned taxes as either "excises" or "duties" imposed on a particular use of, or privilege associated with, the property in question, not as a tax on the property itself.[9] As to *Hylton* specifically, the Court determined that it had upheld the unapportioned carriage tax as an "excise" on the "expense" or "consumption" of carriages, rather than as a tax on carriage ownership.[10]

After the *Pollock* decision, taxpayers challenged numerous taxes that Congress had treated as excises subject to the rule of uniformity as unconstitutional direct taxes. The Court,

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[15] *Id.* (emphasis retained).

[1] 158 U.S. 601 (1895) [hereinafter Pollock II]; 157 U.S. 429 [hereinafter Pollock I]. *Pollock* came to the Court twice. In *Pollock I*, the Court invalidated the tax at issue insofar as it was a tax upon income derived from real property, but the Court was equally divided on whether income derived from personal property was a direct tax. 157 U.S. at 583, 586. In *Pollock II*, on petitions for rehearing, the Court held that a tax on income derived from personal property was also a direct tax. 158 U.S. at 637. For simplicity, this essay refers to the two decisions collectively as the "*Pollock*" decision.

[2] *Pollock II*, 158 U.S. 601; *Pollock I*, 157 U.S. 429.

[3] *Pollock II*, 158 U.S. at 618; *Pollock I*, 157 U.S. at 558; *see* Act of Aug. 27, 1894, ch. 349, 28 Stat. 509.

[4] *Pollock II*, 158 U.S. at 628; *Pollock I*, 157 U.S. at 580–81.

[5] The Court stated that its holding did not extend to income or other gains derived from "business, privileges, or employments." *Pollock II*, 158 U.S. at 635.

[6] *Pollock I*, 157 U.S. at 581 ("An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income."); *Pollock II*, 158 U.S. at 628 (applying "the same reasoning . . . to capital in personalty held for the purpose of income, or ordinarily yielding income, and to the income therefrom").

[7] *Pollock II*, 158 U.S. at 637; *Pollock I*, 157 U.S. at 583.

[8] *Pollock II*, 158 U.S. at 626–27; *Pollock I*, 157 U.S. at 574–80.

[9] *Pollock II*, 158 U.S. at 626–27; *Pollock I*, 157 U.S. at 574–80.

[10] *Pollock II*, 158 U.S. at 627 ("What was decided in the *Hylton* Case was, then, that a tax on carriages was an excise, and therefore an indirect tax.").

however, distinguished taxes levied "because of ownership" or "upon property as such" from those laid upon "privileges."[11] The Court sustained as "excises" a tax on sales of business exchanges,[12] a succession tax construed to fall on the recipients of the property transmitted rather than on the estate of the decedent,[13] and a tax on manufactured tobacco in the hands of a dealer, after an excise tax had been paid by the manufacturer.[14] In *Thomas v. United States*,[15] the Court sustained a stamp tax on sales of stock certificates based on the definition of "duties, imposts and excises."[16] The Court explained that these terms "were used comprehensively to cover customers and excise duties imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like."[17] On the same day, the Court ruled in *Spreckels Sugar Refining Co. v. McClain*[18] that an exaction on the business of refining sugar and measured by gross receipts was an excise and properly levied under the rule of uniformity. Likewise, in *Flint v. Stone Tracy Co.,*[19] the Court held a tax on a corporation that was measured by income, including investment income, to be a tax on the privilege of doing business as a corporation rather than an income tax. Similarly, in *Stanton v. Baltic Mining Co.*[20], the Court held a tax on the annual production of mines "is not a tax upon property as such because of its ownership, but a true excise levied on the results of the business of carrying on mining operations."[21]

Pollock's holding and rationale were further limited in several respects.[22] Most prominently, Congress passed and the states ratified the Sixteenth Amendment in 1913 in direct response to *Pollock*'s prohibition on the unapportioned taxation of income derived from real or personal property.[23] The Sixteenth Amendment authorized Congress "to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several states."[24] Further, while the Court in *Pollock* held that a tax on income derived from property was indistinguishable from a tax on the property itself, the Court later rejected that reasoning in *Stanton v. Baltic Mining Company*, upholding an unapportioned tax on a mine's income as being "not a tax upon property as such . . . , but a true excise levied on the results of the business of carrying on mining operations."[25] The Court opined:

> [T]he Sixteenth Amendment conferred no new power of taxation but simply prohibited the previous complete and plenary power of income taxation possessed by Congress from the beginning from being taken out of the category of indirect taxation to which it inherently belonged and being placed in the category of direct taxation subject to apportionment by a consideration of the sources from which the income was derived,

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[11] Stanton v. Baltic Mining Co., 240 U.S. 103 (1916); Knowlton v. Moore, 178 U.S. 41, 80 (1900).

[12] Nicol v. Ames, 173 U.S. 509 (1899).

[13] *Knowlton*, 178 U.S. at 41.

[14] Patton v. Brady, 184 U.S. 608 (1902).

[15] 192 U.S. 363 (1904).

[16] *Id.* at 369.

[17] *Id.* at 370.

[18] 192 U.S. 397 (1904)

[19] 220 U.S. 107 (1911).

[20] 240 U.S. 103 (1916).

[21] *Stanton*, 240 U.S. at 114 (citing Stratton's Independence v. Howbert, 231 U.S. 399 (1913)).

[22] Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes,"* 33 Ariz. St. L.J. 1057, 1073 (2001).

[23] *Id.*; Boris I. Bittker, *Constitutional Limits on the Taxing Power of the Federal Government*, 41 Tax Law. 3 (1987).

[24] U.S. Const. amend. XVI (emphasis added).

[25] 240 U.S. 103, 112–14 (1916).

> that is by testing the tax not by what it was—a tax on income, but by a mistaken theory deduced from the origin or source of the income taxed.[26]

Despite these developments, the Supreme Court has not expressly overruled *Pollock*'s central holding that a tax on real or personal property solely because of its ownership is a direct tax.[27] In 1920, the Court relied on *Pollock* in *Eisner v. Macomber* to hold an unapportioned tax on shares issued as stock dividends unconstitutional.[28] There, the Court addressed whether a corporation's issuance of additional shares to a stockholder as stock dividends was "income" under the Sixteenth Amendment and, if not, whether a tax on those unrealized gains was a direct tax.[29] After concluding that the stock dividends were not "income,"[30] the Court relied on *Pollock* to conclude that the tax was a direct tax.[31]

The *Eisner* Court determined that the limitation on Congress's taxing power identified in *Pollock* "still has an appropriate and important function . . . not to be overridden by Congress or disregarded by the courts."[32] The Court observed that the Sixteenth Amendment must be "construed in connection with the taxing clauses of the original Constitution and the effect attributed to them," including *Pollock*'s holding that "taxes upon property, real and personal," are direct taxes.[33] Applying that limitation, the Court held that the tax before it was unconstitutional because it was an unapportioned tax on personal property.[34]

In the Supreme Court's 2012 decision, *National Federation of Independent Business v. Sebelius,* the Supreme Court upheld the Affordable Care Act individual mandate, known as a "shared responsibility payment," as a tax under Article I, Section 8, Clause 1 of the Constitution.[35] In its ruling, the Court explained that the individual mandate was not a direct tax subject to the rule of apportionment. The Court stated:

> A tax on going without health insurance does not fall within any recognized category of direct tax. It is not a capitation. Capitations are taxes paid by every person "without regard to property, profession or *any other circumstance.*" The whole point of the shared responsibility payment is that it is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance. The payment is also

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[26] *Id.* at 112–13 (citing Brushaber v. Union Pac. R.R., 240 U.S. 1 (1916)).

[27] *See* Union Elec. Co. v. United States, 363 F.3d 1292, 1299 (Fed. Cir. 2004) ("We agree that *Pollock* has never been overruled, though its reasoning appears to have been discredited."); *see also NFIB*, 567 U.S. at 571 ("In 1895, [in *Pollock II*,] we expanded our interpretation [of direct taxes] to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. That result was overturned by the Sixteenth Amendment, although we continued to consider taxes on personal property to be direct taxes" (citations omitted)).

[28] Eisner v. Macomber, 252 U.S. 189, 219 (1920).

[29] *Id.* at 201–19.

[30] *Id.* at 201–17. *Eisner* defined "income" as "the gain derived from capital, labor, or from both combined." *Id.* at 207 (internal quotation marks omitted).

[31] 252 U.S. at 218–19.

[32] *Id.* at 206.

[33] *Id.* at 205–06; *id.* at 218–19.

[34] *Id.* at 219. In 1921, the Court sustained an estate tax as an excise in *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921). The Court further held that including certain property in computing an estate tax does not constitute a direct tax on the following such property: (1) property held as joint tenants or as tenants by the entirety; or (2) the entire value of community property owned by a husband and wife; or (3) life insurance proceeds. Philips v. Dime Trust & S.D. Co., 284 U.S. 345, 349 (1921) (joint tenants); Tyler v. United States, 281 U.S. 497 (1930) (tenants by the entirety); Fernandez v. Wiener, 326 U.S. 340 (1945) (community property); Chase Nat'l Bank v. United States, 278 U.S. 327 (1929) (insurance proceeds); United States v. Manufacturers Nat'l Bank, 363 U.S. 194, 198–201 (1960) (insurance proceeds). Similarly, the Court upheld a graduated tax on gifts as an excise, saying that it was "a tax laid only upon the exercise of a single one of those powers incident to ownership, the power to give the property owned to another." Bromley v. McCaughn, 280 U.S. 124, 136 (1929). *See also* Helvering v. Bullard, 303 U.S. 297 (1938).

[35] Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

plainly not a tax on the ownership of land or personal property. The shared responsibility payment is thus not a direct tax that must be apportioned among the several States.[36]

The Supreme Court further explained that direct taxes are capitation taxes, real estate taxes, and personal property taxes.[37] While income taxes are also direct taxes under *Pollock*, adoption of the Sixteenth Amendment,[38] as discussed above, amended the Constitution to permit the federal government to tax income.

Clause 5—Exports

ArtI.S9.C5.1 Export Clause and Taxes

Article I, Section 9, Clause 5:

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

Article 1, Section 9, Clause 5 of the U.S. Constitution prohibits Congress from laying taxes and duties on articles exported from any state.[1] Known as the Export Clause,[2] it applies to taxes and duties, not user fees.[3] The Supreme Court has interpreted the Export Clause to address shipments only to foreign countries, not shipments to unincorporated territories, such as Puerto Rico and the Commonwealth of the Northern Mariana Islands.[4] The Court has also

[36] *Id.* at 571.

[37] *Id.*

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

[1] U.S. Const. art. I, § 8, cl. 1; *see, e.g.*, United States v. U.S. Shoe Corp., 523 U.S. 360 (1998) (holding an ad valorem tax directly imposed on the value of cargo loaded at U.S. ports for export violated the Export Clause).

[2] *See, e.g., U.S. Shoe*, 523 U.S. at 362.

[3] *Id.* at 363 ("The [Export] Clause, however, does not rule out a 'user fee,' provided that the fee lacks the attributes of a generally applicable tax or duty and is, instead, a charge designed as compensation for government-supplied services, facilities, or benefits." (citing Pace v. Burgess, 92 U.S. 372 (1876))). In general, a user fee is a charge imposed on the user of a government service with the primary purpose of offsetting the costs of that government service. *See, e.g.*, Pace v. Burgess, 92 U.S. 372, 375–76 (1876) ("The stamp [tax] was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. The payment of twenty-five cents or of ten cents for the stamp used was no more a tax on the export than was the fee for clearing the vessel in which it was transported, or for making out and certifying the manifest of the cargo. It bore no proportion whatever to the quantity or value of the package on which it was affixed. These were unlimited, except by the discretion of the exporter or the convenience of handling. . . . We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned . . . . The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretence of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. . . . [W]e cannot say that the charge imposed is excessive, or that it amounts to an infringement of the [Export Clause]. We cannot say that it is a tax or duty instead of what it purports to be, a fee or charge, for the employment of that instrumentality which the circumstances of the case render necessary for the protection of the government.").

[4] Dooley v. United States, 183 U.S. 151, 153–54 (1901); *see also* Swan & Finch Co. v. United States, 190 U.S. 143, 144–45 (1903) (explaining "'export' as used in the Constitution and laws of the United States, generally means the transportation of goods from this to a foreign country"); *see generally* Christina Duffy Burnett, *United States: American Expansion and Territorial Deannexation*, 72 U. Chi. L. Rev. 797, 800 (2005) (explaining the U.S. Supreme Court's doctrine of territorial incorporation "divided domestic territory . . . into two categories: those places 'incorporated' into the United States and forming an integral part thereof (including the states, the District of Columbia, and the 'incorporated territories'); and those places not incorporated into the United States, but merely 'belonging' to it (which came to be known as the 'unincorporated territories')").

construed the Export Clause as requiring "not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens" the process of exporting.[5]

For example, in *United States v. IBM*, the Supreme Court held that an excise tax[6] on insurance premiums paid to foreign insurers for policies insuring exported goods was unconstitutional under the Export Clause.[7] In *IBM*, the parties agreed that the facts and issue before the Court were largely indistinguishable from an earlier case, *Thames & Mersey Marine Insurance Co. v United States*,[8] in which the Court held that a tax on insuring exports was "functionally the same" as a tax on exports.[9] Applying stare decisis principles, the Court declined to overrule *Thames & Mersey Marine Insurance* absent additional briefing from the parties on whether the insurance policies subject to the excise tax were "so closely connected to the goods that the tax is, in essence, a tax on exports."[10]

The Supreme Court has ruled that the Export Clause's restriction on Congress's taxing power does not extend to several taxes, such as a tax on all property alike, including property intended for export but not in the "course of exportation"[11]; a nondiscriminatory tax on an exporter's income;[12] and a stamp tax to identify goods intended for export.[13] The Court,

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[5] Fairbank v. United States, 181 U.S. 283, 293 (1901). *See* William E. Peck & Co. v. Lowe, 247 U.S. 165, 173 (1918) ("And the court has indicated that where the tax is not laid on the articles themselves while in course of exportation the true test of its validity is whether it 'so directly and closely' bears on the 'process of exporting' as to be in substance a tax on the exportation." (quoting Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 25 (1915))). *See also* A.G. Spaulding & Bros. v. Edwards, 262 U.S. 66, 69–70 (1923).

[6] Fernandez v. Wiener, 326 U.S. 340, 352 (1945) (an excise tax is a tax laid "upon particular use or enjoyment of property or the shifting from one to another of any power or privilege incidental to the ownership or enjoyment of property").

[7] United States v. IBM, 517 U.S. 843, 854–56 (1996).

[8] 237 U.S. 19, 27 (1915) (holding "proper insurance during the voyage is one of the necessities of exportation" and that "the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves").

[9] *IBM*, 517 U.S. at 850, 854. *See also id.* at 846 ("We have had few occasions to interpret the language of the Export Clause, but our cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process. At the same time, we have attempted to limit the term 'Articles exported' to permit federal taxation of pre-export goods and services.").

[10] *Id.* at 855–56; *see id.* at 855 ("[T]he marine insurance policies in *Thames & Mersey* arguably 'had a value apart from the value of the goods.' Nevertheless, the Government apparently has chosen not to challenge that aspect of Thames & Mersey in this case. When questioned on that implicit concession at oral argument, the Government admitted that it 'chose not to' argue that [the excise tax] does not impose a tax on the goods themselves.") (citations omitted).

[11] Turpin v. Burgess, 117 U.S. 504, 507 (1886) ("But a general tax, laid on all property alike, and not levied on goods in course of exportation, nor because of their intended exportation, is not within the constitutional prohibition. . . . In the present case, the tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation; they might never be exported; whether they would be or not would depend altogether on the will of the manufacturer."). *See also* Cornell v. Coyne, 192 U.S. 418, 427 (1904) ("The true construction of the constitutional provision is that no burden by way of tax or duty can be cast upon the exportation of articles, and does not mean that articles exported are relieved from the prior ordinary burdens of taxation which rest upon all property similarly situated.").

[12] William E. Peck & Co. v. Lowe, 247 U.S. 165, 174–75 (1918) (holding the Export Clause did not shield an exporter from an income tax laid generally on net incomes because the tax was laid on the exporter's income from exportation).

[13] Pace v. Burgess, 92 U.S. 372, 376 (1876) (finding the "stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected" and that "[a] stamp may be used, and, in the case before us, we think it is used, for quite a different purpose from that of imposing a tax or duty: indeed, it is used for the very contrary purpose,—that of securing exemption from a tax or duty"). *See also* Turpin v. Burgess, 117 U.S. 504, 505 (1886) ("[T]he tax (if it was a tax) was laid upon the goods before they had left the factory. They were not in course of exportation, they might never be exported, whether they would be or not would depend altogether on the will of the manufacturer. Had the same excise which was laid upon all other tobacco manufactured by the plaintiffs been laid on the tobacco in question, they could not have complained. But it was not. A special indulgence was granted to them (in common with the others), in reference to the particular tobacco which they declared it to be their intention to export. With regard to

however, has held that stamp taxes imposed on foreign bills of lading;[14] charter parties, which "were exclusively for the carriage of cargo from state ports to foreign ports";[15] or marine insurance policies[16] were in effect taxes or duties upon exports, and so void.

The Supreme Court has also held that refunds for taxes collected in violation of the Export Clause are subject to the the general tax refund scheme adopted by Congress.[17] The Court stated: "We therefore hold that the plain language of 26 U.S.C. §§ 7422(a) and 6511 requires a taxpayer seeking a refund for a tax assessed in violation of the Export Clause, just as for any other unlawfully assessed tax, to file a timely administrative refund claim before bringing suit against the Government."[18] The Court reasoned that this was necessary so that "allegations of taxes unlawfully assessed—whether the asserted illegality is based upon the Export Clause or any other provision of law—are processed in an orderly and timely manner, and that costly litigation is avoided when possible."[19]

Clause 6—Ports

ArtI.S9.C6.1 No-Preference Clause for Ports

Article I, Section 9, Clause 6:

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

The No-Preference Clause was designed to prevent preferences between ports because of their location in different states. Discriminations between individual ports are not prohibited. Acting under the Commerce Clause, Congress may do many things that benefit particular ports and that incidentally result to the disadvantage of other ports in the same or neighboring states. It may establish ports of entry, erect and operate lighthouses, improve rivers and harbors, and provide structures for the convenient and economical handling of traffic.[1] A rate order of the Interstate Commerce Commission that allowed an additional charge to be made for ferrying traffic across the Mississippi to cities on the east bank of the river was sustained over the objection that it gave an unconstitutional preference to ports in Texas.[2] Although there were a few early intimations that this Clause was applicable to the states as well as to Congress,[3] the Supreme Court declared emphatically in 1886 that state legislation was

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that, in order to identify it, and to protect the government from fraudulent practices, all that was required of the plaintiffs was to affix a 25 cent stamp of a peculiar design to each package, no matter how much it might contain, and enter into bond either to export it according to the declared intention, or to pay the regular tax, if it should not be exported.").

[14] Fairbank v. United States, 181 U.S. 283 (1901).

[15] United States v. Hvoslef, 237 U.S. 1, 13 (1915). The Court stated that "[a] tax on these charter parties was in substance a tax on the exportation; and a tax on the exportation is a tax on the exports." *Id.* at 17.

[16] Thames & Mersey Inc. v. United States, 237 U.S. 19 (1915).

[17] United States v. Clintwood Elkhorn Mining Co., 553 U.S. 1 (2008).

[18] *Id.* at 23.

[19] *Id.* at 19.

[1] Louisiana PSC v. Texas & N.O. R.R., 284 U.S. 125, 131 (1931); Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 433 (1856); South Carolina v. Georgia, 93 U.S. 4 (1876). In *Williams v. United States,* 255 U.S. 336 (1921), the argument that an act of Congress which prohibited interstate transportation of liquor into states whose laws prohibited manufacture or sale of liquor for beverage purposes was repugnant to this Clause was rejected.

[2] Louisiana PSC v. Texas & N.O. R.R., 284 U.S. 125, 132 (1931).

[3] Passenger Cases (Smith v. Turner), 48 U.S. (7 How.) 283, 414 (1849) (opinion of Justice Wayne); *cf.* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299, 314 (1851).

unaffected by it.[4] After more than a century, the Court confirmed, over the objection that this Clause was offended, the power that the First Congress had exercised[5] in sanctioning the continued supervision and regulation of pilots by the states.[6]

Clause 7—Appropriations

ArtI.S9.C7.1 Overview of Appropriations Clause

Article I, Section 9, Clause 7:

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

The Appropriations Clause establishes a rule of law to govern money contained in "the Treasury," which is a term that describes a place where public revenue is deposited and kept and from which payments are made to cover public expenses.[1] As the Supreme Court has explained, that rule of law directs "that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[2] The Clause has roots in the practice of English parliaments, dating from at least the 1690s, of legislating both the means of raising public revenue and also dedicating, or appropriating, newly raised sums to particular purposes. State constitutions adopted after Independence continued this practice, in most instances expressly identifying an appropriation as a necessity for drawing funds from a state treasury. The proposition that a legislature should control the disbursement of public funds appears to have become so firmly rooted by the late 1780s that the Appropriations Clause itself attracted relatively little debate either in the Constitutional Convention where it was drafted or in the state conventions where it was ratified.[3]

Strictly speaking, the Appropriations Clause does not confer a distinct legislative power upon Congress, on the order of those powers enumerated in Article I, Section 8. Instead, the Clause is phrased as a limitation on government action.[4] Thus, the Supreme Court's cases explain that any exercise of a power granted by the Constitution to the Judiciary or to the Executive is "limited by a valid reservation of congressional control over funds in the Treasury."[5] For instance, the Court has held federal courts may not enter, and Executive Branch officials may not pay, money judgments against the United States for which there is no appropriation. However, the Court's cases also explain that Congress may not dictate that

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[4] Morgan v. Louisiana, 118 U.S. 455, 467 (1886). *See also* Munn v. Illinois, 94 U.S. 113, 135 (1877); Johnson v. Chicago & Pacific Elevator Co., 119 U.S. 388, 400 (1886).

[5] 1 Stat. 53, 54, § 4 (1789).

[6] Thompson v. Darden, 198 U.S. 310 (1905).

[1] *See Treasury*, Black's Law Dictionary (11th ed. 2019); *see also* Samuel Johnson, *Treasury*, A Dictionary of the English Language (10th ed. 1792) ("A place in which riches are accumulated."); *see also* United States v. Bank of Metropolis, 40 U.S. 377, 403 (1841) (describing the "Treasury of the United States" as the place "where its money is directed by law to be kept").

[2] Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937).

[3] *See* ArtI.S9.C7.2 Historical Background on Appropriations Clause.

[4] *Compare, e.g.*, U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."), *with id* art. I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.").

[5] Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 425 (1990).

funds are available subject to a limitation that is itself unconstitutional. The Court has thus disregarded a funding limitation enacted by Congress because the limitation constituted, for example, a Bill of Attainder.[6]

ArtI.S9.C7.2 Historical Background on Appropriations Clause

Article I, Section 9, Clause 7:

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

The Appropriations Clause makes part of American constitutional law a regular practice of British Parliaments dating from at least the Glorious Revolution of the late seventeenth century. Parliament's function of granting its consent to raise revenue as a supplement to the Monarch's ordinary revenue sources had by then been an established and powerful tool.[1] However, prior to the Glorious Revolution, Parliament does not seem to have regularly directed its attention to decisions of how voted sums would be used.[2] The view of King Charles II's chief ministers in the decades prior to the Glorious Revolution, for example, was that the Monarch was the "master of his own money" and that his ministers had discretion to apply voted sums "to defray any casual expenses, of any nature" whatsoever.[3] The ministers viewed a 1665 supply bill passed by the House of Commons, for example, as "not fit for [a] monarchy" because it included a clause of appropriation, that is, legislative language stating that sums the bill raised could be used only for the costs of war against the Dutch Republic.[4] However, when King William III and Queen Mary II jointly assumed the throne in 1689, they recognized Parliament's power to legislate supply and expenditure.[5] Thereafter, clauses of appropriations became common features of parliamentary legislation.[6]

When the American states framed new systems of government after Independence, most state constitutions made legislative authorization a prerequisite for drawing any funds from a

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[6] *See* ArtI.S9.C7.3 Appropriations Clause Generally.

[1] *See* 1 William Blackstone, Commentaries *271, *296–97 (distinguishing between the Monarch's ordinary revenue, meaning revenue sources that belonged to the Monarch by long-standing custom, and extraordinary revenues, defined as the "aids, subsidies, and supplies" periodically granted by Parliament to supplement ordinary revenues).

[2] *See, e.g.*, 3 John Hatsell, Precedents of Proceedings in the House of Commons 203 (1818) (dating regular use of clauses of appropriation to 1688). However, members of Parliament maintained that they had the authority to legislate expenditure decisions even before the practice became more common. *See* 3 Anchitell Grey, Debates of the House of Commons 446–47 (1763) (statement of William Sacheverell, M.P.) (asserting, during 1675 debate in the Grand Committee of Supply, precedent for clauses of appropriation in supply bills dating from the 13th century).

[3] 3 Edward Hyde,The Life of Edward Earl of Clarendon 17 (1827).

[4] *Id.* at 10–11, 13. The clause passed the House of Commons, on Lord High Chancellor Clarendon's telling, because to that point King Charles II had lent it his support, relying on the faulty advice of its proponents. *Id.* at 11. After the House of Lords received the bill, near when Parliament was to be prorogued, the King heard debate over its merits. *Id.* at 14–22. The King left the debate "unsatisfied" but gave the bill his assent because there was not enough time left in the session to correct the allegedly troublesome clause. *See id.* at 22; *see also* 17 Car. II, c. 1 (1665), *reprinted in* 5 Statutes of the Realm 573 (John Raithby ed., 1819) (reciting that "noe moneyes leavyable by this Act be issued out of the Exchequer dureing this Warr but by such Order or Warrant mentioning that the moneyes payable by such Order or Warrant are for the service of Your Majestie in the said Warr respectively").

[5] *See* Bill of Rights of 1689, 1 W. & M., 2d sess., c.2 (1688) (dated under the Old Style calendar), *reprinted in* 6 Statutes of the Realm 143 (John Raithby ed., 1819) (listing among Parliament's ancient rights and liberties the rule that "levying Money for or to the Use of the Crowne" by pretense "of Prerogative without Grant of Parlyament for longer time or in other manner then the same is or shall be granted is Illegall").

[6] *See* 3 Hatsell, *supra note* note 2 at 202–05 (stating that between 1689 and the early 1800s Parliament's general practice was to specify "the particular sums which they thought necessary to be applied to the different services they had voted in the course of the session").

state treasury.[7] No state constitution in effect in 1787 expressly allowed a person to draw money from the state treasury without legislative authorization.[8] The states framed the Articles of Confederation to include a similar appropriating function for the Confederation Congress,[9] albeit one that drew from a common treasury supplied by taxes laid and levied by states rather than by the Confederation Congress itself.[10]

Perhaps owing to the pedigree then enjoyed by the view that a legislature should be solely endowed with the authority to identify the purposes for which public money may be spent, the Appropriations Clause itself attracted little debate at the Constitutional Convention of 1787. The Framers debated only whether the Senate—then conceived as a body whose members the states would elect—would have the power to originate or amend, among others, appropriations bills.[11] The first proposal in the Convention that mentioned Congress's appropriations function stated that "all Bills for raising or appropriating money" shall "originate in the first Branch of the Legislature, and shall not be altered or amended by the second Branch. . . ."[12] This first proposal continued: "and that no money shall be drawn from the public Treasury but in pursuance of appropriations to be originated in the first Branch."[13] The delegates ultimately removed limitations on Senate origination and amendment of appropriations bills in the Constitution before submitting the Constitution to the states for ratification.[14]

The Appropriations Clause occasionally figured in arguments advanced on either side of ratification. Those favoring ratification cited the Clause as a way to ensure that expenditure decisions would be made by legislators, the officials who under the new Constitution would be most accountable to the people.[15] Proponents also argued that the Clause would check

[7] *See* Del. Const. of 1776, art. VII (providing for the appointment of a "chief magistrate" empowered to "draw for such sums of money as shall be appropriated by the general assembly, and be held accountable to them for the same"); Md. Const. or Form of Gov't of 1776, at X – XI (specifying that the House of Delegates would originate all "money bills," a term defined to include all bills "appropriating money in the treasury" or otherwise providing supplies "for the support of the government"); Mass. Const. of 1780, ch. 2, § 1, art. XI ("No moneys shall be issued out of the treasury of this Commonwealth, and disposed of . . . but by warrant, under the hand of the Governour for the time being, with the advice and consent of the council, for the necessary defence and support of the Commonwealth; and for the protection and preservation the inhabitants thereof, agreeably to the act and resolves of the general court."); N.H. Const. of 1783, pt. 2, *reprinted in* The Perpetual Laws of the State of New-Hampshire 16 (John Melcher ed., 1789) (substantially similar language to that of Massachusetts Constitution of 1780); N.C. Const. of 1776, § 19 ("That the governor for the time being, shall have the power to draw for and apply such sums of money as shall be voted by the general assembly for the contingencies of government, and be accountable to them for the same"); Pa. Const. of 1776, § 20 (providing that the president and the president's council "may draw upon the treasury for such sums as shall be appropriated by the house"); S.C. Const. of 1778, art. XVI (directing that no "money be drawn out of the public treasury but by the legislative authority of the state").

[8] The constitutions of Georgia, New Jersey, New York, and Virginia, in effect in 1787, did not expressly refer to the making of appropriations. *See* Ga. Const. of 1777; NJ. Const. of 1776; N.Y. Const. of 1777; Va. Const. of 1776. Rhode Island and Connecticut "retained their colonial charters with only minor modifications as their fundamental law into the nineteenth century." G. Alan Tarr, Understanding States Constitutions 60 (1998).

[9] Articles of Confederation of 1781, art. IX, para. 5 (granting the Confederation Congress the power to "ascertain the necessary sums of Money to be raised for the service of the united states, and to appropriate and apply the same for defraying the public expenses").

[10] *Id.* art. VIII.

[11] 1 The Records of the Federal Convention of 1787, at 544–45 (Max Farrand ed. 1911).

[12] *Id.* at 524.

[13] *Id.*

[14] 2 The Records of the Federal Convention of 1787, at 545, 552 (Max Farrand ed. 1911).

[15] *See, e.g.*, 2 The Documentary History of the Ratification of the Constitution: Pennsylvania 417 (Merrill Jensen ed., 1976) (Nov. 28, 1787 convention statement of Thomas McKean) (contending that because the Appropriations Clause would settle responsibility for disbursements on Congress and the Statements and Accounts Clause would require disclosure of disbursements, the people could "judge of the conduct of their rulers and, if they see cause to object to the use or the excess of the sums raised, they may express their wishes or disapprobation to the legislature in petitions or remonstrances"); 6 The Documentary History of the Ratification of the Constitution: Massachusetts 1322 (John P. Kaminski et al. eds., 2000) (similar argument in January 23, 1788 convention statement of James Bowdoin); *see also*

Executive power[16] and guard against waste of public funds.[17] Those opposing ratification of the Constitution as proposed drew unfavorable comparisons between the original text of the Appropriations Clause, which would have barred the Senate from amending or originating bills making appropriations, and the version submitted to the states for ratification, which made the Senate an equal partner to the House of Representatives in authorizing expenditures.[18]

ArtI.S9.C7.3 Appropriations Clause Generally

Article I, Section 9, Clause 7:

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

The Supreme Court has construed the Appropriations Clause in relatively few cases, concluding that the requirement for an "appropriation made by law" to prohibit conduct that would result in disbursements of public funds for which an appropriation was lacking. The Court has explained in cases involving the claims of private parties, for example, that a judgment requiring payment to a person asserting a claim against the United States could not be entered in that person's favor without an appropriation to pay the judgment.[1] In *Knote v. United States*, the Court decided that an appropriation would likewise be needed for a court to order the return of the proceeds of seized property that had been paid into the Treasury.[2] Prior to entry of judgment, the Appropriations Clause also shapes the legal doctrines that courts

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Brutus, Virginia J. (Dec. 6, 1787), *reprinted in* 8 The Documentary History of the Ratification of the Constitution: Virginia 215 (John P. Kaminski et al. eds., 1988) (excerpted response to George Mason's objections to the Constitution) (pointing to the Appropriations Clause as requiring that "any evils which may arise from an improper application of the public money must either originate with, or have the assent of the immediate Representatives of the people").

[16] *See* An Impartial Citizen, in Petersburg Virginia Gazette (Jan. 10, 1788), *reprinted in* 8 The Documentary History of the Ratification of the Constitution: Virginia 295 (John P. Kaminski et al. eds., 1988) (arguing that because, among other things, the President could not "appropriate the public money to any use, but what is expressly provided by law," the President's constitutional powers would leave "dignity enough for the execution" of the office "without the possibility of making a bad use of it").

[17] *See* A Native of Virginia, Observations upon the Proposed Plan of Federal Government (Apr. 2, 1788), *reprinted in* 9 The Documentary History of the Ratification of the Constitution: Virginia 676 (John P. Kaminski et al. eds., 1990) ("As all appropriations of money are to be made by law, and regular statements thereof published, no money can be applied but to the use of the United States.").

[18] *See, e.g.*, George Mason, Objections to the Proposed Federal Constitution (1787), *reprinted in* Pamphlets on the Constitution of the United States Published During Its Discussion by the People, 1787–1788, at 329 (Paul Leicester Ford ed., 1888) [hereinafter Pamphlets on the Constitution] (pointing to the Senate's composition powers, including its ability to alter money bills and originate appropriations, to argue that the Senate would "destroy any balance in the government"); *but see* James Iredell, Answers to Mr. Mason's Objections to the New Constitution, Recommended by the Late Convention (1788), *reprinted in* Pamphlets on the Constitution, at 340–41 (arguing that the Senate should have a role in offering and amending appropriations because the House of Representatives might overlook a needed appropriation and the House would be able to check the Senate's power by withholding its assent to appropriations proposed in the upper chamber).

[1] Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1851) ("[N]o mandamus or other remedy lies against any officer of the Treasury Department, in a case situated like this, where no appropriation to pay it has been made.").

[2] *See* 95 U.S. 149, 154 (1877) (explaining that "if the proceeds" of condemned and sold property "have been paid into the treasury, the right to them has so far become vested in the United States that they can only be secured to the former owner of the property through an act of Congress"); *see also* Republic Nat. Bank v. United States, 506 U.S. 80, 94–96 (1992) (Rehnquist, C.J., opinion of the Court) (reading *Knote* as standing for "the principle that once funds are deposited into the Treasury, they become public money," and "thus may only be paid out pursuant to a statutory appropriation," even if the Government's ownership of the funds is disputed, but concluding that there was an appropriation that authorized payment of the funds sought by the petitioner).

may apply to adjudicate money claims against the United States.[3] Congress may even direct that no funds are available to pay what might otherwise be a valid debt.[4] If there is no appropriation to pay an alleged debt, either because no such appropriation had been made or Congress has validly prohibited the use of otherwise available funds, the only way that the purported creditor may seek relief is by petitioning Congress.[5]

The Appropriations Clause's limitation on drawing funds from the Treasury is not confined to the types of relief available in judicial proceedings against the United States.[6] As the Court explained in 1850 in *Reeside v. Walker*, if there is no appropriation available, the President and Executive Branch officers and employees lack the authority to pay the "debts of the United States generally, when presented to them"[7] or to incur obligations on behalf of the United States in anticipation of Congress later making an appropriation to support the obligation.[8] Even the President's constitutionally vested powers may not, on their own, authorize or require disbursements from the Treasury.[9] For example, though a presidential pardon removes all disabilities resulting from a pardoned offense, a pardon cannot require return of property seized, sold, and paid into the Treasury as a consequence of the offense.[10]

However, the Court has also identified circumstances in which the Appropriations Clause is not a relevant limitation on government action. The Clause governs the conduct of federal officers or employees, but it does not constrain Congress in its ability to incur obligations—binding commitments to pay federal funds—by statute[11] or to otherwise dispose of public funds.[12] Similarly, the Clause is not implicated where there is an appropriation

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[3] *See* Off. of Pers. Mgmt. v. Richmond, 496 U.S. 414, 426 (1990) ("[J]udicial use of the equitable doctrine of estoppel cannot grant respondent a money remedy that Congress has not authorized.").

[4] *See* Hart v. United States, 118 U.S. 62, 65, 67 (1886) ("It was entirely within the competency of congress to declare" that no debt that accrued prior to the outbreak of the Civil War could be paid in favor of a claimant who had "promoted, encouraged, or in any manner sustained" rebellion "till the further order of congress.").

[5] *See* Bradley v. United States, 98 U.S. 104, 117 (1878) (stating that where the Federal Government contracted to lease real property owned by a third party, subject to Congress making appropriations in the future to pay the agreed annual rental amounts, the lessor had to "rely upon the justice of Congress" to recover the difference between the agreed rental value for the third year of the lease, $4,200, and the lesser amount actually appropriated for that year's rental payments, $1,800); *Reeside*, 52 U.S. (11 How.) at 291 ("Hence, the petitioner should have presented her claim on the United States to Congress, and prayed for an appropriation to pay it."); *cf.* R.R. v. Alabama, 101 U.S. 832, 835 (1879) (drawing an analogy between the Appropriations Clause and a similar provision in the Alabama Constitution to explain that in the absence of an appropriation "the party who gets a judgment must wait until Congress makes an appropriation before his money can be had").

[6] *Richmond*, 496 U.S. at 425.

[7] *Reeside*, 52 U.S. at 291 ("No officer, however high, not even the President, much less a Secretary of the Treasury or Treasurer, is empowered to pay debts of the United States generally, when presented to them . . . . However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not thus previously sanctioned.").

[8] *See Bradley*, 98 U.S. at 114 ("Argument to show that money cannot be drawn from the treasury before it is appropriated is unnecessary, as the Constitution provides that 'no money shall be drawn from the treasury but in consequence of an appropriation made by law. . . .'" (quoting U.S. CONST. art. I, § 9, cl. 7)).

[9] *See Richmond*, 496 U.S. at 425 ("Any exercise of a power granted by the Constitution to one of the other branches of Government is limited by a valid reservation of congressional control over funds in the Treasury.").

[10] Knote v. United States, 95 U.S. 149, 154 (1877) (holding that however large the President's pardon power may be, that power, like "all" of the President's powers, "cannot touch moneys in the treasury of the United States, except expressly authorized by act of Congress").

[11] *See* Me. Cmty. Health Options v. United States, No. 18-1023, slip op. at 10, 13 (U.S. Apr. 27, 2020) (explaining that the Appropriations Clause constrains "how federal employees and officers may make or authorize payments without appropriations" but does not address "whether Congress itself can create or incur an obligation directly by statute").

[12] *See* Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 – 22 (1937) (concluding that the Appropriations Clause was "intended as a restriction upon the disbursing authority of the Executive department" and thus was "without significance" in a case challenging Congress's decision to pay the proceeds of a tax on coconut oil to the treasury of the Philippine Islands and further rejecting the argument that the terms of the appropriation were so

available to make a payment, because in that event payments made pursuant to the appropriation would comply with the Clause.[13]

While the Appropriations Clause does not itself constrain Congress's ability to dictate the terms upon which it makes funds available, other provisions of the Constitution may. The Court held in *United States v. Lovett* that a limitation in an appropriations act that barred payment of compensation to three named federal employees was an unconstitutional bill of attainder because it inflicted punishment without judicial trial.[14] The Court also disregarded a limitation placed on an appropriation for the payment of Court of Claims judgments in *United States v. Klein*, explaining that the limitation impermissibly sought to change the legal effect of a presidential pardon.[15]

In short, the Court's case law has considered the Appropriations Clause and its effects in roughly three contexts. The Court has articulated how, from Congress's perspective, the Clause it not a relevant limitation on congressional action. The Clause requires an appropriation "made by law" before funds may leave the Treasury, and Congress is the branch empowered to authorize such disbursements. From the perspective of the other branches, the Clause conditions any exercise of a constitutional or statutory power, so that such powers cannot result in disbursements of Treasury funds absent an appropriation. Finally, the Court has considered appropriations made by Congress for their consistency with provisions or features of the Constitution other than the Appropriations Clause. If Congress imposes a limitation on funds that is itself unconstitutional, the limitation cannot be enforced.

Clause 8—Titles of Nobility and Foreign Emoluments

ArtI.S9.C8.1 Overview of Titles of Nobility and Foreign Emoluments Clauses

Article I, Section 9, Clause 8:

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

This provision encompasses two distinct commands. The first half, sometimes called the federal "Title of Nobility Clause,"[1] limits the power of the United States by prohibiting it from

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general that it constituted an impermissible delegation of legislative power to the Executive Branch); *cf.* United States v. Realty Co., 163 U.S. 427, 444 (1896) (stating that Congress's decision to recognize a claim "founded upon equitable and moral considerations, and grounded upon principles of right and justice" and "appropriating money for its payment, can rarely, if ever, be the subject of review by the Judicial Branch of the government").

[13] *See* Salazar v. Ramah Navajo Chapter, 567 U.S. 182, 198 n.9 (2012) (reading *Richmond* as having "indicated that the Appropriations Clause is no bar to recovery in a case like this one, in which 'the express terms of a specific statute' establish 'a substantive right to compensation' from" an appropriation (quoting *Richmond*, 496 U.S. at 432)). Congress may appropriate funds in terms that leave disbursing officials no discretion to deny a claimant the funds owed. *See* United States v. Price, 116 U.S. 43, 44 (1885) ("fully" concurring with the conclusion of the Court of Claims that "congress undertook, as it had the right to do, to determine, not only what particular citizens of Tennessee, by name, should have relief, but also the exact amount which should be paid to each of them" (internal quotation marks omitted)); United States v. Jordan, 113 U.S. 418, 422 (1885) (same).

[14] *See* 328 U.S. 303, 313, 316–18 (1946) (holding that though Congress phrased the limitation as compensation prohibition it served as a permanent bar on federal employment, a consequence that case law held to be punishment within the meaning of the Bill of Attainder Clause).

[15] *See* United States v. Klein, 80 U.S. 128, 147 – 48 (1871) (explaining that the "legislature cannot change the effect of" a "pardon any more than the executive can change a law").

[1] *See, e.g.*, Mark R. Killenbeck, *The Physics of Federalism*, 51 U. Kan. L. Rev. 1, 7 (2002) (using the term "Title of Nobility Clause" to refer to this provision). More often, the collective terms "Title of Nobility Clauses" or "Nobility Clauses" are used to refer to both this provision and the parallel prohibition on state-granted titles of nobility in the following section. *See* U.S. Const. art. I, § 10, cl. 1 ("No state shall . . . grant any Title of Nobility."); *see, e.g.,* Akhil Reed

granting any "title of Nobility." The second half, often referred to as the "Foreign Emoluments Clause,"[2] limits the actions of certain federal officers by prohibiting them from accepting "any present, Emolument, Office, or Title, of any kind whatever" from a foreign state, without the consent of Congress.

For most of their history, neither the Title of Nobility Clause nor the Foreign Emoluments Clause have been much discussed or substantively examined by the courts.[3] The meaning and scope of the Foreign Emoluments Clause have been examined in opinions from the Department of Justice's Office of Legal Counsel and the Comptroller General of the United States concerning the obligations of federal officers with respect to gifts, salaries, awards, and other potential emoluments from foreign sources.[4] During the administration of President Donald Trump, the lower federal courts for the first time issued substantive—but often conflicting—decisions interpreting the Foreign Emoluments Clause.[5]

ArtI.S9.C8.2 Historical Background on Foreign Emoluments Clause

Article I, Section 9, Clause 8:

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

The Foreign Emoluments Clause's basic purpose is to prevent corruption and limit foreign influence on federal officers. At the Constitutional Convention, Charles Pinckney of South Carolina introduced the language that became the Foreign Emoluments Clause based on "the necessity of preserving foreign Ministers & other officers of the U.S. independent of external influence."[1] The Convention approved the Clause unanimously without noted debate.[2] During the ratification debates, Edmund Randolph of Virginia, a key figure at the Convention,

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Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 131 (2000) (using the term "Title of Nobility Clauses" to refer to these two prohibitions); J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2349 (1997) (same).

[2] *See, e.g.*, Deborah Samuel Sills, *The Foreign Emoluments Clause: Protecting Our National Security Interests*, 26 J.L. & Pol'y 63 (2018); Amandeep S. Grewal, *The Foreign Emoluments Clause and the Chief Executive*, 102 Minn. L. Rev. 639 (2017); Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. U.L. Rev. Colloquy 180 (2013). The usage "Foreign Emoluments Clause" distinguishes Article I, Section 9, Clause 8 from another clause governing the emoluments that the President in particular may receive, sometimes called the "Domestic Emoluments Clause." *See* ArtII.S1.C7.1 Emoluments Clause and Presidential Compensation.

[3] *See generally* Michael A. Foster & Kevin J. Hickey, Cong. Rsch. Serv., R45992, The Emoluments Clauses and the Presidency: Background and Recent Developments 1 (2019), https://crsreports.congress.gov/product/pdf/R/R45992 ("For most of their history, the Foreign and Domestic Emoluments Clauses . . . were little discussed and largely unexamined by the courts."); Manley W. Roberts, *The Nobility Clauses: Rediscovering the Cornerstone*, 1 J. Attenuated Subtleties 20, 21 (1982), *reprinted in* 9 J.L.: Periodical Lab'y of Leg. Scholarship 102, 103 (2019) ("For two centuries the courts . . . said nothing about the [Title of] Nobility Clauses.").

[4] *See, e.g.*, Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1 (2009); Proposal that the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278 (1963); *In re* Retired Uniformed Service Members Receiving Compensation from Foreign Governments, 58 Comp. Gen. 487 (1979).

[5] *See* ArtI.S9.C8.3 Foreign Emoluments Clause Generally.

[1] 2 The Records of the Federal Convention of 1787, at 389 (Max Farrand ed., 1911) [hereinafter Farrand's Records] (Madison's notes).

[2] *Id.*

explained that the Foreign Emoluments Clause was intended to "prevent corruption" by "prohibit[ing] any one in office from receiving or holding any emoluments from foreign states."[3]

The Foreign Emoluments Clause reflected the Framers' experience with the then-customary European practice of giving gifts to foreign diplomats.[4] Following the example of the Dutch Republic, which prohibited its ministers from receiving foreign gifts in 1651,[5] the Articles of Confederation provided: "any person holding any office of profit or trust under the United States, or any of them" shall not "accept of any present, emolument, office, or title of any kind whatever, from any king, prince, or foreign state."[6] The Foreign Emoluments Clause largely tracks this language from the Articles, although there are some differences.[7]

During the Articles period, American diplomats struggled with how to balance their legal obligations and desire to avoid the appearance of corruption, against prevailing European norms and the diplomats' wish to not offend their host country.[8] A well-known example from this period, which appears to have influenced the Framers of the Emoluments Clause,[9] involved the King of France's gift of an opulent snuff box to Benjamin Franklin.[10] Concerned that receipt of this gift would be perceived as corrupting and violate the Articles of Confederation, Franklin sought (and received) congressional approval to keep the gift.[11] Following this precedent, the Foreign Emoluments Clause prohibits federal officers from accepting foreign presents, offices, titles, or emoluments, unless Congress consents.[12]

The Foreign Emoluments Clause thus provides a role for Congress in determining the propriety of foreign emoluments. Under this authority, Congress has in the past provided consent to the receipt of particular presents, emoluments, and decorations through public or

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[3] *See* 3 Farrand's Records, *supra* note 1, at 327; *accord* Joseph Story, 3 Commentaries on the Constitution of the United States 215–16 (1st ed. 1833) ("[The Foreign Emoluments Clause] is founded in a just jealousy of foreign influence of every sort.").

[4] *See generally* Deborah Samuel Sills, *The Foreign Emoluments Clause: Protecting Our National Security Interests*, 26 J.L. & Pol'y 63, 69–72 (2018); Robert G. Natelson, *The Original Meaning of "Emoluments" in the Constitution*, 52 Ga. L. Rev. 1, 37, 43–45 (2017); Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. U.L. Rev. Colloquy 30, 33–35 (2012).

[5] *See* Zephyr Teachout, Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United 20–21 (2014) (citing 4 John Bassett Moore, A Digest of International Law 579 (1906)).

[6] Articles of Confederation of 1781, art. VI, ¶ 1.

[7] Two differences are notable. First, unlike the corresponding provision in the Articles, the Foreign Emoluments Clause expressly provides that Congress may consent to a federal official's receipt of emoluments. *See* U.S. Const. art. I, § 9, cl. 8. Second, the Articles expressly reached *state* officeholders as well as federal ones, while the Foreign Emoluments Clause does not. Articles of Confederation of 1781, art. VI, ¶ 1; *see also* Natelson, *supra* note 4, at 37–38 (discussing these differences); Seth Barrett Tillman, *Citizens United and the Scope of Professor Teachout's Anti-Corruption Principle*, 107 Nw. U. L. Rev. Colloquy 1, 5 (2012) (same).

[8] *See generally* Teachout, *supra* note 5, at 20–26; Natelson, *supra* note 4, at 43–45.

[9] As Edmund Randolph recounted to the Virginia ratifying convention:

> An accident which actually happened, operated in producing the [Foreign Emoluments Clause]. A box was presented to our ambassador by the king of [France]. It was thought proper, in order to exclude corruption and foreign influence, to prohibit any one in office from receiving or holding any emoluments from foreign states. . . . [I]f at that moment, when we were in harmony with the king of France, we had supposed that he was corrupting our ambassador, it might have disturbed that confidence . . . .

3 Farrand's Records, *supra* note 1, at 327. It is unclear whether Randolph was referring to the snuff box gifted to Franklin, or a similar gift made to Arthur Lee, an American envoy to France during this same period. *See* Teachout, *supra* note 5, at 35.

[10] *See* Teachout, *supra* note 5, at 25–26.

[11] *See id.*; Applicability of Emoluments Clause to Employment of Government Employees by Foreign Public Universities, 18 Op. O.L.C. 13, 16 n.4 (1994).

[12] U.S. Const. art. I, § 9, cl. 8.

private bills,[13] or by enacting general rules governing the receipt of gifts by federal officers from foreign governments.[14] For example, in 1966, Congress enacted the Foreign Gifts and Decorations Act, which provided general congressional consent for foreign gifts of minimal value, as well as conditional authorization for acceptance of gifts on behalf of the United States in some cases.[15]

Several Presidents in the nineteenth century—such as Andrew Jackson,[16] Martin Van Buren,[17] John Tyler,[18] and Benjamin Harrison[19]—notified Congress of foreign presents they received, and either placed the gifts at Congress's disposal or obtained consent for their acceptance. Other nineteenth century Presidents treated presents they received as "gifts to the United States, rather than as personal gifts."[20] Thus, in one instance, President Lincoln accepted a foreign gift on behalf of the United States and then deposited it with the Department of State.[21] In the twentieth century, some Presidents sought the advice of the Department of Justice's Office of Legal Counsel on whether acceptance of particular honors or benefits would violate the Emoluments Clauses.[22]

[13] *See generally* S. Rep. No. 89-1160, at 1–2 (1966) ("In the past, the approval of Congress, as required by [the Foreign Emoluments Clause], has taken the form of public or private bills, authorizing an individual or group of individuals to accept decorations or gifts.").

[14] *See, e.g.*, Act of Jan. 31, 1881, ch. 32, § 3, 21 Stat. 603, 603–04 (1881) (authorizing certain named persons to accept presents from foreign governments, and requiring that "hereafter, any presents, decoration, or other thing, which shall be conferred or presented by any foreign government to any officer of the United States . . . shall be tendered through the Department of State").

[15] *See* Pub. L. No. 89-673, 80 Stat. 952 (1966) (codified as amended at 5 U.S.C. § 7342).

[16] A Compilation of the Messages and Papers of the Presidents 1789–1902, at 466–67 (James Richardson, ed., 1907) (January 19, 1830 letter from President Jackson to the Senate and House of Representatives stating that the Constitution prohibited his acceptance of a medal from Simon Bolivar, and therefore placing the medal "at disposal of Congress").

[17] S.J. Res. 4, 26th Cong., 5 Stat. 409 (1840) (joint resolution of Congress authorizing President Van Buren to dispose of presents given to him by the Imam of Muscat and deposit the proceeds in the Treasury).

[18] S. Journal, 28th Cong., 2d Session 254 (1844) (authorizing sale of two horses presented to the United States by the Imam of Muscat); *see also* Teachout, *supra* note 5, at 42 (discussing the Van Buren and Tyler precedents); Seth Barrett Tillman, The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout, 107 Nw. L. Rev. Colloquy 180, 190 (2013) (same).

[19] Pub. Res. 54-39, 29 Stat. 759 (1896) (congressional resolution authorizing delivery of Brazilian and Spanish medals to former President Benjamin Harrison).

[20] *See* Proposal that the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278, 281 (1963).

[21] *Id.*

[22] *See* Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1, 4, 7–9 (2009) (concluding that acceptance of the Nobel Peace Prize does not violate the Foreign Emoluments Clause because it is awarded by a private organization, not a foreign government); President Reagan's Ability to Receive Retirement Benefits from the State of California, Op. O.L.C. 187, 189–92 (1981) (concluding that retirement benefits are not "emoluments" under the Domestic Emoluments Clause because they "are neither gifts nor compensation for services" and would not subject the President to improper influence); Honorary Irish Citizenship, 1 Op. O.L.C. Supp. at 278 (concluding that President's acceptance of even "honorary" Irish citizenship would violate "the spirit, if not the letter" of the Foreign Emoluments Clause).

ArtI.S9.C8.3 Foreign Emoluments Clause Generally

Article I, Section 9, Clause 8:

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

For most of its history, courts have rarely substantively analyzed or interpreted the Foreign Emoluments Clause.[1] During the administration of President Donald Trump, however, a number of private parties, state attorneys general, and Members of Congress sued the President based on alleged violations of both the Foreign Emoluments Clause and the Domestic Emoluments Clause[2] (collectively, the Emoluments Clauses). Three major federal lawsuits concerning the Emoluments Clauses were filed against President Trump.[3] Over nearly four years, these cases progressed through the lower federal courts, resulting in the first significant judicial decisions on the Emoluments Clauses.

In late 2020, the Supreme Court denied review in one of these cases,[4] and—after the end of President Trump's term in January 2021—instructed two federal appellate courts to vacate their judgments and dismiss the other two cases as moot.[5] As a result, most of the lower court decisions on the Emoluments Clauses have been vacated.[6] In the absence of definitive precedent from the Supreme Court, this section reviews these lower court holdings regarding the meaning and scope of the Emoluments Clauses, although they generally retain at most persuasive, and not precedential, value.[7]

In the three cases, plaintiffs alleged that President Trump's retention of certain business and financial interests during his Presidency violated the Emoluments Clauses. For example, because President Trump retained an ownership interest in the Trump International Hotel, plaintiffs alleged he received constitutionally forbidden "emoluments" when foreign or state governments paid for their officials to stay at the Hotel.[8] In a series of rulings, the lower courts addressed three main issues: (1) who has standing to assert Emoluments Clause violations; (2)

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[1] *See* Michael A. Foster & Kevin J. Hickey, Cong. Rsch. Serv., R45992, The Emoluments Clauses and the Presidency: Background and Recent Developments 1 (2019), https://crsreports.congress.gov/product/pdf/R/R45992. Like the Title of Nobility Clause, the Foreign Emoluments Clause is occasionally cited by the Supreme Court in passing to make a rhetorical point. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 424 n.51 (2010) (Stevens, J., concurring in part and dissenting in part) (citing Foreign Emoluments Clause to argue that the "notion that Congress might lack the authority to distinguish foreigners from citizens in the regulation of electioneering would certainly have surprised the Framers"); Roe v. Wade, 410 U.S. 113, 157 (1973) (noting that the Emoluments Clause, along with a number of other constitutional provisions, uses the term "Person" without "pre-natal application").

[2] *See* ArtII.S1.C7.1 Emoluments Clause and Presidential Compensation.

[3] *See* Complaint, Citizens for Resp. & Ethics in Washington (CREW) v. Trump, No. 1:17-cv-00458-RA (S.D.N.Y. Jan. 23, 2017); Complaint, Blumenthal v. Trump, No. 1:17-cv-01154-EGS (D.D.C. June 14, 2017); Complaint, District of Columbia v. Trump, No. 8:17-cv-01596-PJM (D. Md. June 12, 2017).

[4] Blumenthal v. Trump, 949 F.3d 14 (D.C. Cir. 2020), *cert. denied*, 141 S. Ct. 553 (U.S. 2020).

[5] *See* CREW v. Trump, 953 F.3d 178 (2d Cir. 2019), *cert. granted, judgment vacated*, No. 20-330, 2021 WL 231541 (U.S. Jan. 25, 2021); *In re* Trump, 958 F.3d 274 (4th Cir. 2020) (en banc), *cert. granted, judgment vacated sub nom.*, Trump v. District of Columbia, No. 20-331, 2021 WL 231542 (U.S. Jan. 25, 2021).

[6] An exception is the District of Columbia Circuit's opinion on legislative standing, which remains good law. *See Blumenthal*, 949 F.3d 14.

[7] *See Persuasive Authority*, Black's Law Dictionary (11th ed. 2019) ("Authority that carries some weight but is not binding on a court . . . .").

[8] *See, e.g.*, CREW v. Trump, 276 F. Supp. 3d 174, 182 (S.D.N.Y. 2017) (reviewing plaintiffs' allegations), *vacated and remanded*, 953 F.3d 178 (2d Cir. 2019), *judgment vacated*, No. 20-330, 2021 WL 231541 (U.S. Jan. 25, 2021).

whether the President and other elected officials are subject to the Foreign Emoluments Clause; and (3) the meaning and scope of the term "emolument."[9]

On the standing-to-sue issue, the U.S. Court of Appeals for the District of Columbia Circuit held that individual Members of Congress lacked standing to sue based on alleged injuries to the legislature as a whole (namely, the deprivation of an opportunity to vote on whether to consent to the acceptance of foreign emoluments).[10] As to the standing of private individuals, the U.S. Court of Appeals for the Second Circuit held that hospitality-industry plaintiffs had standing based on a theory of competitive harm resulting from the allegedly unlawful acceptance of emoluments.[11] However, a number of judges on the Second Circuit dissented from this holding[12] and the Supreme Court subsequently vacated the decision as moot.[13]

On the second issue, commentators have debated whether federal elected officials hold an "Office of Profit or Trust" under the United States are thus subject to the Foreign Emoluments Clause.[14] The Department of Justice's Office of Legal Counsel (OLC), which has developed a body of opinions on the Emoluments Clauses, has opined that the President "surely" holds an office of profit and trust under the Constitution.[15] In litigation, President Trump conceded that he was subject to the Foreign Emoluments Clause,[16] and the only lower court to directly reach the issue agreed with the OLC's view.[17] However, that holding was subsequently vacated.[18]

The final litigated issue was the meaning and scope of the term "emolument" as used in the Emoluments Clauses—particularly, whether it includes private, arm's-length market transactions. In the litigation, President Trump argued that "emoluments" included only benefits received by an officeholder in return for official action or through his office or employment.[19] Plaintiffs urged that "emoluments" be defined more broadly to apply to any "profit, gain, or advantage" received by the President from a foreign or domestic government.[20] The two district courts that reached the issue adopted the plaintiffs' broader definition of "emolument,"[21] although the appellate courts subsequently vacated those decisions.[22]

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[9] For a fuller examination of these decisions, see Foster & Hickey, *supra* note 1, at 5–18.

[10] *Blumenthal*, 949 F.3d at 19–20.

[11] CREW v. Trump, 953 F.3d 178, 189–200 (2d Cir. 2019), *cert. granted, judgment vacated*, No. 20-330, 2021 WL 231541 (U.S. Jan. 25, 2021). A district court in Maryland adopted a similar view of competitor standing with respect to state-government plaintiffs. *See* District of Columbia v. Trump, 291 F. Supp. 3d 725, 740–49 (D. Md. 2018), *vacated,* 838 F. App'x 789, 790 (4th Cir. 2021).

[12] *See* CREW v. Trump, 971 F.3d 102, 102 (2d Cir. 2020) (noted dissents from five judges from the denial of rehearing en banc).

[13] CREW v. Trump, No. 20-330, 2021 WL 231541 (U.S. Jan. 25, 2021).

[14] *Compare* Seth Barrett Tillman, *The Original Public Meaning of the Foreign Emoluments Clause: A Reply to Professor Zephyr Teachout*, 107 Nw. L. Rev. Colloquy 180, 185–95 (arguing that the Foreign Emoluments Clause does not apply to elected federal officials), *with* Zephyr Teachout, *Gifts, Offices, and Corruption*, 107 Nw. L. Rev. Colloquy 30, 39–48 (2012) (disputing this view).

[15] Applicability of the Emoluments Clause and the Foreign Gifts and Decorations Act to the President's Receipt of the Nobel Peace Prize, 33 Op. O.L.C. 1, 4 (2009); *see also* Proposal that the President Accept Honorary Irish Citizenship, 1 Op. O.L.C. Supp. 278, 278 (1963) (assuming that the Foreign Emoluments Clause applies to the President).

[16] *See, e.g.*, Blumenthal v. Trump, 373 F. Supp. 3d 191, 196 n.3 (D.D.C. 2019) ("The parties do not dispute that the [Foreign Emoluments] Clause applies to the President."), *rev'd on other grounds*, Blumenthal v. Trump, 949 F.3d 14 (D.C. Cir. 2020).

[17] *See* District of Columbia v. Trump, 315 F. Supp. 3d 875, 882–86 (D. Md. 2018), *vacated,* 838 F. App'x 789, 790 (4th Cir. 2021).

[18] District of Columbia v. Trump. 838 F. App'x 789, 790 (4th Cir. 2021).

[19] *See, e.g.*, *Blumenthal*, 373 F. Supp. 3d at 196–98.

[20] *See, e.g.*, *id.* at 197–98.

[21] *See id.* at 199–208; *D.C. v. Trump*, 315 F. Supp. 3d at 886–904.

ArtI.S9.C8.4 Titles of Nobility and the Constitution

Article I, Section 9, Clause 8:

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

The Constitution's prohibition on titles of nobility reflects both "the American aversion to aristocracy"[1] and the republican character of the government established by the Constitution.[2] The Clause thus complements other constitutional provisions—most notably the Thirteenth, Fourteenth, and Fifteenth Amendments—that prohibit invidious governmental distinctions between classes of American citizens.[3]

The Articles of Confederation[4] and many Revolutionary-era state constitutions contained prohibitions of titles of nobility and other systems of hereditary privilege.[5] The federal Title of Nobility Clause substantially follows the Articles' prohibition and was not a subject of significant debate at the Constitutional Convention.[6] As James Madison observed in the *Federalist No. 44*: "The prohibition with respect to titles of nobility is copied from the articles of Confederation and needs no comment."[7] Alexander Hamilton, in the *Federalist No. 84*, was only slightly more loquacious:

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[22] District of Columbia v. Trump, 838 F. App'x 789, 790 (4th Cir. 2021); Blumenthal v. Trump, 949 F.3d 14, 21 (D.C. Cir. 2020), *cert. denied*, 141 S. Ct. 553 (2020).

[1] Zobel v. Williams, 457 U.S. 55, 70 n.3 (1982) (Brennan, J., concurring); *see also* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (characterizing Title of Nobility Clauses as reflecting the Constitution's "rejection of dispositions . . . based on blood").

[2] *See* The Federalist No. 39 (James Madison); The Federalist No. 84 (Alexander Hamilton).

[3] *See* Fullilove v. Klutznick, 448 U.S. 448, 533–55 (1980) (Stevens, J., dissenting) (discussing Title of Nobility Clauses as "one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially"); J. M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2349–52 (1997) (characterizing the Title of Nobility Clauses as among "status-dismantling" constitutional provisions intended "to ensure that nothing like a hereditary monarchy or a hereditary nobility would ever rise up in the United States").

[4] Articles of Confederation of 1781, art. VI, ¶ 1 ("[N]or shall the United States in Congress assembled, or any of them, grant any title of nobility.").

[5] *See, e.g.*, Md. Const. of 1776, art. XL ("[N]o title of nobility, or hereditary honours, ought to be granted in this State."); N.C. Const. of 1776, art. XXII ("[N]o hereditary emoluments, privileges or honors ought to be granted or conferred in this State."); Ga. Const. of 1777, art. XI ("[N]or shall any person who holds any title of nobility be entitled to a vote, or be capable of serving as a representative, or hold any post of honor, profit, or trust in this State, whilst such person claims his title of nobility."); Mass. Const. of 1780, art. VI ("No man, or corporation, or association of men, have any other title to obtain advantages, or particular and exclusive privileges, distinct from those of the community, than what arises from the consideration of services rendered to the public . . . ."); Pa. Const. of 1790, art. IX, § 24 ("[T]he legislature shall not grant any title of nobility or hereditary distinction . . . .").

[6] *See* Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 Wash. U.L. Rev. 1375, 1401–02 (2006) ("The Nobility Clauses occasioned little debate in the Constitutional Convention itself; indeed, as carry-overs from the Articles of Confederation they were unlikely to be the subject of much comment."); *Eugenic Artificial Insemination: A Cure for Mediocrity?*, 94 Harv. L. Rev. 1850, 1859 (1981) ("Taken from the Articles of Confederation, the titles of nobility clause was enacted virtually without debate in the Constitutional Convention.").

[7] The Federalist No. 34 (James Madison).

> Nothing need be said to illustrate the importance of the prohibition of titles of nobility. This may truly be denominated the corner-stone of republican government; for so long as they are excluded, there can never be serious danger that the government will be any other than that of the people.[8]

Very few courts have had occasion to interpret the meaning of the federal Title of Nobility Clause.[9] The Supreme Court has only discussed the Title of Nobility Clause in passing, as when Justices cite the Clause to make a rhetorical point in a concurring or dissenting opinion.[10]

How broadly to understand the Title of Nobility Clause's prohibition thus remains an open, if perhaps academic, question. On a narrow reading, the Clause merely prohibits a federal system of hereditary privilege along the lines of the British aristocratic system.[11] More broadly understood, the Clause could preclude other governmental grants of enduring favor or disfavor to particular classes based on birth or other non-merit-based criteria.[12] Some commentators

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[8] The Federalist No. 84 (Alexander Hamilton); *accord* The Federalist No. 39 (James Madison) ("Could any further proof be required of the republican complexion of this system, the most decisive one might be found in its absolute prohibition of titles of nobility . . . ").

[9] There are only a handful of lower court decisions that can be characterized as substantive interpretations of the Clause. *See, e.g.*, State v. Larson, 419 N.W.2d 897, 898 (N.D. 1988) (holding that state issuance of driver's licenses did not confer a title of nobility); United States v. Thomason, 444 F.2d 1094, 1095 (9th Cir. 1971) (holding that military rank system does not constitute a title of nobility); *In re* Jama, 272 N.Y.S.2d 677, 678 (N.Y. Civ. Ct. 1966) (rejecting application for surname change to "von Jama" based on "spirit and intent" of federal Title of Nobility Clause); *see generally* Jol A. Silversmith, *The "Missing Thirteenth Amendment": Constitutional Nonsense and Titles of Nobility*, 8 S. Cal. Interdisc. L.J. 577, 606 n.178 (1999) (collecting cases). A substantial number of these lower-court cases raise the oft-rejected claim that attorneys' or public officials' use of the term "Esquire" violates the Title of Nobility Clause. *See, e.g.*, State v. Casteel, 634 N.W.2d 338, 343 n.6 (Wis. Ct. App. 2001); Williams v. Florida., No. 218CV389FTM29UAM, 2019 WL 858024, at *2 (M.D. Fla. Feb. 22, 2019); Bassoff v. Treanor, Pope & Hughes P.A., No. CV RDB-14-3753, 2015 WL 8757651, at *4 (D. Md. Dec. 15, 2015); *see generally* Silversmith, *supra* note 9, at 602–07 (addressing this argument).

[10] *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring) (observing that the Title of Nobility Clause reflects the Constitution's "rejection of dispositions . . . based on blood"); Zobel v. Williams, 457 U.S. 55, 70 n.3 (1982) (Brennan, J., concurring) (noting that both the Title of Nobility Clause and the Fourteenth Amendment forbid "degrees of citizenship"); Fullilove v. Klutznick, 448 U.S. 448, 533–55 (1980) (Stevens, J., dissenting) (discussing the Title of Nobility Clauses as "one aspect of our commitment to the proposition that the sovereign has a fundamental duty to govern impartially"); Mathews v. Lucas, 427 U.S. 495, 521 n.3 (1976) (Stevens, J., dissenting) (arguing that the Title of Nobility Clause "would prohibit the United States from attaching any badge of ignobility to a citizen at birth").

As in the *Federalist Papers*, early mentions of the Clause in Supreme Court opinions treat its meaning as self-explanatory. *See, e.g.*, Briscoe v. Bank of Commonwealth of Kentucky, 36 U.S. 257, 350 (1837) (noting that "title of nobility" is "a term which defines itself"); Sturges v. Crowninshield, 17 U.S. 122, 153 (1819) (characterizing the state Title of Nobility Clause as a "plain prohibition" that is "clearly understood"); *accord* 3 Joseph Story, Commentaries on the Constitution of the United States 215 (1833) ("[The Title of Nobility] clause seems scarcely to require even a passing notice. As a perfect equality is the basis of all our institutions, state and national, the prohibition against the creation of any titles of nobility seems proper, if not indispensable . . . .").

[11] *See, e.g.*, *Nobility*, Black's Law Dictionary (11th ed. 2019) (defining "nobility" with respect to the English peerage system of "dukes, marquises, earls, viscounts, and barons, and their female counterparts," usually associated with land grants and hereditary descent of title and privilege); *but see* Larson, *supra* note 6, at 1380–82 (arguing the Title of Nobility Clauses' scope extends "beyond the narrow meaning of nobility under English law").

[12] *See Mathews*, 427 U.S. at 521 n.3 (Stevens, J., dissenting) (arguing the Title of Nobility Clause would prohibit "any badge of ignobility" imposed by the government to "a citizen at birth"); Richard Delgado, *Inequality "From the Top": Applying an Ancient Prohibition to an Emerging Problem of Distributive Justice*, 32 UCLA L. Rev. 100, 115–17 (1984) (arguing the Title of Nobility Clauses prohibit state action that confers the "indices of nobility," such an enduring grant of advantage or wealth to a closed class of individuals).

This broader reading of the Title of Nobility Clause is in tension, as a matter of original meaning, with the system of chattel slavery prevailing in the American South when the Constitution was ratified. *See* Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 62 (2000) ("In the antebellum South, there were indeed lords and serfs notwithstanding the Nobility Clauses."). This discord between the Constitution's literal textual guarantees and the reality of American slavery at the Founding is not unique to the Title of Nobility Clause. *See* Amar, *supra* note 12, at 60–63 (examining this issue and noting "[s]lavery seemed to contradict a huge part of the Constitution if read

have suggested, for example, that the Title of Nobility Clause might forbid admission preferences for legacy students at state universities or certain benefits that accompany receipt of the Medal of Honor.[13] After the adoption of the Fourteenth Amendment, challenges to governmental favoritism based on class, race, or other bases have usually relied on the Equal Protection Clause.[14]

Section 10—Powers Denied States

Clause 1—Proscribed Powers

ArtI.S10.C1.1 Foreign Policy by States

Article I, Section 10, Clause 1:

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

At the time of the Civil War, the Court relied on the prohibition on treaties, alliances, or confederations in holding that the Confederation formed by the seceding states could not be recognized as having any legal existence.[1] Today, the prohibition's practical significance lies in the limitations that it implies upon the power of the states to deal with matters having a bearing upon international relations.

In the early case of *Holmes v. Jennison*,[2] Chief Justice Roger Taney invoked it as a reason for holding that a state had no power to deliver up a fugitive from justice to a foreign state. More recently, the kindred idea that the responsibility for the conduct of foreign relations rests exclusively with the Federal Government prompted the Court to hold that, because the oil under the three-mile marginal belt along the California coast might well become the subject of international dispute, and because the ocean, including this three-mile belt, is of vital consequence to the Nation in its desire to engage in commerce and to live in peace with the world, the Federal Government has paramount rights in and power over that belt, including full dominion over the resources of the soil under the water area.[3] In *Skiriotes v. Florida*,[4] the Court, on the other hand, ruled that this clause did not disable Florida from regulating the manner in which its own citizens may engage in sponge fishing outside its territorial waters. Speaking for a unanimous Court, Chief Justice Charles Evans Hughes declared, "When its action does not conflict with federal legislation, the sovereign authority of the State over the

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blithely"); Frederick Douglass, *The Constitution of the United States: Is it Pro-Slavery or Anti-Slavery?* (1860), *in* Frederick Douglass: Selected Speeches and Writings 338 (Philip S. Foner & Yuval Taylor eds., 2000) ("The Constitution forbids the passing of a bill of attainder . . . a law entailing upon the child the disabilities and hardships imposed upon the parent. Every slave law in America might be repealed on this very ground. The slave is made a slave because his mother is a slave.").

[13] *See, e.g.*, Larson, *supra* note 6, at 1375, 1425; Manley W. Roberts, *The Nobility Clauses: Rediscovering the Cornerstone*, 1 J. Attenuated Subtleties 20, 22–23 (1982), *reprinted in* 9 J.L.: Periodical Lab'y of Leg. Scholarship 102, 104–05 (2019).

[14] *See* Amdt14.S1.8.1.1 Overview of Race-Based Classifications; Amdt14.S1.8.7.1 Overview of Non-Race Based Classifications.

[1] Williams v. Bruffy, 96 U.S. 176, 183 (1878).

[2] 39 U.S. (14 Pet.) 540 (1840).

[3] United States v. California, 332 U.S. 19 (1947).

[4] 313 U.S. 69 (1941).

conduct of its citizens upon the high seas is analogous to the sovereign authority of the United States over its citizens in like circumstances."[5]

ArtI.S10.C1.2 Coining Money by States

Article I, Section 10, Clause 1:

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

Within the sense of the Constitution, bills of credit signify a paper medium of exchange, intended to circulate between individuals, and between the government and individuals, for the ordinary purposes of society. It is immaterial whether the quality of legal tender is imparted to such paper. Interest-bearing certificates, in denominations not exceeding ten dollars, that were issued by loan offices established by the state of Missouri and made receivable in payment of taxes or other moneys due to the state, and in payment of the fees and salaries of state officers, were held to be bills of credit whose issuance was banned by this section.[1] The states are not forbidden, however, to issue coupons receivable for taxes,[2] nor to execute instruments binding themselves to pay money at a future day for services rendered or money borrowed.[3] Bills issued by state banks are not bills of credit;[4] it is immaterial that the state is the sole stockholder of the bank,[5] that the officers of the bank were elected by the state legislature,[6] or that the capital of the bank was raised by the sale of state bonds.[7]

ArtI.S10.C1.3 Legal Tender Issued by States

Article I, Section 10, Clause 1:

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

Relying on this clause, which applies only to the states and not to the Federal Government[1], the Supreme Court has held that, where the marshal of a state court received state bank notes in payment and discharge of an execution, the creditor was entitled to demand payment in gold or silver.[2] Because, however, there is nothing in the Constitution prohibiting a bank depositor from consenting when he draws a check that payment may be

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[5] 313 U.S. at 78–79.

[1] Craig v. Missouri, 29 U.S. (4 Pet.) 410, 425 (1830); Byrne v. Missouri, 33 U.S. (8 Pet.) 40 (1834).

[2] Virginia Coupon Cases (Poindexter v. Greenhow), 114 U.S. 270 (1885); Chaffin v. Taylor, 116 U.S. 567 (1886).

[3] Houston & Texas Central R.R. v. Texas, 177 U.S. 66 (1900).

[4] Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

[5] Darrington v. Bank of Alabama, 54 U.S. (13 How.) 12, 15 (1851); Curran v. Arkansas, 56 U.S. (15 How.) 304, 317 (1853).

[6] Briscoe v. Bank of Kentucky, 36 U.S. (11 Pet.) 257 (1837).

[7] Woodruff v. Trapnall, 51 U.S. (10 How.) 190, 205 (1851).

[1] Juilliard v. Greenman, 110 U.S. 421, 446 (1884).

[2] Gwin v. Breedlove, 43 U.S. (2 How.) 29, 38 (1844). *See also* Griffin v. Thompson, 43 U.S. (2 How.) 244 (1844).

made by draft, a state law providing that checks drawn on local banks should, at the option of the bank, be payable in exchange drafts, was held valid.[3]

ArtI.S10.C1.4 State Bills of Attainder

Article I, Section 10, Clause 1:

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

A bill of attainder is legislation that imposes punishment on a specific person or group of people without a judicial trial.[1] The Constitution includes two separate clauses respectively banning enactment of bills of attainder by the federal government and the states.[2] The Supreme Court has interpreted the federal and state bill of attainder prohibitions as having the same scope.[3]

The Supreme Court applied the constitutional prohibition on state bills of attainder in a Reconstruction-era case, *Cummings v. Missouri*.[4] That case involved a post-Civil War amendment to the Missouri constitution that required persons engaged in certain professions to swear an oath that they had never been disloyal to the United States.[5] The Court held that the purpose and effect of the challenged provision was to punish a group of individuals who had been disloyal to the United States by effectively permanently excluding them from the covered professions.[6] Based on that holding, the Supreme Court invalidated the provision as an unconstitutional bill of attainder.[7]

In *Drehman v. Stifle*, the Supreme Court rejected a bill of attainder challenge to another provision of the Missouri constitution that barred civil suits against individuals for actions

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[3] Farmers & Merchants Bank v. Federal Reserve Bank, 262 U.S. 649, 659 (1923).

[1] *See, e.g.*, Nixon v. Adm'r of Gen. Servs., 433 U.S. 425, 468 (1977).

[2] For the prohibition on federal bills of attainder, see U.S. Const. art. I, § 9, cl. 3. For discussion of the prohibition on federal bills of attainder and further information on the historical roots of the federal and state Bill of Attainder Clauses, see ArtI.S9.C3.1 Historical Background on Bills of Attainder.

[3] *See, e.g.*, *Nixon*, 433 U.S. at 468–76. In *Nixon*, the Court cited *Cummings v. Missouri*, 71 U.S. 277 (1866), a case involving the state Bill of Attainder Clause, to support its application of the federal Bill of Attainder Clause.

[4] 71 U.S. 277 (1866). In an earlier case, the Supreme Court considered a challenge to a Georgia statute enacted before the federal Constitution was ratified that punished treason through banishment and confiscation of property without a judicial trial. Cooper v. Telfair, 4 U.S. 14, 14–15 (1800). A former resident of Georgia living abroad who had allegedly supported the British during the Revolutionary War argued that the statute violated the Georgia state constitution, which did not expressly bar enactment of bills of attainder. *Id.* at 16–17. The Court declined to strike down the law. *Id.* at 19. Justice William Paterson opined, "the power of confiscation and banishment does not belong to the judicial authority, whose process could not reach the offenders: and yet, it is a power, that grows out of the very nature of the social compact, which must reside somewhere, and which is so inherent in the legislature, that it cannot be divested, or transferred, without an express provision of the constitution." *Id.* (opinion of Paterson, J.).

[5] *Id.* at 280.

[6] *See id.* at 320 (The oath requirement "was exacted, not from any notion that the several acts designated indicated unfitness for the callings, but because it was thought that the several acts deserved punishment, and that for many of them there was no way to inflict punishment except by depriving the parties, who had committed them, of some of the rights and privileges of the citizen.").

[7] *Id.* at 325–29. In a related case, *Ex parte Garland*, the Court applied its reasoning in *Cummings* to strike down a similar federal law. 71 U.S. 333, 377–78 (1866). For additional discussion of *Cummings* and *Garland*, see ArtI.S9.C3.1 Historical Background on Bills of Attainder. *See also* Pierce v. Carskadon, 83 U.S. 234, 239 (1873); *cf.* Klinger v. Missouri, 80 U.S. 257, 262 (1872) (holding, in a challenge to a loyalty oath for jurors, that it would have raised constitutional concerns if a juror was excluded solely for past conduct, "simply because he had sympathized with or aided the rebellion during the war," but that it was permissible to exclude a juror who "also refused to take [the oath] because he was still a more bitter rebel than ever, [because] the avowal of such a feeling was inconsistent with the upright and loyal discharge of his duties").

taken under federal or state military authority during the Civil War.[8] The Court concluded that the law did not impose punishment on those who might want to file such suits: "If not the opposite of penal, there is certainly nothing punitive in its character. It simply exempts from suits . . . those who might otherwise be harassed by litigation and made liable in damages."[9]

The Supreme Court has also rejected bill of attainder challenges to state and local rules imposing employment qualifications, as long as those employment qualifications were not punitive. For instance, in *Garner v. Board of Public Works*, the Supreme Court considered bill of attainder challenges to a provision of the Charter of the City of Los Angeles barring from public employment any person who within the last five years had been affiliated with a group that advocated the forceful overthrow of the government, and a city ordinance requiring public employees to state whether they had ever been members of the Communist Party.[10] The Court upheld both provisions, holding that a bill of attainder must inflict punishment, and the Court was "unable to conclude that punishment is imposed by a general regulation which merely provides standards of qualification and eligibility for employment."[11] Similarly, in *De Veau v. Braisted*, the Supreme Court rejected a bill of attainder challenge to a state law that prevented any person who had been convicted of a felony and had not been pardoned from serving as an officer or agent for certain labor organizations.[12] A plurality of the Court held that the law "embodies no further implications of appellant's guilt than are contained in his . . . judicial conviction; and so it manifestly is not a bill of attainder."[13]

The state Bill of Attainder Clause is part of a single sentence of the Constitution that provides, "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts."[14] In *Fletcher v. Peck*, Chief Justice John Marshall stated that those restrictions on state legislative power "may be deemed a bill of rights for the people of each state."[15] The Supreme Court has held that the state Ex Post Facto Clause[16] and the Contract Clause,[17] also located in Article I, Section 10, Clause 1, apply only to legislative action and do not apply to judicial decisions.[18] The Court has not expressly considered whether the state Bill

[8] 75 U.S. 595, 598 (1869).

[9] *Id.* at 601.

[10] 341 U.S. 716, 718–19 (1951).

[11] *Id.* at 722. *See also* Hawker v. People of New York 170 U.S. 189, 198–200 (1898); Konigsberg v. State Bar of California, 366 U.S. 36, 47 n.9 (1961). Loyalty oaths in public employment, particularly those premised on political affiliation, have sometimes also been challenged under the First Amendment. *See Garner*, 341 U.S. at 719–21 (noting that "Congress may reasonably restrict the political activity of federal civil service employees" to protect the integrity and competency of the service, and holding that "a State is not without power to do as much"); *see also, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 606 (1967) (holding that university professors could not be dismissed based on their refusal to swear that they had never been members of the Communist party, as mere "membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions").

[12] 363 U.S. 144, 160 (1960) (plurality opinion). Justice William Brennan concurred, stating in part that the challenged provision "does not deny due process or otherwise violate the Federal Constitution." *Id.* at 161 (Brennan, J., concurring).

[13] *Id.* at 160 (plurality opinion).

[14] U.S. Const. art. I, § 10, cl. 1.

[15] 10 U.S. 87, 138 (1810).

[16] *See* ArtI.S10.C1.5 State Ex Post Facto Laws.

[17] *See* ArtI.S10.C1.5 State Ex Post Facto Laws.

[18] *E.g.*, Frank v. Mangum, 237 U.S. 309, 344 (1914) ("the constitutional prohibition: "No state shall . . . pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts" . . . is directed against legislative action only, and does not reach erroneous or inconsistent decisions by the courts"); *see also* Ross v. Oregon 227 U.S. 150, 161 (1913); Moore-Mansfield Constr. Co. v. Elec. Installation Co., 234 U.S. 619, 624 (1914).

of Attainder Clause similarly excludes judicial action, but because it is located in the same provision barring states from "pass[ing]" prohibited laws, it is likely the Court would interpret this clause in the same way.

ArtI.S10.C1.5 State Ex Post Facto Laws

Article I, Section 10, Clause 1:

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

An ex post facto law is a law that imposes criminal liability or increases criminal punishment retroactively.[1] Two separate clauses of the Constitution, Article I, Sections 9 and 10, ban enactment of ex post facto laws by the Federal Government and the states, respectively.[2] The Supreme Court has cited cases interpreting the federal Ex Post Facto Clause in challenges under the state clause, and vice versa, treating the two clauses as having the same scope.[3] The Court's decisions interpreting both clauses are therefore discussed collectively in greater detail in the Article I, Section 9 essays on the federal Ex Post Facto Clause.[4] In particular, those essays on federal and state ex post facto laws discuss Supreme Court jurisprudence addressing imposing or increasing punishments, procedural changes, employment qualifications, retroactive taxes, inapplicability to judicial decisions, and deportation and related issues.

The Supreme Court has interpreted the Ex Post Facto Clauses to limit only legislation that is criminal or penal in nature,[5] though the Court has also made clear that "the ex post facto effect of a law cannot be evaded by giving a civil form to that which is essentially criminal."[6] In addition, the Court has uniformly applied the prohibition on ex post facto legislation only to laws that operate retroactively.[7] In the 1798 case *Calder v. Bull*, the Court enumerated four ways in which a legislature may violate the Ex Post Facto Clauses' prohibition on imposing retroactive criminal liability: (1) making criminal an action taken before enactment of the law that was lawful when it was done; (2) increasing the severity of an offense after it was committed; (3) increasing the punishment for a crime after it was committed; and (4) altering the rules of evidence after an offense was committed so that it is easier to convict an offender.[8] The Ex Post Facto Clauses are related to other constitutional provisions that limit retroactive government action, including the federal and state Bill of Attainder Clauses, the Contract Clause, and the Due Process Clauses.[9]

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[1] *See, e.g.*, Calder v. Bull, 3 U.S. 386, 391 (1798); Locke v. New Orleans, 71 U.S. 172, 173 (1867).

[2] For the prohibition on federal ex post facto laws, see U.S. CONST. art. I, § 10, cl. 1; *see also* ArtI.S9.C3.3.1 Overview of Ex Post Facto Laws.

[3] *See, e.g.*, Peugh v. United States, 569 U.S. 530, 532–33 (2013) (case construing federal clause citing case construing state clause); Reetz v. Michigan, 188 U.S. 505, 510 (1903) (case construing state clause citing case construing federal clause).

[4] *See* ArtI.S9.C3.3.1 Overview of Ex Post Facto Laws.

[5] *E.g.*, *Calder*, 3 U.S. at 389; Watson v. Mercer, 33 U.S. 88, 110 (1834); *see also* ArtI.S9.C3.3.4 Ex Post Facto Law Prohibition Limited to Penal Laws.

[6] Burgess v. Salmon, 97 U.S. 381, 385 (1878).

[7] *E.g.*, *Calder*, 3 U.S. at 389; *see also* ArtI.S9.C3.3.3 Retroactivity of Ex Post Facto Laws.

[8] *Calder*, 3 U.S. at 390.

[9] *See, e.g.*, Fletcher v. Peck, 10 U.S. 87, 138–39 (1810); *cf.* Landgraf v. USI Film Prods., 511 U.S. 244, 267 (1994) (the restrictions that the Constitution places on retroactive legislation "are of limited scope" and "[a]bsent a violation of one

Multiple Supreme Court decisions have held that the Ex Post Facto Clauses apply only to federal and state legislation, not to judicial decisions.[10] The state Ex Post Facto Clause also applies to state constitutional amendments. In *Cummings v. Missouri*, the Court considered a challenge to a post-Civil War amendment to the Missouri Constitution that required persons engaged in certain professions to swear an oath that they had never been disloyal to the United States.[11] In holding that the amendment violated the state Ex Post Facto Clause, the Court looked to the Clause's language providing that "'no State'—not *no legislature of a State*, but that '*no State*'—should pass any ex post facto law," and concluded that "[i]t can make no difference, therefore, whether such legislation is found in a constitution or in a law of a State; if it be within the prohibition it is void."[12]

ArtI.S10.C1.6 Contracts

ArtI.S10.C1.6.1 Overview of Contract Clause

Article I, Section 10, Clause 1:

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

In addition to prohibiting states from enacting bills of attainder and ex post facto laws, the Constitution seeks to protect private rights from state interference by limiting the states' power to enact legislation that alters existing contract rights.[1] The Constitution's Contract Clause provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[2] Although this language could be read as completely prohibiting a state's

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of those specific provisions," when a new law makes clear that it is retroactive, the arguable "unfairness of retroactive civil legislation is not a sufficient reason for a court to fail to give [that law] its intended scope").

[10] *E.g.*, Frank v. Magnum, 237 U.S. 309, 344–45 (1914); *cf.* Rogers v. Tennessee, 532 U.S. 451, 456–60 (2000) (holding that "limitations on ex post facto judicial decisionmaking are inherent in the notion of due process," but the due process limitation on courts is not identical to the ex post facto prohibition that applies to legislation); *see also* ArtI.S9.C3.3.11 Ex Post Facto Prohibition and Judicial Decisions.

[11] 71 U.S. 277, 280–81 (1866).

[12] *Id.* at 307–08. For additional discussion of *Cummings*, see ArtI.S9.C3.3.9 Employment Qualifications and Ex Post Facto Laws.

[1] *See* Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 266–67 (1827) ("If it were proper to prohibit a State legislature to pass a retrospective law, which should take from the pocket of one of its own citizens a single dollar, as a punishment for an act which was innocent at the time it was committed; how much more proper was it to prohibit laws of the same character precisely, which might deprive the citizens of other States, and foreigners, as well as citizens of the same State, of thousands, to which, by their contracts, they were justly entitled, and which they might possibly have realized but for such State interference?"); *see also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 431 (1934) ("The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them[,] and impairment, as above noted, has been predicated on laws which without destroying contracts derogate from substantial contractual rights.") (citations omitted).

[2] U.S. Const. art. I, § 10, cl. 1. The Supreme Court has long considered contractual "obligations" to encompass both the express terms of an agreement and the underlying state law regarding interpreting and enforcing contracts upon which the parties relied when they made the contract. *See* U.S. Trust Co. v. New Jersey, 431 U.S. 1, 19–20 & n.17 (1977) ("The obligations of a contract long have been regarded as including not only the express terms but also the contemporaneous state law pertaining to interpretation and enforcement."). Such underlying state law may include the law of the place in which the contract was made and the place where it will be performed. *Id.* Thus, the "obligation" of a contract refers to laws that affect its "validity, construction, discharge and enforcement." *Blaisdell*, 290 U.S. at 429–30 (quoting Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 550 (1866)). States have long regulated the formation, interpretation, enforcement, and performance of contracts. *Ogden*, 25 U.S. (12 Wheat.) at 286 ("But to assign to contracts, universally, a literal purport, and to exact for them a rigid literal fulfilment, could not have been the intent of the constitution. It is repelled by a hundred examples. Societies exercise a positive control as well over the inception, construction, and fulfilment of contracts, as over the form and measure of the remedy to enforce them.").

legislative impairment of contracts, the Supreme Court has interpreted the clause to *limit* a state's power to enact legislation that: (1) breaches or modifies its own contracts; or (2) regulates contracts between private parties.[3]

The Supreme Court has held that the Contract Clause does not generally prevent states from enacting laws to protect the welfare of their citizens.[4] Thus, states retain some authority to enact laws with retroactive effect that alter contractual or other legal relations among individuals and entities.[5] However, a state's regulation of contracts, whether involving public or private parties, must generally be reasonably designed and appropriately tailored to achieve a legitimate public purpose.[6]

Prior to the ratification of the Fourteenth Amendment and the subsequent development of the Supreme Court's Due Process jurisprudence in the late nineteenth and early twentieth centuries, the Contract Clause was one of the few constitutional clauses that expressly limited the power of the states.[7] As Chief Justice John Marshall explained in an early opinion

[3] *U.S. Trust Co.*, 431 U.S. at 17. Notably, the Clause does not apply to acts of the Federal Government. Sinking-Funds Cases, 99 U.S. 700, 718–19 (1878) (acknowledging that the Federal Government is "prohibited from depriving persons or corporations of property without due process of law" but is "not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts"); *see also* Samuel R. Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of the Contract Clause*, 72 Or. L. Rev. 513, 519 (1993) (discussing how the Contract Clause "differed from the Northwest Ordinance in that it barred only state impairment of contract obligations").

[4] *Blaisdell*, 290 U.S. at 434–35 (observing that a state "continues to possess authority to safeguard the vital interests of its people[;] . . . [t]his principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court"); *see also* W.B. Worthen Co. v. Thomas, 292 U.S. 426, 433 (1934) ("[L]iteralism in the construction of the contract clause . . . would make it destructive of the public interest by depriving the State of its prerogative of self-protection.").

[5] *See Blaisdell*, 290 U.S. at 428 ("[T]he prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula."); *U.S. Trust Co.*, 431 U.S. at 17 ("[T]he Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects."); El Paso v. Simmons, 379 U.S. 497, 506–09 (1965) ("[I]t is not every modification of a contractual promise that impairs the obligation of contract under federal law . . . . The State has the 'sovereign right . . . to protect the . . . general welfare of its people . . . . Once we are in this domain of the reserve power of a State we must respect the wide discretion on the part of the legislature in determining what is and what is not necessary.'") (quoting E. N.Y. Sav. Bank v. Hahn, 326 U.S. 230, 232–33 (1945)); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 628–30 (1819) ("Taken in its broad unlimited sense, the [Contract Clause] would be an unprofitable and vexatious interference with the internal concerns of a State . . . . [T]he framers of the constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit."). Notably, other constitutional provisions may limit a state's power to enact retroactive legislation that, for example, imposes a punishment (e.g., a bill of attainder or ex post facto law). *See U.S. Trust Co.*, 431 U.S. at 17 n.13. For example, the Contract Clause generally does not prevent a state from altering laws governing state offices or civil institutions, or from enacting laws on the subject of divorce. *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 627–30 ("That the framers of the constitution did not intend to retrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us, is not to be so construed, may be admitted. The provision of the constitution never has been understood to embrace other contracts, than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces."). The Court has cautioned, however, that the clause should not be interpreted to imply that parties may contract to obtain immunity from state regulation. *U.S. Trust Co.*, 431 U.S. at 22 ("The States must possess broad power to adopt general regulatory measures without being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise, one would be able to obtain immunity from state regulation by making private contractual arrangements."); *see also* Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 357 (1908) ("One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.").

[6] *U.S. Trust Co.*, 431 U.S. at 22 ("Legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."). A court's evaluation of the reasonableness of state legislation that affects private contract rights may include consideration of the background circumstances that motivated the state law's adoption and the measure's duration, among other factors. *See Blaisdell*, 290 U.S. at 444–47. Courts accord legislatures some deference in determining necessity and reasonableness of such legislation. *U.S. Trust Co.*, 431 U.S. at 22–23.

[7] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978) (characterizing the Contract Clause as "perhaps the strongest single constitutional check on state legislation during our early years as a Nation"); *U.S. Trust*

interpreting the Contract Clause, the Framers' intent in including such language in the Constitution was to prohibit states from enacting legislation intended to assist debtors by abrogating or modifying the terms of existing contracts, as many colonies and states had done during the Colonial Era and under the Articles of Confederation.[8] Many of the Framers believed that such laws discouraged commerce and the extension of credit, undermining the stability of contractual relations and damaging the national economy.[9] Although limited evidence exists to clarify the Contract Clause's original meaning, James Madison argued during debates over ratification of the Constitution that the Clause would prevent shifting state legislative majorities from retroactively impairing private rights.[10] And Alexander Hamilton suggested that the Contract Clause would avoid a breakdown in commercial relations among the states, noting that state laws abrogating private contract rights could serve as a source of hostility among them.[11]

The Supreme Court's views on the level of protection that the Contract Clause provides for contract rights have shifted over time. During the 1800s, and in particular prior to the ratification of the Fourteenth Amendment in 1868, the Supreme Court often relied on the Contract Clause to strike down state legislation as unconstitutional when it interfered with existing contract rights.[12] The Court interpreted the Clause to protect a variety of property interests, such as an executed grant of land[13] and the state-granted charter of a private

Co., 431 U.S. at 15 ("Over the last century, however, the Fourteenth Amendment has assumed a far larger place in constitutional adjudication concerning the States [than the Contract Clause]."). As noted in *McDonald v. Chicago,* 561 U.S. 742 (2010), during the 1960s, the Court "shed any reluctance to hold that rights guaranteed by the Bill of Rights met the requirements for protection under the Due Process Clause. The Court eventually incorporated almost all of the provisions of the Bill of Rights. Only a handful of the Bill of Rights protections remain unincorporated." *Id.* at 764–65; *see e.g.*, Duncan v. Louisiana, 391 U.S. 145, 161–62 (1968) (holding that the Fourteenth Amendment's Due Process Clause incorporates the Sixth Amendment right to trial by jury and makes it applicable to the states). For a discussion of the limitations that the Due Process Clause imposes on states with respect to retroactive deprivations of a life, liberty, or property interest, see Amdt14.S1.5.1 Overview of Procedural Due Process. In addition, the Dormant Commerce Clause doctrine, although not specifically directed at protecting contract rights, limits state power by restraining state authority to regulate interstate commerce. For more, see ArtI.S8.C3.7.1 Overview of Dormant Commerce Clause.

[8] *Cf. Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 628–30 ("That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements."); Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 199, 203 (1819) ("[T]he prevailing evil of the times, which produced this clause in the constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant instalments.").

[9] *Blaisdell*, 290 U.S. at 427–28.

[10] The Federalist No. 44 (James Madison).

[11] The Federalist No. 7 (Alexander Hamilton) ("Laws in violation of private contracts, as they amount to aggressions on the rights of those States whose citizens are injured by them, may be considered as another probable source of hostility [among the states].").

[12] *See, e.g.*, *Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 627, 654 (striking down as unconstitutional a state law that interfered with a private corporate charter established under state law); *Sturges*, 17 U.S. (4 Wheat.) at 208 (holding a bankruptcy law that allowed insolvent debtors to obtain the discharge of their debts by surrendering their property violated the Contract Clause); Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 127, 135–39 (1810) (interpreting the Contract Clause to prohibit a state from breaching its own contracts by rescinding a land grant); *see also* James W. Ely, Jr., The Contract Clause: A Constitutional History 1 (2016) ("Under the leadership of John Marshall, the Supreme Court construed the provision expansively, and it rapidly became the primary vehicle for federal judicial review of state legislation before the adoption of the Fourteenth Amendment. Indeed, the contract clause was one of the most litigated provisions of the Constitution throughout the nineteenth century . . . .").

[13] *Fletcher*, 10 U.S. (6 Cranch) at 137.

corporation.[14] But even during the early years of the Republic, the Court recognized that the states retained some power to regulate contracts in order to further the public interest.[15]

During the late nineteenth and early twentieth centuries, the Supreme Court decided cases that gradually weakened the Contract Clause's protections.[16] The Court's view of the Contract Clause underwent a major change during the New Deal Era when the Court decided *Home Building & Loan Ass'n v. Blaisdell*.[17] In that case, the Court declined to enforce strictly the Contract Clause's prohibition on state legislation that alters *private* contracts.[18] During the depths of the Great Depression, the Court upheld the Minnesota Mortgage Moratorium Law, which allowed courts to extend temporarily the period of time during which a mortgagor (e.g., a homeowner) could redeem a home after the bank foreclosed on the property.[19] The Supreme Court's decision in *Blaisdell* marked a turning point in its Contract Clause jurisprudence, signaling that the Court would thereafter be more solicitous of states' use of their police powers to regulate contracts to "protect the lives, health, morals, comfort and general welfare of the people," even when the exercise of such powers would substantially impact contract rights.[20]

Since *Blaisdell*, the Court has permitted state legislatures to modify contract rights to serve the public interest in several cases.[21] Nonetheless, since the 1970s, the Court has decided a few cases indicating that the Contract Clause still provides some protection for contracts, at least when the state lacks a legitimate public purpose for substantially interfering with contract rights and has not regulated such rights in a reasonable or necessary way.[22] For example, the Contract Clause continues to prohibit states from unreasonably and unnecessarily breaching certain legislative covenants with private bondholders,[23] and from

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[14] *See Trs. of Dartmouth Coll.*, 17 U.S. (4 Wheat.) at 644, 652–54. As the Court noted in *Blaisdell*, the Clause has been held not to encompass a marriage contract as it pertains to divorce laws, a judgment rendered upon a contract, or a state's waiver of sovereign immunity in general legislation. *Blaisdell*, 290 U.S. at 429 n.8.

[15] *See, e.g.*, W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 535–36 (1848) (upholding a state's authority to use the power of eminent domain to take a company's toll bridge franchise in order to construct a public highway as not violative of the Contract Clause).

[16] Ely, *supra* note 12, at 1 ("Over time . . . courts carved out several malleable exceptions to the constitutional protection of contracts . . . thereby weakening the protection of the contract clause and enhancing state regulatory authority.").

[17] 290 U.S. 398 (1934).

[18] *Id.* at 444–48.

[19] *Id.* at 415–16, 424. The law prevented the mortgagee from obtaining possession during that time. *Id.* This right ran contrary to existing contracts, which granted the lender the right to foreclose. *Id.* at 424–25.

[20] Allied Structural Steel Co v. Spannaus, 438 U.S. 234, 241 (1978) (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905)).

[21] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474–78, 502, 506 (1987) (upholding a Pennsylvania safety and environmental law—which prohibited mining that would damage existing structures, such as public buildings and homes, by eliminating underground support—against a Contract Clause challenge where the challengers argued the law nullified the surface owner's contractual waiver of liability for damage to the surface estate from coal mining); Exxon Corp. v. Eagerton, 462 U.S. 176, 178–79, 196 (1983) (upholding an Alabama law that increased the severance tax on oil and gas extracted from wells located in the state—which the state imposed on producers at the time of severance and which exempted the owners of royalty interests but forbid producers from passing the tax increase on to purchasers or consumers—against a Contract Clause challenge alleging the law impaired the obligations of oil and gas producers' contracts with royalty owners and consumers).

[22] *Spannaus*, 438 U.S. at 242, 250 ("If the Contract Clause is to retain any meaning at all, . . . it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.").

[23] U.S. Trust Co. v. New Jersey, 431 U.S. 1, 26, 32 (1977) ("If a State could reduce its financial obligations [by breaching a legislative covenant to protect private bondholders] whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.").

enacting legislation that regulates private pension contracts by imposing a substantial new and retroactive payment obligation on a narrow class of companies.[24]

ArtI.S10.C1.6.2 Historical Background on Contract Clause

Article I, Section 10, Clause 1:

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

After the American Revolution, many citizens of the newly created United States had difficulty repaying their debts, motivating state legislatures to enact a number of laws to relieve them of their financial obligations.[1] During the peak of this financial crisis, and under the Articles of Confederation, states enacted laws that assisted debtors by, for example, (1) permitting a debtor to tender worthless property or nearly valueless commodities in payment of debts; (2) extending the time for repaying a debt beyond the time period provided for in a contract; and (3) permitting the payment of overdue obligations in installments rather than a lump sum.[2]

Historical sources from the time of the Founding do not shed much light on the Contract Clause's original meaning.[3] Certainly, the Framers knew the states had enacted various laws that disrupted private contracts, and they wanted to protect private property rights.[4] At least some of the delegates who attended the Constitutional Convention of 1787 in Philadelphia were aware that the Confederation Congress, the country's governing body under the Articles of Confederation, had recently passed an ordinance governing the Northwest Territory that specifically protected private contract rights from legislative interference.[5] Article 2 of the Northwest Ordinance provided that "in the just preservation of rights and property it is understood and declared, that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previously formed."[6]

During deliberations over the Constitution, delegate Rufus King of Massachusetts proposed to insert the Northwest Ordinance's broad language into the Constitution.[7] Delegates Gouverneur Morris and George Mason opposed the addition of this language,

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[24] *Spannaus*, 438 U.S. at 247–50.

[1] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1934) ("The widespread distress following the revolutionary period, and the plight of debtors, had called forth in the States an ignoble array of legislative schemes for the defeat of creditors and the invasion of contractual obligations."); *see also* Sveen v. Melin, No. 16-1432, slip op. at 6 (U.S. June 11, 2018) ("The origins of the Clause lie in legislation enacted after the Revolutionary War to relieve debtors of their obligations to creditors.").

[2] *See* Sturges v. Crowninshield, 17 U.S. 122, 199, 204–05 (1819).

[3] *See Blaisdell*, 290 U.S. at 427.

[4] *See* James W. Ely Jr., The Contracts Clause: A Constitutional History 11 (2016) ("Historians generally agree that the establishment of safeguards for private property was one of the principal objectives of the constitutional convention of 1787."); *see also Blaisdell*, 290 U.S. at 459–60 (Sutherland, J., dissenting) (indicating that at least some of the Framers were aware of state laws that disrupted private contracts).

[5] *See* Ely, *supra* note 4, at 11 ("Passed by the Confederation Congress while the constitutional convention was meeting in Philadelphia, the Northwest Ordinance established a framework for territorial governance in the Old Northwest.").

[6] *An ordinance for the government of the territory of the United States, North-west of the river Ohio*, Library of Congress, https://www.loc.gov/resource/bdsdcc.22501/?st=gallery.

[7] *See* 2 The Records of the Federal Convention of 1787, at 439–40 (Max Farrand ed., rev. ed. 1966).

arguing that state legislatures would occasionally need to modify contract rights in order to protect their citizens.[8] On the other hand, James Madison "admitted that inconvenience might arise from such a prohibition but thought on the whole it would be overbalanced by the utility of it."[9] However, Madison suggested that the Constitution's prohibition on ex post facto laws would prevent states from impairing the obligation of contracts retroactively, and the delegates approved language in Article I, Section 10 of the draft Constitution without the proposed Contract Clause.[10]

The next day, however, delegate John Dickinson of Delaware stated that, after further research, he had determined the term ex post facto "related to criminal cases only; that [the language prohibiting such laws] would not, consequently, restrain the states from retrospective laws in civil cases; and that some further provision for this purpose would be requisite."[11] Nonetheless, the delegates did not approve the Contract Clause's addition to the Constitution during these deliberations; rather, the Committee of Style and Arrangement, which produced the final version of the Constitution, added a modified version of the Contract Clause to the document without significant comment.[12]

The debates over the Constitution's ratification briefly addressed the Contract Clause. Federalists, who generally supported a strong central government, argued the clause would (1) protect private contract rights from state debtor relief legislation; and (2) improve commercial relations among the states. Writing in the *Federalist No. 44*, James Madison briefly discussed the importance of the Contract Clause along with the Ex Post Facto Clause and the Constitution's prohibition on bills of attainder.[13] Madison argued these clauses would prevent shifting state legislative majorities from retroactively impairing private rights.[14] The Framers may also have added the Contract Clause to prevent a breakdown in commercial relations among the states. In the *Federalist No. 7*, Alexander Hamilton noted that state laws abrogating private contract rights could serve as a source of hostility among the states.[15] And several other speakers at state ratifying conventions argued that the Contract Clause would protect interstate contracts from impairment.[16] Perhaps surprisingly, the Anti-Federalists, who

[8] *See id.*

[9] *Id.* at 440.

[10] *See id.*

[11] Jonathan Elliot, 5 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 488 (2d ed. 1836) (statement of John Dickinson).

[12] *See* 2 The Records of the Federal Convention of 1787, at 596–97, 610 (Max Farrand ed., rev. ed. 1966) (McHenry's notes, September 10–12, 1787) (Report of Committee of Style); Ely, *supra* note 4, at 13 (noting the Committee of Style "placed a differently worded contract clause into Article I, section 10, that contained various restrictions on state power"). An attempt to apply the Contract Clause to the Federal Government failed. Elliot, *supra* note 11, at 546 (motion of Elbridge Gerry).

[13] The Federalist No. 44 (James Madison).

[14] *See id.*; *see also* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137–38 (1810) ("[I]t is not to be disguised that the framers of the constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the states are obviously founded in this sentiment.").

[15] *See* The Federalist No. 7 (Alexander Hamilton) ("Laws in violation of private contracts, as they amount to aggressions on the rights of those States whose citizens are injured by them, may be considered as another probable source of hostility [among the States].").

[16] Ely, *supra* note 4, at 15 (collecting statements).

generally opposed a strong central government, supported the Contract Clause.[17] However, they believed that state courts rather than federal courts should enforce it.[18]

Although most commentators involved in debates over the proposed Constitution agreed that the document should include the Contract Clause, one delegate to the Federal Convention, Maryland Attorney General Luther Martin, opposed the Clause.[19] In a letter to the Maryland House of Delegates that foreshadowed the development of the Supreme Court's jurisprudence, Martin argued that the Contract Clause would tie states' hands and prevent them from modifying contracts to address national crises.[20]

As Justice John Marshall explained in an early opinion interpreting the Contract Clause, the Framers' intent in including such language in the Constitution was to prohibit states from enacting legislation intended to assist debtors by abrogating or modifying the terms of existing contracts,[21] as many colonies and states had done during the Colonial Era and under the Articles of Confederation.[22] The Founders believed these laws injured creditors and undermined contractual relationships.[23] The Constitution's Framers therefore sought to preserve faith in contractual relationships—and facilitate interstate and foreign commerce—by adding a constitutional restraint on state power to impair contractual obligations.[24] This restraint reflected the Framers' preference for private ordering; that is, the notion that private parties could enter into and rely upon binding contracts to "order their personal and business affairs."[25]

ArtI.S10.C1.6.3 Evolution of Contract Clause's Use

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a*

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[17] Ely, *supra* note 4, at 16–17.

[18] Ely, *supra* note 4, at 16–17 ("Anti-Federalists rarely focused on the clause in urging rejection of the proposed new government. . . . [Instead, at least one writer] insisted that state, not federal, courts should be trusted with deciding cases arising under [the Contract Clause].").

[19] Elliot, *supra* note 11, at 376–77 (letter of Luther Martin to the Maryland House of Delegates) ("I considered, sir, that there might be times of such great public calamities and distress, and of such extreme scarcity of specie, as should render it the duty of a government, for the preservation of even the most valuable part of its citizens, in some measure to interfere in their favor, by passing laws totally or partially stopping courts of justice; or authorizing the debtor to pay by instalments, or by delivering up his property to his creditors at a reasonable and honest valuation.").

[20] *See* Elliot, *supra* note 11, at 376–77.

[21] *See* Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 628–30 (1819) ("That anterior to the formation of the constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements."); *see also* Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 199 (1819) ("[T]he prevailing evil of the times, which produced this clause in the constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant instalments.").

[22] *Sturges*, 17 U.S. (4 Wheat.) at 203.

[23] *See id.* at 204; *see also* Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 427 (1934) ("Legislative interferences had been so numerous and extreme that the confidence essential to prosperous trade had been undermined and the utter destruction of credit was threatened.").

[24] *See Blaisdell*, 290 U.S. at 427–28; *see also* Sveen v. Melin, No. 16-1432, slip op. at 2 (U.S. June 11, 2018) (Gorsuch, J., dissenting) ("[The Framers] took the view that treating existing contracts as 'inviolable' would benefit society by ensuring that all persons could count on the ability to enforce promises lawfully made to them—even if they or their agreements later prove unpopular with some passing majority." (quoting *Sturges*, 17 U.S. (4 Wheat.) at 206).

[25] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 245 (1978) ("Contracts enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.").

Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

During the 1800s, the Supreme Court often relied on the Contract Clause to strike down as unconstitutional state legislation that interfered with existing contract rights. In fact, the Court relied on the Contract Clause in one of the earliest cases in which it determined that a state law violated the Constitution: its 1810 decision in *Fletcher v. Peck*.[1] In that case, the Court interpreted the Contract Clause to protect public contracts (i.e., those involving a state as a party to an agreement with one or more private entities) in addition to private agreements.[2] The Court determined that a state could not breach its own contracts with private parties by revoking a grant of real estate.[3] Almost a decade later, the Court held in *Trustees of Dartmouth College v. Woodward* that the Contract Clause barred a state from enacting legislation that substantially interfered with a private corporate charter established under state law.[4] And with respect to contracts between private parties, in the 1819 decision, *Sturges v. Crowninshield*, the Court held that a bankruptcy law allowing insolvent debtors to obtain the discharge of their debts by surrendering their property violated the Contract Clause.[5] But even during the early years of the Republic, the Court recognized that states retained some power to regulate contracts in order to further the public interest.[6]

The Supreme Court's view of the Contract Clause changed significantly during the New Deal Era when the Court decided *Home Building & Loan Ass'n v. Blaisdell*, a case in which the Court declined to enforce strictly the Contract Clause's prohibition on state legislation that altered *private* contracts.[7] During the depths of the Great Depression, the Court upheld the constitutionality of the Minnesota Mortgage Moratorium Law, which allowed courts to extend temporarily the period of time during which a mortgagor (e.g., a homeowner) could redeem a home after the bank foreclosed on the property.[8] Although the Minnesota law prevented the mortgagee from obtaining actual possession, the Court upheld the law as necessary and reasonable to address the economic crisis because it was appropriately tailored to address the

[1] 10 U.S. (6 Cranch) 87, 127 (1810).

[2] *Id.* at 139.

[3] *Id.*

[4] Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 627, 644–45 (1819).

[5] Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 197, 208, 212 (1819). The Supreme Court's early interpretations of the Contract Clause often drew a distinction between permissible state legislation that retroactively altered private contractual *remedies* and often forbidden state legislation that modified contractual *obligations*. *See* U.S. Trust Co. v. New Jersey, 431 U.S. 1, 19 n.17 (1977) (discussing early cases). For example, a state law that prohibited the imprisonment of debtors did not contravene the Contract Clause because it removed a *remedy* rather than modifying a contract's terms. *Id.*; *see also Sturges*, 17 U.S. (4 Wheat.) at 200 ("Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct."). However, the Court later rejected this distinction between contractual remedies and obligations, determining that even altering a contract's obligations retroactively may not contravene the Contract Clause in some circumstances. *See* Bronson v. Kinzie, 42 U.S. 311, 317 (1843) ("It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."); *see also U.S. Trust Co.*, 431 U.S. at 19 n.17 ("More recent decisions have not relied on the remedy/obligation distinction, primarily because it is now recognized that obligations as well as remedies may be modified without necessarily violating the Contract Clause.").

[6] *See* W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 535 (1848) (discussing a state's exercise of its eminent domain power).

[7] *See* 290 U.S. 398, 442–43, 444–48 (1934).

[8] *See id.* at 415–18, 447. This right ran contrary to existing contracts, which granted the lender the right to foreclose. *See id.* at 424–25.

emergency and was limited in duration.[9] The Court determined that a state had the power to regulate existing contracts to "safeguard the vital interests of its people"[10] as an exercise of its sovereignty.[11]

The Supreme Court's decision in *Blaisdell* marked a turning point in its Contract Clause jurisprudence, signaling that the Court would thereafter be more solicitous of states' use of their police powers to regulate contracts to "protect the lives, health, morals, comfort and general welfare of the people,"[12] even when the exercise of such powers would substantially impact contract rights. Since *Blaisdell*, the Court has permitted states to alter contract rights legislatively to serve a legitimate public interest.[13] But the Court has indicated that the Contract Clause still provides some protection for contracts.[14] For example, in a 1978 case, the Court closely scrutinized state legislation affecting *public* contracts and held that the Contract Clause prohibited a state from breaching a legislative covenant it made with private bondholders.[15] In the context of private contracts, although the Court continues to defer to the judgment of a state's legislature when weighing the impairment of private contracts against the public purposes that allegedly motivated the challenged legislation's enactment, the Court has held that the Clause prohibits a state from enacting legislation that regulates private contracts by imposing a substantial new and retroactive payment obligation on a narrow class of companies.[16]

ArtI.S10.C1.6.4 State Contracts

ArtI.S10.C1.6.4.1 Early Cases on State Modifications to State Contracts

Article I, Section 10, Clause 1:

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

Early in the nation's history, the Supreme Court established that, in addition to barring a state from substantially interfering with contracts of private individuals, the Constitution's Contract Clause may prohibit a state from breaching or modifying its own contracts. In fact, one of the first cases in which the Supreme Court struck down a state law as unconstitutional arose under the Contract Clause, and involved contracts between the State of Georgia and private parties.[1] In *Fletcher v. Peck*, Robert Fletcher sued John Peck, arguing, among other

[9] *See id.* at 424–25, 444–48.

[10] *Id.* at 434–35.

[11] *See id.* ("Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.").

[12] Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241 (1978) (quoting Manigault v. Springs, 199 U.S. 473, 480 (1905)).

[13] *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 474–78, 506 (1987); Exxon Corp. v. Eagerton, 462 U.S. 176, 178–79, 196 (1983).

[14] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. at 242 (1978) ("If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power.").

[15] *See U.S. Trust Co.*, 431 U.S. at 23–28, 32 ("If a State could reduce its financial obligations [by breaching a legislative covenant to protect private bondholders] whenever it wanted to spend the money for what it regarded as an important public purpose, the Contract Clause would provide no protection at all.").

[16] *See Spannaus*, 438 U.S. at 247–50.

[1] *See* Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 127 (1810).

things, that Peck lacked clear title to a tract of land he had conveyed to Fletcher.[2] The State of Georgia sold the tract to private parties in 1795 by an act of its legislature.[3] However, a subsequent legislature, determining that corruption tainted the sale, passed a law purporting to rescind the earlier grant.[4] This raised the question of whether Peck had title to the land he purported to convey to Fletcher.

Chief Justice John Marshall, writing for the Court, characterized Georgia's original sale of land as a contract between Georgia and private parties that fell within the scope of the Contract Clause.[5] Although the contract had already been executed, the grant of real estate continued to impose obligations on Georgia not to reassert title to the land.[6] The Court interpreted the Contract Clause to prohibit a state from breaching *its own* contracts as well as impairing those between private individuals.[7] Drawing a comparison between the act rescinding the land grant and an unconstitutional ex post facto state law that punished an individual for an act that was not a crime at the time it was committed, the Court determined that the Contract Clause prohibited the Georgia legislature from nullifying its earlier grant of land.[8] The Court stated that subsequent purchasers of the land bought it without notice of the corrupt intent of the legislature that initially conveyed it, and, therefore, "the state of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void."[9] The Court's decision in *Fletcher* was an early indication that the Justices would closely scrutinize a state's breach of its own contracts with private parties, and that grants of real estate could constitute contract rights protected by the Contract Clause.

Nine years later, in a seminal corporate law decision, the Supreme Court further extended its interpretation of the types of contracts and property interests protected by the Contract Clause, determining the Clause may prohibit states from revoking or substantially interfering with private corporate charters established under state law. In *Trustees of Dartmouth College v. Woodward*, the New Hampshire state legislature enacted a law amending the corporate charter of Dartmouth College, which King George III of Great Britain established in a 1769 grant.[10] New Hampshire altered the charter to vest control of the College in the state's governor and other state officials.[11] The majority of the college's trustees objected to this

[2] *See id.* at 127–28.

[3] *Id.* at 127.

[4] *Id.* at 130–32. For more on the history of the so-called "Yazoo Land Fraud," see Allen Pusey, *The Yazoo Land Fraud Becomes Law*, 104 A.B.A. J. 72 (2018).

[5] *See Fletcher*, 10 U.S. (6 Cranch) at 135, 137 ("A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.").

[6] *See id.* at 136–37; *cf.* Texaco, Inc. v. Short, 454 U.S. 516, 518, 531 (1982) (upholding, against a Contract Clause challenge, an Indiana law that automatically extinguished severed mineral interests if they were not used for twenty years unless the mineral owner filed a statement of claim with the local county recorder because the mineral owners in the case had not executed mineral leases until after their mineral rights had lapsed, and thus there was no existing contract to be impaired).

[7] *See Fletcher*, 10 U.S. (6 Cranch) at 137.

[8] *Id.* at 136–39.

[9] *Id.* at 139.

[10] *See* 17 U.S. (4 Wheat.) 518, 624–26 (1819). After the Revolution, the State of New Hampshire succeeded to the duties and powers of government previously held by the Crown, including obligations to Dartmouth College created by the charter. *See id.* at 651.

[11] *Id.* at 626.

transfer of control of the College to the state and sued the secretary of the new board of trustees to recover corporate property transferred to the new secretary.[12]

The Court determined that Dartmouth's corporate charter was a contract subject to the Contract Clause even though the Constitution's Framers may not have contemplated the Clause would protect rights granted under a corporate charter.[13] In support of this view, the Court focused on the law's effects on the corporation's property, noting the charter had been made for the "security and disposition of property" and that "real and personal estate ha[d] been conveyed to the corporation" to accomplish its mission of education.[14] Donors gifted the College with money and property upon the expectation that its mission would be fulfilled by the trustees without interference by the state legislature.[15]

Having determined the trustees' rights under the corporate charter were protected by the Contract Clause, the Court further decided that the New Hampshire law impaired these rights because, contrary to the will of the College's donors, the legislation transferred the power of governing the College from the trustees appointed in the founder's will to the New Hampshire governor and placed donor funds under the state government's control.[16] The College's founders donated funds with the expectation that the charter would protect the objectives and governance structure of Dartmouth College for posterity.[17] Furthermore, Dartmouth College was a private institution that held property for nongovernmental purposes; its professors and trustees were not public officers; and it was funded by private donors.[18]

Thus, even though the College was formed under state law, the Court determined it was not a civil institution, and thus the government had no right to change its governance structure and mission substantially without its consent.[19] Moreover, the legislature had not reserved a right to amend the charter.[20] *Dartmouth College* was a key decision with ramifications beyond the higher education context. The decision established constitutional limits on a state's power to alter a corporation's charter without its consent, at least when the state had not reserved a right to amend the charter.

ArtI.S10.C1.6.4.2 State Sovereign Powers and Contracts

Article I, Section 10, Clause 1:

> *No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a*

[12] *Id.* at 626–27.

[13] *Id.* at 627, 644–45.

[14] *Id.* at 643–44.

[15] *See Id.* at 647 ("It is probable, that no man ever was, and that no man ever will be, the founder of a college, believing at the time, that an act of incorporation constitutes no security for the institution; believing, that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the legislature.").

[16] *Id.* at 652.

[17] *Id.* at 652–54 ("They contracted for a system, which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed, in the hands of persons approved by themselves.").

[18] *See id.* at 629–36.

[19] *See id.* at 637–38 ("There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.").

[20] *See id.* at 674–75, 680 (Story, J., concurring).

ArtI.S10.C1.6.4.2
State Sovereign Powers and Contracts

Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

During the 1800s, the Supreme Court often interpreted the Contract Clause as providing robust protection for public and private contracts. However, the Court decided some cases that were more solicitous of the states' power to regulate contracts in the public interest. Under Chief Justice Roger B. Taney, the Court held that states could not contract away their sovereign powers, including their powers of eminent domain and police powers.[1]

An early example of a case in which the Supreme Court recognized the Contract Clause allows states some leeway to adopt legislation that would interfere with existing contracts in order to protect the public interest involved the Vermont legislature's exercise of the power of eminent domain to "take" contractual rights of private parties.[2] In *West River Bridge Co. v. Dix*, the Vermont legislature enacted a law granting an exclusive 100-year franchise to operate a toll bridge over the West River to the West River Bridge Company.[3] However, several decades later, the legislature passed a statute that permitted certain public officials to "take" such franchises using the power of eminent domain to construct public highways—a power the state sought to use against the West River Bridge Company's toll bridge franchise.[4] In an attempt to avoid the taking of its franchise, the company sued, arguing the state's eminent domain law impaired the obligation of the franchise contract between Vermont and itself by depriving the company of its franchise without its consent.[5]

The Supreme Court disagreed that the subsequently enacted Vermont law violated the Contract Clause.[6] Acknowledging the legislature's grant of a corporate charter to the company was a contract, the Court nevertheless determined that taking the corporation's franchise for public use upon payment of compensation was a proper exercise of the state's inherent and long-standing sovereign power of eminent domain over subordinate private property rights.[7] The Court noted the state's power of eminent domain constituted part of the background law and conditions under which parties entered into private contracts, and thus the state's exercise of that power could not impair the franchise contract.[8] However, the state would have to compensate the bridge company adequately for the taking.[9] *West River Bridge Co.* represents the Court's early recognition that the Contract Clause was not absolute, and that states retained some leeway to exercise their sovereign powers to protect the public interest, which they could not contract away, regardless of interference with contractual relationships.

During this era, the Supreme Court decided other important cases that recognized that a state could functionally abrogate the terms of a corporate charter to serve the public interest

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[1] James W. Ely, Jr., The Contract Clause: A Constitutional History 4 (2016) ("[Chief Justice] Taney both limited and strengthened the security of contractual obligations under the contract clause."). "On the other hand, . . . [the Taney Court] vigorously invoked the [Contract Clause] to safeguard the rights of parties under private agreements and to uphold clearly expressed tax exemptions." *Id.*

[2] *See* W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 530–31 (1848).

[3] *Id.* at 530.

[4] *Id.* at 530–31.

[5] *See id.* at 531, 533–34.

[6] *Id.* at 536.

[7] *See id.* at 530–36.

[8] *See* W. River Bridge Co. v. Dix, 47 U.S. 507, 532–33 (1848) ("[I]nto all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself, they are superinduced by the preexisting and higher authority of the laws of nature, of nations, or of the community to which the parties belong, they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force.").

[9] *Cf. id.* at 535.

through the exercise of its police powers. In *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*,[10] Chief Justice Taney, writing for the Court, held that a state could functionally abrogate the terms of a corporate charter to benefit its economy when the charter had not specifically preserved an exclusive toll franchise for a bridge company.[11] As one scholar has noted, the Taney Court "established the principle that corporate charters should be strictly construed and that privileges such as monopoly status . . . could never be implied."[12] Later in the nineteenth century, the Court carved out additional exceptions for state police powers. For example, the Court held that a state could use its police powers to revoke, on public moral grounds, a previously granted charter to a company to operate a lottery.[13]

From the late nineteenth to early twentieth centuries, the Contract Clause gradually took on a lesser role in the Court's jurisprudence. Although the Court's Contract Clause jurisprudence protected state tax exemptions in corporate charters and the rights of state bondholders from subsequent legislative impairment,[14] the Clause diminished in importance with the ratification of the Fourteenth Amendment.[15] Specifically, the Fourteenth Amendment's Due Process Clause offered a new avenue for the protection of private property interests, including contract rights, against unreasonable state interference.[16]

ArtI.S10.C1.6.4.3 Modern Doctrine on State Changes to State Contracts

Article I, Section 10, Clause 1:

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

The Court revived the Contract Clause in the context of public contracts in the late twentieth century. A major case from this time period, in which the Supreme Court confirmed it would thoroughly scrutinize state legislation that modified the state's *own contracts*, is *United States Trust Co. v. New Jersey*.[1] In that case, holders of bonds issued by the Port Authority of New York and New Jersey challenged a New Jersey statute as violative of the Contract Clause.[2] The law, along with a parallel New York enactment, repealed a prior

[10] 36 U.S. (11 Pet.) 420 (1837).

[11] *Id.* at 448–53.

[12] Ely, *supra* note 1, at 4.

[13] *See* Stone v. Mississippi, 101 U.S. 814, 821 (1879) ("Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume [a prohibition on lotteries] at any time when the public good shall require, whether [the charter] be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will.").

[14] *See, e.g.*, Wilmington R.R. v. Reid, 80 U.S. (13 Wall.) 264, 266–68 (1871) (holding the North Carolina General Assembly violated the Contract Clause by taxing the property of a railroad corporation after agreeing not to tax the property in the company's charter); Home of the Friendless v. Rouse, 75 U.S. (8 Wall.) 430, 438–39 (1869) ("Without pursuing the subject further, we are of the opinion that the State of Missouri did make a contract on sufficient consideration with the Home of the Friendless, to exempt the property of the corporation from taxation, and that the attempt made on behalf of the State through its authorized agent, notwithstanding this agreement, to compel it to pay taxes, is an indirect mode of impairing the obligation of the contract, and cannot be allowed.").

[15] Ely, *supra* note 1, at 5 ("Although both federal and state courts heard a steady stream of contract clause cases [during the late nineteenth century], they increasingly relied on other constitutional provisions, notably the due process clause of the Fourteenth Amendment, to protect economic rights.").

[16] Ely, *supra* note 1, at 5.

[1] 431 U.S. 1 (1977).

[2] *See id.* at 3.

statutory covenant that limited the Port Authority's discretion to use revenue and reserve funds pledged as security for the bonds in order to subsidize passenger rail transportation.[3] The bondholders argued that in repealing the covenant, which sought to promote investors' confidence in the bonds, the state impaired a contractual obligation in violation of the Contract Clause.[4]

The Supreme Court agreed with the New Jersey trial court that the state legislature's statutory covenant was a contract among New Jersey, New York, and the bondholders that fell within the Contract Clause's protection.[5] The Court further determined that repeal of the covenant impaired the obligation of the states' contract with the bondholders because the covenant had limited the Port Authority's deficits, which in turn protected bondholders from depletion of the Authority's general reserve fund, and the state had not replaced it with a comparable provision.[6] Moreover, the impairment violated the Contract Clause because it modified the express terms of the parties' agreement by repealing the covenant retroactively without being justified by a legitimate public purpose.[7] The state legislature's interests in protecting its citizens' welfare by financing new mass transit projects, conserving energy, and protecting the environment could not justify the repeal,[8] and the Court refused to defer to the state legislature's judgment when balancing the alleged benefits that would result from impairment of the covenant against the private financial loss that the private bondholders would incur from impairment of the covenant.[9] Instead, the Court considered whether the impairment was reasonable and necessary to serve the public purposes for which the State had accomplished it.[10]

In this vein, the Supreme Court determined that "a less drastic modification" of the covenant would have achieved the state's purposes, such as amending the covenant to exclude new revenues from the limitation in order to subsidize mass transit.[11] The repeal was also unreasonable because the original covenant had been made with full knowledge that the public might demand increased options for mass transit in the future.[12] In other words, the Court was not reviewing a case in which a contract had been made a long time ago and circumstances had changed significantly.

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[3] *Id.* "In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *Id.* at 17 n.14. State law addressing interpretation and enforcement of contracts may be deemed a part of the obligation of the contract as well. *See id.*

[4] *Id.* at 17.

[5] *See* 431 U.S. 1, 17–18 (1977).

[6] *Id.* at 19.

[7] *See id.* at 19–32.

[8] *Id.* at 21–32. The Supreme Court also examined whether the state could properly enter into the covenant without giving up an essential element of its sovereign powers. *Id.* at 23 & n.20, 28–29 (discussing the example of a state's revocation of a twenty-five-year charter to operate a lottery as an illustration of the Contract Clause's limits on a state's power to bind itself not to exercise its police powers in the future). However, the Court determined the states could properly bind themselves to financial restrictions regarding use of revenues and reserves securing bonds to finance passenger railroads through the exercise of their spending (and, perhaps, taxing) powers, and thus the states could not argue that the 1962 covenant was invalid when it was adopted. *Id.* at 24–26. The Court listed a few examples of state powers that could not be contracted away, including its power of eminent domain and its police power. *Id.* at 24 n.21.

[9] *See id.* at 21–32.

[10] *Id.* at 29 ("[A] State cannot refuse to meets its legitimate financial obligations simply because it would prefer to spend the money to promote the public good rather than the private welfare of its creditors. We can only sustain the repeal of the 1962 covenant if that impairment was both reasonable and necessary to serve the admittedly important purposes claimed by the State.").

[11] *Id.* at 29–31 & 30 n.28.

[12] *Id.* at 31–32.

Notably, in *United States Trust Co.*, the Court declined to defer to the state's characterization of the public interests affected by the challenged state legislation and refused to weigh these public interests against private contract rights.[13] Consequently, the Court established a heightened standard of review for state laws that modify a state's own obligations as opposed to laws that simply interfere with contracts between private parties.[14] The Court justified this "dual standard of review" on the grounds that the state was a self-interested party.[15]

ArtI.S10.C1.6.5 Private Contracts

ArtI.S10.C1.6.5.1 Early Cases on State Changes to Private Contracts

Article I, Section 10, Clause 1:

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

The Supreme Court has long held that the Contract Clause limits a state's power to regulate contracts between private parties. In the 1819 case *Sturges v. Crowninshield*, the Court examined a New York bankruptcy law that allowed insolvent debtors to obtain the discharge of their debts by surrendering their property.[1] Notably, the law applied retroactively to debt contracts parties had entered into prior to its enactment, raising the question of whether it interfered with existing contracts in violation of the Contract Clause.[2]

The Supreme Court began its analysis by defining a "contract" for purposes of the Clause as "an agreement in which a party undertakes to do, or not to do, a particular thing."[3] In the Court's view, the "obligation" of the contract in *Sturges* was the underlying state law binding the defendant-debtor to pay the plaintiff-creditor money on or before a certain date in accordance with a promissory note's terms.[4] When New York enacted a law allowing debtors to obtain the discharge of their entire debts upon surrender of their property, the state impaired the obligation of the debt contracts by potentially limiting a debtor's liability to an amount less than provided for in the original contract.[5]

Having determined the New York law impaired the obligation of contracts, the Court turned next to an analysis of whether that impairment violated the Contract Clause.[6] The Court adopted a broad reading of the Clause that arguably extended beyond the Framers'

[13] *See id.* at 25–28.

[14] *See id.*

[15] *Id.* at 26 & n.25 ("As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.").

[1] 17 U.S. (4 Wheat.) 122, 197, 208 (1819).

[2] *See id.* at 197. The Court determined that Article I, Section 10 of the Constitution did not necessarily prohibit states from passing bankruptcy laws so long as those laws did not conflict with federal law. *Id.* at 196–97.

[3] *Id.* at 197.

[4] *Id.*

[5] *See id.* at 197–98.

[6] *See id.* at 204.

original understanding of its scope to encompass state bankruptcy laws.[7] To the extent the New York law operated retroactively, the Court found, it impaired the obligation of contracts in violation of the Constitution.[8]

Nearly a decade after its decision in *Sturges*, the Court addressed a question left unanswered in that case—that is, whether a state bankruptcy law that permits a debtor to obtain a discharge from liability under a contract entered into *after the passage of the law* impairs the obligations of that contract in violation of the Contract Clause.[9] In *Ogden v. Saunders*, a citizen of New York contracted a debt in that state and claimed to have been discharged from that debt under a bankruptcy law in force at the time he entered into the contract.[10]

As in *Sturges*, the Supreme Court began its analysis by defining the *obligation* of contracts as the state law that binds parties to contracts to perform their duties thereunder or, alternatively, to pay compensation.[11] Unless the parties agreed otherwise, such law became part of the contract and governed enforcement of parties' obligations before any tribunal, as well as the contract's validity, construction, and discharge.[12] As a result, a bankruptcy law that discharged a party from a contract made under the law of that state was part of the contract's terms and conditions and discharged the obligation in all other tribunals.[13] Such a law could not be said to impair that contract, the Court held, so long as it applied to future contracts rather than existing contracts.[14] The *Ogden* decision thus drew a distinction between state laws that impaired obligations of contracts already in existence at the time of enactment and laws that affected future contracts, deeming the former to be more problematic from a constitutional standpoint.

Following its decision in *Ogden*, the Supreme Court decided cases in the 1800s that often adopted a broad view of the Contract Clause's protections for both public and private contracts.[15] But, as noted, by the end of the nineteenth century, the Contract Clause diminished in importance with the ratification of the Fourteenth Amendment and the imposition of limits on state power in the Amendment's Due Process Clause.[16] And during the

[7] *See id.* at 204–05 ("It seems scarcely possible to suppose that the framers of the constitution, if intending to prohibit only laws authorizing the payment of debts by instalment, would have expressed that intention by saying 'no State shall pass any law impairing the obligation of contracts.'").

[8] *Id.* at 208.

[9] Ogden v. Saunders, 25 U.S. (12 Wheat.) 213, 254 (1827).

[10] *Id.* at 255–56.

[11] *Id.* at 257–59. The Court distinguished between a law that impairs a contract and a law that impairs a contractual obligation. *Id.* at 256–57. A law that impairs the contract itself "enlarges, abridges, or in any manner changes" the intention of the contracting parties by modifying the contract's validity or "the construction, the duration, the mode of discharge, or the evidence of the agreement." *Id.*

[12] *Id.* at 257–59.

[13] *Id.* at 260.

[14] *Id.* at 262–64 ("[A] bankrupt law, which operates prospectively, or in so far as it does so operate, does not violate the constitution of the United States.").

[15] *See, e.g.*, Von Hoffman v. City of Quincy, 71 U.S. (4 Wall.) 535, 550–55 (1867); Cook v. Moffat, 46 U.S. (5 How.) 295, 308–09 (1847); Green v. Biddle, 21 U.S. (8 Wheat.) 1, 84, 91–93 (1823). *But see* Stone v. Mississippi, 101 U.S. (11 Otto) 814, 819–21 (1880).

[16] James W. Ely, Jr., The Contract Clause: A Constitutional History 5 (2016) ("Although both federal and state courts heard a steady stream of contract clause cases [during the late nineteenth century], they increasingly relied on other constitutional provisions, notably the due process clause of the Fourteenth Amendment, to protect economic rights.").

early twentieth century, the Court further reduced the Contract Clause's protections, specifically holding that "private agreements as well as public contracts were subject to the police power."[17]

ArtI.S10.C1.6.5.2 Blaisdell Case and State Modifications to Private Contracts

Article I, Section 10, Clause 1:

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

Although the Supreme Court had long recognized that states retained at least some sovereign power to regulate contracts to protect the public welfare[1]—and increasingly permitted states to modify private contract rights to respond to changes in the economy during the early twentieth century[2]—a major shift in Contract Clause doctrine resulted from the Court's decision in *Home Building & Loan Ass'n v. Blaisdell* in 1934.[3] Prior to the 1930s, the Court often adopted a robust interpretation of the Contract Clause when evaluating state legislation, applying it stringently to strike down state laws deemed to interfere with contract and property interests.[4] However, during the depths of the Great Depression, the Court significantly weakened the constraints that the Contract Clause imposes on state government regulation of private contracts.[5]

In *Blaisdell*, the State of Minnesota enacted the Minnesota Mortgage Moratorium Law, which allowed courts to extend temporarily the period of time during which a mortgagor (e.g., a homeowner) could redeem a home after the bank foreclosed on the property, preventing the mortgagee from obtaining possession during that time.[6] This right ran contrary to existing contracts, which granted the lender the right to foreclose.[7] In order to take advantage of this option, the mortgagor had to pay a "reasonable value of the income on" or "reasonable rental value of" the property to the mortgagee.[8]

Although the Minnesota law prevented the mortgagee from obtaining actual possession, the Supreme Court upheld the law as necessary and reasonable to address the economic crisis because it was appropriately tailored to address the emergency and was limited in duration.[9] The Court noted that a state had the power to regulate existing contracts in order to

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[17] *Id.* at 5–6.

[1] *See, e.g.*, W. River Bridge Co. v. Dix, 47 U.S. (6 How.) 507, 532–33 (1848).

[2] As one commentator noted, during the early twentieth century and before *Blaisdell*, the Supreme Court "expanded the basis upon which states could modify contract rights and advanced an interpretation of the Contract Clause that stressed judicial deference to local legislation enacted for the protection of the economic and social interests of all segments of society." Samuel R. Olken, *Charles Evans Hughes and the Blaisdell Decision: A Historical Study of the Contract Clause*, 72 Or. L. Rev. 548 (1993). Such legislation included laws that permitted tenants "to remain in possession of rental apartments upon the expiration of their leases." *Id.* at 547–51, 601 (citing Levy Leasing Co. v. Siegel, 258 U.S. 242 (1922)).

[3] 290 U.S. 398 (1934).

[4] *See id.* at 431–32 (collecting cases).

[5] *See* James W. Ely, Jr., The Contract Clause: A Constitutional History 1 (2016).

[6] *Id.* at 415–16, 424–25.

[7] *See id.*

[8] *Id.* at 416–18.

[9] *Id.* at 425, 444–48; *see also* El Paso v. Simmons, 379 U.S. 497, 516–17 (1965) (holding a Texas law that limited the time in which a purchaser of land could exercise their reinstatement rights to five years following forfeiture to the state for non-payment of interest did not contravene the Contract Clause).

"safeguard the vital interests of its people"[10] as an exercise of its sovereignty.[11] The Court cited several examples of cases in which it upheld state regulation aimed at protecting citizen welfare despite interference with existing contracts. For example, a state could amend its constitution to forbid lotteries that it previously authorized[12] or regulate intoxicating liquors[13] without violating existing contracts. It could regulate to protect the public from nuisances[14] or regulate to further public safety more generally, even when such regulations disrupted existing contractual relationships.[15] The Court also cited cases in which a state exercised its sovereign powers to protect its own *economic* interests, despite interference with existing contracts, including cases in which the Court upheld a state's regulation of rates charged by public services corporations or laws that imposed various legal requirements on businesses.[16]

In addition to signaling that the Court would more often defer to state regulation of private contracts in the public interest, *Blaisdell* is also notable because the Court set forth a test for when such state regulation impairs private contractual obligations in violation of the Contract Clause. The Court adopted a balancing test, justifying a pragmatic approach on the grounds that contract rights were meaningful only if the state exercised its powers to "safeguard the economic structure upon which the good of all depends."[17] It held that a state may regulate existing private contractual relationships, consistent with the Contract Clause, if the law serves a legitimate public purpose and the "measures taken are reasonable and appropriate to that end."[18] This standard, which is more deferential to the state than the standard applicable to public contracts,[19] leaves judges with room to balance the states' reserved powers to regulate to protect the public welfare against the Contract Clause's limitation on state power, which aims to safeguard the sanctity of contractual relationships.[20]

ArtI.S10.C1.6.5.3 State Laws Creating New Contractual Obligations

Article I, Section 10, Clause 1:

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

Although the Supreme Court has not had occasion to consider many Contract Clause challenges in the modern era, it has refined the test for private contracts it developed in the

[10] Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 434 (1934).

[11] *Id.* at 435 ("Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order.").

[12] *Id.* at 436 (citing Stone v. Mississippi, 101 U.S. 814, 819 (1880)).

[13] *Id.* (citing Beer Co. v. Massachusetts, 97 U.S. 25, 32–33 (1878)).

[14] *Id.* (citing Fertilizing Co. v. Hyde Park, 97 U.S. 659, 667 (1878)).

[15] *Id.* (citing Chi., Burlington & Quincy R.R. v. Nebraska, 170 U.S. 57, 70, 74 (1898)).

[16] *Blaisdell*, 290 U.S. at 437–38 (collecting cases).

[17] *Id.* at 442–44 ("If by the statement that what the Constitution meant at the time of its adoption it means to-day, it is intended to say that the great clauses of the Constitution must be confined to the interpretation which the framers, with the conditions and outlook of their time, would have placed upon them, the statement carries its own refutation. . . . With a growing recognition of public needs and the relation of individual right to public security, the court has sought to prevent the perversion of the clause through its use as an instrument to throttle the capacity of the States to protect their fundamental interests.").

[18] *Id.* at 438.

[19] *See* U.S. Trust Co. v. New Jersey, 431 U.S. 1, 25–28 (1977).

[20] *See Blaisdell*, 290 U.S. at 439 ("The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects.").

1934 case *Home Building & Loan Ass'n v. Blaisdell*, focusing on whether the challenged state legislation is broadly applicable, was foreseeable, and has a legitimate purpose. For example, in the 1978 case *Allied Structural Steel Co. v. Spannaus*, the Court determined a state law that regulated private pension contracts violated the Contract Clause because it sought to address a limited societal problem through the imposition of a substantial new and retroactive payment obligation on a narrow class of companies.[1]

In *Allied Structural Steel Co.*, the Minnesota legislature enacted the Private Pension Benefits Protection Act, requiring certain companies having offices in the state and offering pension plans to employees to pay a fee to cover full pensions for employees who worked at least ten years if the employer terminated its pension plan or closed a Minnesota office.[2] The Court considered whether it would violate the Contract Clause to apply the law to the appellant, an Illinois steel corporation that closed a Minnesota office.[3] Minnesota charged the company $185,000 under the Act to cover the cost of pensions for eligible discharged employees.[4] In response, the company maintained the fee "unconstitutionally impaired its contractual obligations to its employees under its pension agreement."[5]

The Supreme Court held the Act impaired the company's employment contracts because it substantially increased the company's obligation to fund pensions beyond the terms of the existing contracts it had entered into with its employees.[6] However, the Court noted it had to further examine whether such an impairment violated the Contract Clause.[7] Although noting the Contract Clause does not "obliterate" the states' police powers,[8] the Court determined the Minnesota law amounted to a significant impairment that could not be justified for public policy reasons.[9]

First, the employer relied on the payment terms of the existing pension plan when determining how to allocate its resources, and the Act retroactively required the company to pay more to its employees than the company had foreseen because the company closed its office.[10] There was no indication in the record that the state targeted an issue of pressing social need by enacting sweeping legislation covering a variety of employers and circumstances.[11] Rather, the Act targeted for the first time a narrow societal problem by imposing on a specific class of companies a substantial retroactive and permanent payment obligation unforeseen at the time of the pension plans' creation and contrary to the company's employment agreements.[12] These factors, the Court held, amounted to a violation of the Contract Clause.[13] *Allied Structural Steel Co.* stands for the notion that a state law may impair the obligation of

[1] *See* 438 U.S. 234, 247–50 (1978).

[2] *Id.* at 238.

[3] *See id.* at 236, 239.

[4] *Id.* at 239.

[5] *Id.* at 239–40.

[6] *See id.*

[7] *See id.*

[8] *Id.* at 241.

[9] *See id.* at 246–50.

[10] *See id.* at 247 ("[T]he statute in question here nullifies express terms of the company's contractual obligations and imposes a completely unexpected liability in potentially disabling amounts.").

[11] *See id.* at 247–48.

[12] *Id.* at 249–50; *cf.* Gen. Motors Corp. v. Romein, 503 U.S. 181, 183–88 (1992) (rejecting a Contract Clause challenge to a 1987 Michigan law that essentially required automobile companies to repay workers' compensation benefits withheld in reliance on a 1981 law, because the collective bargaining agreements entered into before the 1981 law did not address workers' compensation terms specifically and such terms could not be deemed to have been incorporated by law into the contracts, and thus there was no relevant contractual interest to impair).

[13] *See Allied Structural Steel Co.*, 428 U.S. at 250.

contracts not only when it abrogates contractual obligations, but also when it imposes substantial new and retroactive legal obligations on a specific subset of entities.

ArtI.S10.C1.6.5.4 Public Interest and State Modifications to Private Contracts

Article I, Section 10, Clause 1:

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

In the 1980s, the Supreme Court upheld generally applicable state laws regulating private contracts, which it determined were intended to serve a broad public interest, against Contract Clause challenges. For example, in *Exxon Corp. v. Eagerton*, the Court considered the constitutionality of an Alabama law that increased the severance tax on oil and gas extracted from wells located in the state, which the state imposed on producers at the time of severance.[1] The law, which amended a statute that imposed a tax on oil and gas extracted from Alabama wells, exempted the owners of royalty interests from the tax increase and forbid producers from passing the tax increase on to purchasers or consumers.[2] Oil and gas producers argued the law impaired the obligations of their contracts with royalty owners and consumers in violation of the Contract Clause.[3]

The Supreme Court determined the royalty owner exemption did not violate the Contract Clause because it did not impair contractual obligations benefiting the producers.[4] The Alabama law merely provided that the royalty owners were not legally responsible for paying the tax to the state, and did not prevent the producers from shifting the burden of the tax to the royalty owners through contractual stipulations.[5]

With regard to the state law's prohibition on passing through the severance tax to consumers, the Supreme Court confronted a more difficult question.[6] The Court determined the prohibition interfered with producers' existing contracts that required consumers to absorb increases in severance taxes.[7] However, the Court noted the Contract Clause leaves some room for state regulation to protect the public welfare, even when such regulation would interfere with existing contracts.[8] The Court deemed the pass-through prohibition to be similar to state laws setting rates in heavily regulated industries, like the electricity industry or oil transportation sector, which were consistent with the Contract Clause despite their incidental effect on existing contracts.[9] Comparing the pass-through prohibition to a rate-setting scheme that displaced contractual rates, the Court determined the prohibition applied broadly, had a legitimate public interest justification (i.e., safeguarding consumers

[1] 462 U.S. 176, 178 (1983).

[2] *Id.* at 178–79.

[3] *Cf. id.* at 178–80. The producers were parties to contracts that allocated the tax among themselves, royalty owners, and nonworking interests "in proportion to each party's share of the sale proceeds." *Id.* at 180. They also were party to sales contracts that made purchasers responsible for reimbursing them for the severance tax on products sold. *Id.*

[4] *Id.* at 187–88.

[5] *Id.* at 188–89.

[6] *See id.* at 189.

[7] *Id.*

[8] *Id.* at 190–91.

[9] *See id.* at 192–94. In a separate section of its opinion, the Court determined that federal law preempted the pass-through prohibition as applied to sales of natural gas in interstate commerce. *Id.* at 187.

from high prices), and was not targeted specifically at contracts of oil and gas producers.[10] Thus, there was no violation of the Contract Clause.[11]

Another case in which the Supreme Court determined that a state's sovereign power to protect public interests justified the impairment of private contracts is *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[12] In that case, the Pennsylvania legislature, concerned about public safety, land conservation, and other issues, enacted a law prohibiting mining that would damage existing structures, such as public buildings and homes, by eliminating underground support.[13] Petitioners, including a coal industry association and companies that controlled subsurface coal reserves, sued to enjoin a state environmental agency from enforcing the act and regulations promulgated thereunder.[14] One of the petitioners' challenges was that the Act on its face violated the Contract Clause by nullifying the surface owner's contractual waiver of liability for damage to the surface estate from coal mining.[15] The Court agreed with the lower courts that "the Commonwealth's strong public interests in the legislation [were] more than adequate to justify the impact of the statute on petitioners' contractual agreements."[16]

The Court determined that a contract right had been impaired because the coal companies secured waivers of liability from property owners for damages from mining to surface structures and much of the land affected by the Subsidence Act.[17] The Act impaired this right by nullifying the surface owners' contractual waiver obligations.[18] However, the Court found that Pennsylvania's interest in preventing environmental damage and hazards to people and property outweighed this contract right.[19] Because the state was not a party to the contracts at issue, the court deferred to the state's judgment that the legislation was appropriately tailored to the public purpose justifying it.[20]

In a subsequent case, *Sveen v. Melin*, the Supreme Court examined state regulation of private contracts in the context of a life insurance policy.[21] In that case, the Court upheld against a Contract Clause challenge a Minnesota law that revoked any revocable beneficiary designation an individual made to his or her spouse (e.g., in a life insurance policy) if their marriage was dissolved or annulled.[22] The law operated on the theory that the policyholder would have supported the revocation, and it allowed the policyholder to redesignate the ex-spouse as the beneficiary at any time.[23]

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[10] *See id.* at 191–94 ("If a party that has entered into a contract to transport oil is not immune from subsequently enacted state regulation of the rates that may be charged for such transportation, parties that have entered into contracts to sell oil and gas likewise are not immune from state regulation of the prices that may be charged for those commodities.").

[11] *Id.* at 196.

[12] 480 U.S. 470 (1987).

[13] *Id.* at 474, 476.

[14] *Id.* at 478.

[15] *Id.* at 502.

[16] *Id.*

[17] *Id.* at 504.

[18] *Id.*

[19] *Id.* at 505 ("[T]he Commonwealth has a strong public interest in preventing this type of harm, the environmental effect of which transcends any private agreement between contracting parties.").

[20] *Id.* at 505–06.

[21] No. 16-1432, slip op. at 1 (U.S. June 11, 2018).

[22] *Id.* at 1.

[23] *Id.*

In *Sveen*, the life insurance policyholder designated his wife as the primary beneficiary prior to the state's passage of the law, which operated retroactively.[24] The policyholder and his wife subsequently divorced, and the divorce decree did not mention the insurance policy.[25] After the policyholder passed away, his wife, who would have been the primary beneficiary under the policy if the legislature had not enacted the law, and his children, who were the contingent beneficiaries, claimed a right to the insurance proceeds.[26] The Court examined whether retroactive application of the revocation-on-divorce law to the policyholder's designation violated the Contract Clause.[27]

The Supreme Court, in an opinion authored by Justice Elena Kagan, rejected the Contract Clause challenge to the Minnesota statute.[28] Although the Court determined that a life insurance policy was a contract subject to the Contract Clause,[29] its holding recognized that not all laws that retroactively alter contracts in existence at the time of their passage violate the Contract Clause.[30] Rather, a violation occurs only when (1) the law substantially impairs a contractual relationship (e.g., by undermining the agreement, interfering with a party's reasonable expectations, or preventing a party from safeguarding or reinstating its rights); and (2) the law was not a reasonable and appropriate means of furthering a "significant and legitimate public purpose."[31]

In *Sveen*, the Court determined the Minnesota law did not substantially impair the life insurance contract for three reasons.[32] First, the law supported the general objectives of life insurance contracts by attempting "to reflect a policyholder's intent."[33] Second, the law would not undermine the policyholder's expectations regarding his or her beneficiary designation because the policyholder could not significantly rely upon that designation; a divorce court could revoke the beneficiary designation.[34] Finally, the law provided a default rule the policyholder could modify simply by submitting paperwork.[35]

Clause 2—Import-Export

ArtI.S10.C2.1 Overview of Import-Export Clause

Article I, Section 10, Clause 2:

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

[24] *Id.* at 5–6.
[25] *Id.* at 5.
[26] *Id.* at 5–6.
[27] *Id.* at 6.
[28] *Id.* at 1.
[29] *Id.* at 7.
[30] *Id.*
[31] *Id.*
[32] *Id.* at 7–8.
[33] *Id.*
[34] *See id.* at 8–10.
[35] *Id.*

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

In conjunction with several other provisions, particularly the Commerce Clause,[1] the Import-Export Clause was designed to limit the states' ability to interfere with commerce. To achieve this objective, the Clause generally prohibits States from imposing "imposts" or "duties" on imports and exports, absent congressional consent, except for purposes of covering charges associated with their inspection laws. The Clause further discourages States from imposing such duties by barring the States from using the funds collected from any such duties, instead requiring all funds to be deposited with the U.S. Treasury, and authorizing Congress to revise any State laws that impose duties.

ArtI.S10.C2.2 Historical Background on Import-Export Clause

Article I, Section 10, Clause 2:

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

Prior to the Constitution's adoption, the colonies, and later states, imposed tariffs on goods from foreign countries and from other colonies, often in response to adverse economic conditions that the governments believed were due to trade imbalances, and to protect or promote domestic industries. For example, in 1788, New Hampshire adopted the first law expressly imposing import duties to improve its economic conditions in response to what it considered an unreasonable trade imbalance that favored foreign countries, primarily Great Britain. This rationale subsequently informed the adoption or amendment of other colonial tariff legislation.[1] Similarly, Massachusetts imposed two types of import duties ("double duties") on vessels from foreign powers and other colonies, as well as additional duties on all commodities from the colonies directly surrounding it.[2] These measures were described as offering "the best protection" for the colonial shipping industry in the early to mid-1700s, resulting in Massachusetts having "the most shipping," and by 1789, "nearly all the shipping in the trade of Massachusetts was American."[3]

In response to the states' fragmented approach to controlling interstate and foreign commerce, the Continental Congress asked the states in 1786 to grant the Congress authority to control or prohibit trade with foreign powers for fifteen years. Although some states agreed to the request, others did not or did so with conditions on such power, which ultimately led to no federal action and a continuance of separate state actions and regulations.[4]

The question of state power to impose import and export duties inspired significant debate during the Constitutional Convention. The delegates considered and proposed multiple drafts that reflected different views about whether states should ever be permitted to impose import

[1] U.S. Const. art. I, § 8, cl. 3.

[1] William W. Bates, American Navigation 35–36 (1902).

[2] *Id.* at 33.

[3] *Id.* at 33, 38.

[4] *Id.* at 41–42.

and export duties, as well as what conditions should apply to any such duties that states could legally impose. This debate ultimately led to a relatively detailed constitutional provision that reflected these concerns.

An early draft of the Import-Export Clause applied only to duties on imports and was included within a larger list of actions that states generally could not undertake unless Congress authorized them to do so.[5] On August 28, 1787, however, the delegates voted 6-5 to add export duties to the general prohibition.[6] James Madison proposed moving the provision from the list of actions that states could not take without congressional consent to a different part of the Constitution that listed absolute prohibitions, thereby prohibiting states from imposing import and export duties in all circumstances. Colonel George Mason argued against such a blanket prohibition, asserting that states may wish to impose duties to assist the industries in which they had competitive advantages. Madison countered that allowing states to protect their industries through duties on foreign countries and other states would only continue the problems associated with lacking a unified, national power to regulate commerce.[7] The Convention rejected Madison's proposal by a vote of 4-7.[8]

In September 1787, the delegates continued debating amendments to the provision. On September 12, the Convention agreed to reconsider the version of the Import-Export Clause debated in August to add a qualifying phrase. This phrase stated that the Clause should not be interpreted to prevent the states from adopting export duties to cover the costs of inspection, packaging, and storage fees, as well as indemnifying the losses incurred while the goods were held by public officers.[9] Colonel Mason formally proposed the amendment on September 13 as follows:

> Provided that no State shall be restrained from imposing the usual duties on produce exported from such State, for the sole purpose of defraying the charges of inspecting, packing, storing, and indemnifying the losses on such produce, while in the custody of public officers: but all such regulations shall in case of abuse, be subject to the revision and controul of Congress.[10]

The delegates adopted this amendment by a vote of 7-3, agreeing to compare and reconcile that version with the proposed provision from the Committee on Style.[11] The Committee's version of the provision separated the issue of import and export duties from all other limits on state power, stating as follows: "No state shall, without the consent of Congress, lay imposts or duties on imports or exports, nor with such consent, but to the use of the treasury of the United States."[12]

On September 15, 1787, the delegates sought to reconcile these drafts. They chose to adopt the Committee of Style's decision to make the prohibition on import and export duties a standalone provision, rather than include the prohibition within a longer list of limits on state power. This allowed the delegates to incorporate the amendments adopted on September 13 into the version reflected in the Constitution.[13] Indicative of how divisive the provision

[5] 2 The Records of the Federal Convention of 1787, at 187 (Max Farrand ed., 1911).

[6] *Id.* at 435.

[7] *Id.* at 441.

[8] *Id.* at 435, 441.

[9] *Id.* at 583.

[10] *Id.* at 605.

[11] *Id.*

[12] *Id.* at 597.

[13] *Id.* at 624.

remained, however, a final motion was made to strike the Clause subjecting all state laws imposing import and export duties "to the Revision and Controul of the Congress." This motion failed, and the final text was adopted with ten delegates in favor, and Virginia the only vote in opposition.[14]

ArtI.S10.C2.3 Import-Export Clause Generally

Article I, Section 10, Clause 2:

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

Supreme Court jurisprudence on the Import-Export Clause can be divided into two periods: the first lasting from 1827 to 1976, and the second beginning thereafter. During the first phase, the Court construed the Clause broadly to give effect to the constitutional prohibition on state interference with foreign commerce, even holding that the Twenty-First Amendment, which allowed states to prohibit the sale of alcohol, did not alter the Import-Export Clause's general prohibition on such interference.[1] The Court's jurisprudence focused on determining whether the items subject to state charges qualified as imports or exports, and did not seek to define precisely what types of charges fell within the Clause's scope.

By contrast, during the second phase of jurisprudence, the Court clarified that the Clause's prohibition on state interference applied only to the extent the charges imposed qualified as "imposts" or "duties." In other words, not all state taxation on imports or exports fall within the constitutional prohibition; therefore, a court must assess whether the relevant charge is an "impost" or "duty." The Supreme Court has not overruled its jurisprudence from the first period insofar as it addresses whether items qualify as exports or imports. However, this jurisprudence's continued relevance to Import-Export cases remains unclear.

ArtI.S10.C2.4 Whether a Good Qualifies as an Import or Export

Article I, Section 10, Clause 2:

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

The first phase of Supreme Court doctrine on the Import-Export Clause focused on determining whether the challenged measures applied to goods that qualified as imports or exports. In a series of cases, the Court sought to clarify the Clause's scope by focusing on when products qualify as "imports" or "exports."

In the 1827 case of *Brown v. Maryland*, the Court established the primary contours of the doctrine applicable to the Import-Export Clause until the late 1970s. In *Brown*, the Court considered whether a state law requiring sellers of foreign goods to obtain and pay for a license

[14] *Id.*

[1] Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 346 (1964).

before being permitted to sell any such goods violated the Import-Export Clause.[1] Interpreting the Clause, the Court held that it applied not only to duties on the item imported, but also to "dut[ies] levied after it has entered the country," explaining that taking a more restrictive view would potentially allow states to prevent the importation of goods.[2] The Court further held that, at some point after entering the United States, goods no longer qualify as imports and may thereafter be subject to state charges. As identifying a single point in time or fact would not address sufficiently all circumstances, the Court indicated instead that a reviewing court must consider whether the "importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country."[3] However, while the item remained the importer's property, "in his warehouse, in the original form or package in which it was imported, a tax" on the item clearly fell within the constitutional prohibition.[4] The Court then held that the state law in question was effectively a tax on importation because it taxed only the occupation of importers and therefore violated the Import-Export Clause.[5]

In dicta, the *Brown* Court also addressed the Clause's territorial scope, suggesting that "import" and "export" covered goods transported in foreign as well as interstate commerce.[6] However, in *Woodruff v. Parham*, the Court held that the Import-Export Clause applied only to goods from or to foreign countries, and did not apply to measures affecting goods traveling only in interstate commerce.[7] Subsequent cases have consistently followed this holding.[8] The Court also extended the Clause's application to the Philippines, during the time it was a U.S. possession, on the ground that it remained outside of and therefore foreign to the United States for purposes of the Clause.[9]

Following *Brown*, the Court sought to clarify when a good no longer qualifies as an import or export. First, the Court maintained and applied the "original package" rule in a number of cases, holding that charges on imported goods kept in their original form within warehouses violated the Import-Export Clause. Such charges included ad valorem property taxes;[10] taxes on foreign goods sold at auction;[11] and franchise taxes on the landing, storage, or sale of imported goods.[12] By contrast, the Court held that once boxes with imported items were opened for sale or delivery, or once the goods were manipulated for use or sale, they no longer qualifed as imports.[13]

Second, the Court held that imports lose their character as imports once the goods fall within the purchaser's ownership or possession rather than the importer's,[14] or importation is

[1] 25 U.S. 419 (1827).

[2] *Id.* at 437–38.

[3] *Id.* at 441–42.

[4] *Id.* at 442.

[5] *Id.* at 444.

[6] *Id.* at 419.

[7] 75 U.S. 123, 133 (1868).

[8] Pervear v. Commonwealth of Mass., 72 U.S. (5 Wall.) 475 (1866); *In re* State Tax on Ry. Gross Receipts, 82 U.S. (15 Wall.) 284, 296–97 (1872); Pittsburgh & S. Coal Co. v. Louisiana, 156 U.S. 590, 600 (1895); Am. Steel & Wire Co. v. Speed, 192 U.S. 500, 519–20 (1904); New Mexico *ex rel.* E.J. McLean Co. v. Denver & Rio Grande R.R., 203 U.S. 38, 50 (1906); Toomer v. Witsell, 334 U.S. 385, 394 (1948).

[9] Hooven & Allison Co. v. Evatt, 324 U.S. 652, 679 (1945), *rev'd on other grounds*, 466 U.S. 353 (1984).

[10] Low v. Austin, 80 U.S. 29, 32 (1871).

[11] Cook v. Pennsylvania, 97 U.S. 566, 573 (1878).

[12] Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218, 225 (1933).

[13] May v. New Orleans, 178 U.S. 496, 508–09 (1900); Gulf Fisheries Co. v. MacInerney, 276 U.S. 124, 126 (1928); Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 542 (1959).

[14] Waring v. Mayor, 75 U.S. 110, 116 (1868); *Hooven & Allison Co.*, 324 U.S. at 658.

otherwise complete (e.g., the goods reach their final resting place).[15] The Court also held that charges imposed on actions more remote from loading or unloading goods, such as transit through U.S. states, do not affect the import process and therefore do not fall within the Import-Export Clause's scope.[16]

The Court also extended *Brown* to exports expressly, holding that state taxes on the sale of goods abroad and on the ability to export qualify as unconstitutional charges on exports.[17] Further, consistent with other cases involving imports, the Court held that states may tax goods intended for export "until they have been shipped, or entered with a common carrier for transportation, to another state, or have been started upon such transportation in a continuous route or journey."[18]

A separate line of cases also clarifies that the terms "import" and "export" do not include natural persons. In several early cases, it was suggested that the Constitutional Convention's discussion of slaves in conjunction with the term "import" indicated that the Import-Export Clause extended to persons. However, in dicta in the *Passenger Cases* and in later cases' holdings, the Court decided that the Clause did not apply to natural persons.[19]

ArtI.S10.C2.5 Whether a Charge Qualifies as an Impost or Duty

Article I, Section 10, Clause 2:

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

The Import-Export Clause does not define what qualifies as an "impost" or "duty" that falls within its scope. Beginning with *Brown v. Maryland*, the Supreme Court interpreted these terms broadly, stressing that the form or name of the charge did not determine whether it falls within the Clause's scope. Rather, the focus of the inquiry was the substance or operation of the challenged measure.[1] Thus, for example, a duty on an importer, despite not being on the product itself, was effectively equivalent to a duty on imports and thereby prohibited.[2]

Following *Brown*, the Supreme Court applied the Import-Export Clause to a variety of state taxes and other charges.[3] As the Court later noted, the Court generally treated the Clause as potentially applicable to all forms of state taxation on imports or exports,[4] although

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[15] Pittsburgh & S. Coal Co. v. Bates, 156 U.S. 577, 598–99 (1895); New York v. Wells, 208 U.S. 14 (1908).

[16] Canton R.R. v. Rogan, 340 U.S. 511, 515 (1951); W. Md. Ry. v. Rogan, 340 U.S. 520, 521 (1951).

[17] Crew Levick Co. v. Pennsylvania, 245 U.S. 292, 295–96 (1917); Richfield Oil Corp. v. State Bd. of Equalization, 329 U.S. 69, 85–86 (1946).

[18] Empresa Siderurgica v. Cnty. of Merced, 337 U.S. 154, 156–57 (1949); Joy Oil Co. v. State Tax Comm'n of Mich., 337 U.S. 286, 288–89 (1949); Kosydar v. Nat'l Cash Reg. Co., 417 U.S. 62, 69 (1974).

[19] Passenger Cases, 48 U.S. 283 (1849); Crandall v. Nevada, 73 U.S. 35, 41 (1868); New York v. Compagnie Generale Transatlantique, 107 U.S. 59, 61–62 (1883).

[1] Brown v. Maryland, 25 U.S. 419, 444–45 (1827); Selliger v. Kentucky, 213 U.S. 200, 209 (1909).

[2] *Brown*, 25 U.S. at 444–45.

[3] *See, e.g.*, Almy v. California, 65 U.S. 169 (1860) (stamp tax on bills of lading for gold and silver exports); Crew Levick & Co. v. Pennsylvania, 245 U.S. 292 (1917) (state tax on the business of selling goods in foreign commerce, as measured by gross receipts from merchandise shipped abroad); Anglo-Chilean Nitrate Sales Corp. v. Alabama, 288 U.S. 218 (1933) (franchise tax).

[4] Limbach v. Hooven & Allison Co., 466 U.S. 353, 360 (1984).

the Court also ruled that pilotage fees fell outside the Clause's scope, and that the measures must have some connection to importation or exportation to fall within the Clause.[5]

In 1976, the Court adopted a new approach to assessing whether a state measure violates the Import-Export Clause, cabining the Clause's scope by holding that the terms "impost" and "duty" do not encompass all taxes or charges. In *Michelin Tire Corp. v. Wages*, the Court considered the history and meaning of these terms to conclude that the Import-Export Clause did not reach non-discriminatory ad valorem property taxes. The Court also overruled *Low v. Austin* to the extent that case was inconsistent with the Court's new emphasis on defining "impost" and "duty."[6]

Under this new approach, to determine whether a charge may qualify as an impermissble impost or duty, a court must consider three factors: (1) whether it interferes with the Federal Government's ability to speak with one voice in commercial relations with foreign governments; (2) whether it diverts import revenues from the federal to state government; and (3) whether it may jeopardize harmony between the states.[7]

The Court reiterated its "different approach" to the Import-Export Clause in 1978, concluding in *Department of Revenue of the State of Washington v. Ass'n of Washington Stevedors*, that an occupution tax on stevedores did not fall within the Clause's scope.[8] Not until the 1984 case of *Limbach v. Hooven & Allison Co.*, however, did the Court expressly acknowledge that, in *Michelin*, it "adopted a fundamentally different approach to cases claiming the protection of the Import-Export Clause" and that therefore some of its prior cases, in addition to *Low*, were overruled.[9] Applying this new approach, the Court has held other state taxes, including ad valorem property taxes and sales taxes, to fall outside the Clause's scope.[10]

ArtI.S10.C2.6 State Inspection Charges

Article I, Section 10, Clause 2:

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

The Supreme Court has interpreted the Import-Export Clause's final phrase—"except what may be absolutely necessary for executing it's inspection Laws"—relatively rarely. However, the Court has upheld the constitutionality of charges for inspecting tobacco when the charges incurred were for services rendered, and when the challenged law's objective was to ensure the product's quality.[1] The Court has also suggested in dicta that whether an inspection charge is excessive "might be for congress to determine, and not the courts."[2]

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[5] Mager v. Grima, 49 U.S. 490, 494 (1850); Cooley v. Bd. of Wardens, 53 U.S. 299 (1851).

[6] 423 U.S. 276, 279–83 (1976).

[7] *Id.* at 285–86.

[8] 435 U.S. 734, 752–54 (1976).

[9] 466 U.S. at 359–61 (overruling Hooven & Allison Co. v. Evatt, 324 U.S. 652, 658 (1945)).

[10] R.J. Reynolds Tobacco Co. v. Durham Cnty., 479 U.S. 130, 153 (1986); Itel Containers Int'l Corp. v. Huddleston, 507 U.S. 60, 77 (1993).

[1] Turner v. Maryland, 107 U.S. 38, 54 (1883).

[2] Patapsco Guano Co. v. Bd. of Agric., 171 U.S. 345, 350–51 (1898).

Clause 3—Acts Requiring Consent of Congress

ArtI.S10.C3.1 Duties of Tonnage

ArtI.S10.C3.1.1 Overview of Duties of Tonnage

Article I, Section 10, Clause 3:

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

Article I, Section 10, Clause 3, prohibits states from interfering with interstate and foreign commerce by imposing duties of tonnage—charges to access a port based on a vessel's capacity (i.e., its tonnage)—without congressional consent. States may impose other types of taxes or charges on vessels provided they do not constitute duties of tonnage or otherwise violate the Constitution.

ArtI.S10.C3.1.2 Historical Background on Duties of Tonnage

Article I, Section 10, Clause 3:

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

Prior to the Constitution's enactment, many colonies, and later states, imposed duties of tonnage. While such duties most commonly applied to foreign vessels entering state ports,[1] some duties also applied to vessels from other colonies.[2] Colonies generally framed these duties as revenue-raising measures to provide for the public defense.[3] Because colonies considered these duties to be a potential way to protect and grow their own shipping industries, they often exempted their own ships from the tonnage duties.[4] Colonies also used duties of tonnage to retaliate economically when another colony imposed duties, offering to remove the retaliatory duties on a reciprocal basis. For example, Virginia adopted duties of tonnage in retaliation for Maryland's decision to impose such duties. While Virginia described the duty as "unneighborly," it insisted that "Maryland vessels must [also be subject to a duty] until [Maryland's] laws are repealed."[5]

During the Constitutional Convention, the delegates did not consider the question of duties of tonnage until August 1787. The committee considering whether to regulate state authority to impose these duties tabled a report that proposed prohibiting states from requiring vessels to pay duties to access their ports. The Committee concluded that tonnage duties should be "uniform throughout the United States."[6]

When the Constitutional Convention considered the committee's proposal in September 1787, the delegates debated whether such a clause was necessary and would appropriately balance the powers of the federal and state governments. Some delegates, including James

[1] William W. Bates, American Navigation 32 (1902).

[2] *Id.* at 33.

[3] *Id.* at 34.

[4] *Id.*

[5] *Id.*

[6] 2 The Records of the Federal Convention of 1787, at 434 (Max Farrand ed., 1911).

Madison, thought the power to impose duties of tonnage qualified as regulation of trade and therefore fell exclusively within Congress's general authority to regulate commerce.[7] Other delegates, who viewed the Commerce Clause's language as too vague to determine whether duties of tonnage fell within its scope, argued that the Constitution should expressly allow states to impose such duties in order to pay certain expenses, such as cleaning harbours and constructing lighthouses. Maryland delegates, James McHenry and Daniel Carroll, proposed that "no State shall be restrained from laying duties of tonnage for the purpose of clearing harbours and erecting light-houses."[8] Another delegate, Gouverneur Morris of Pennsylvania, thought Congress's power to regulate commerce did not extend to duties of tonnage.[9] The Clause's final text addressed the conflict over the Commerce Clause's scope and state needs for revenue from duties of tonnage by generally prohibiting states from imposing duties of tonnage unless permitted by Congress. This text was narrowly adopted with six delegations in favour, four against, and one divided.[10]

ArtI.S10.C3.1.3 Determining Whether a Measure Qualifies as a Duty of Tonnage

Article I, Section 10, Clause 3:

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

The Supreme Court first considered the Duty of Tonnage Clause in *Cooley v. Board of Wardens of the Port of Philadelphia* in 1851, and established what remain essential features of its jurisprudence. First, the Court concluded the term "duty of tonnage" was "well understood when the Constitution was formed" and thus should be interpreted as prohibiting states from imposing only such measures as would have been considered duties of tonnage at that time.[1] Second, by implication, states may impose other fees and charges that do not qualify as duties of tonnage, including pilot fees, wharfage, towage, and penalties imposed to enforce certain laws.[2] Thus, courts must determine whether or not a challenged measure constitutes a duty of tonnage. To make this determination, "it is the thing, and not the name, which is to be considered."[3] In other words, courts must consider the contents, substance, and effect of the measure to determine whether it qualifies as a duty of tonnage.

In subsequent cases, the Supreme Court expanded on these principles. First, in keeping with its broad reading of the Clause, the Court clarified in *In re State Tonnage Tax Cases* that the prohibition on imposing duties of tonnage covers all vessels, whether traveling in interstate or intrastate commerce, reasoning that the Framers would have made any exception express.[4] Second, in *Clyde Mallory Lines v. Alabama*, the Court stated expressly that the Duty of Tonnage Clause applies to "all taxes and duties regardless of their name or form, and even

[7] *Id.* at 625.
[8] *Id.*
[9] *Id.*
[10] *Id.* at 625–26.
[1] Cooley v. Bd. of Wardens, 53 U.S. 299, 314 (1851).
[2] *Id.*
[3] *Id.*
[4] *In re* State Tonnage Tax Cases, 79 U.S. 204, 226 (1870).

though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port."[5]

Although the Court has consistently interpreted the Clause broadly, its precise mode of determining whether a measure qualifies as a duty of tonnage has evolved in several respects. One line of cases involves measures qualifying as taxes, while another involves other fees or charges. In a series of cases decided between 1865 and 1876, the Court indicated that any tax measure that uses the tonnage of a ship to calculate the amount to charge to a vessel is a duty of tonnage.[6] By contrast, as the Court clarified in *Transportation Co. v. Wheeling*, taxes that treat vessels as personal property and assessed in the "same manner as other personal property" do not violate the duty of tonnage clause, although taxes not taxed in the "same manner" may violate the clause.[7]

In 1877, the Court clarified in *Packet Co. v. Keokuk* that using tonnage to calculate the amount to charge a vessel is not determinative in cases not involving taxes. Rather, the court must also consider the nature of the charge in dispute.[8] Following *Keokuk*, the Court has applied this more holistic approach to determine whether contested charges qualify as duties of tonnage. Thus, the Court has considered not only whether the state is using a vessel's tonnage to assess fees, but also whether the state is imposing the fees to compensate for costs incurred by the state or municipality in providing and maintaining ports or as another means to charge vessels to access a port. Applying this method of analysis, the Court has upheld the constitutionality of fees to cover services for the safety and upkeep of wharves and locks;[9] fees to cover quarantine services;[10] annual license fees;[11] and fees imposed to cover the costs of providing harbor police services.[12]

ArtI.S10.C3.1.4 Personal Property Taxes and Duties of Tonnage

Article I, Section 10, Clause 3:

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

While the Court's duties of tonnage jurisprudence has been consistent,[1] questions remain about how to evaluate disputed charges. In particular, the Court appears divided on how the Duty of Tonnage Clause interacts with state or municipal authority to impose personal property taxes. In the 2009 case, *Polar Tankers v. City of Valdez*, the Court considered a tax

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[5] Clyde Mallory Lines v. Alabama, 296 U.S. 261, 265–66 (1935).

[6] Steamship Co. v. Portwardens, 71 U.S. 31 (1867); *In re State Tonnage Tax Cases*, 79 U.S. 204; Peete v. Morgan, 86 U.S. 581 (1870); Cannon v. New Orleans, 87 U.S. 577 (1874); Inman Steamship Co. v. Tinker, 94 U.S. 238 (1876).

[7] Transp. Co. v. Wheeling, 99 U.S. 273, 284 (1878).

[8] Packet Co. v. Keokuk, 95 U.S. 80 (1877); *see also* Wiggins Ferry Co. v. City of E. St. Louis, 107 U.S. 365, 376 (1883) (noting that whether a rate is imposed based on tonnage is "not a conclusive circumstance . . . [but] is one of the tests applied to determine whether a tax is a tax on tonnage or not").

[9] *Keokuk*, 95 U.S. at 87–88; Vicksburg v. Tobin, 100 U.S. 430, 432–33 (1879); Packet Co. v. St. Louis, 100 U.S. 423, 429 (1879); Packet Co. v. Catlettsburg, 105 U.S. 559, 561–62 (1881); Transp. Co. v. Parkersburg, 107 U.S. 691, 706–07 (1883); Huse v. Glover, 119 U.S. 543, 550 (1886); Ouachita Packet Co. v. Aiken, 121 U.S. 444, 448 (1887).

[10] Morgan's S.S. Co. v. La. Bd. of Health, 118 U.S. 455, 463 (1886).

[11] *Wiggins Ferry Co.*, 107 U.S. at 376.

[12] *Clyde Mallory Lines*, 296 U.S. at 264.

[1] Polar Tankers, Inc. v. City of Valdez, 557 U.S. 1, 6 (2009) ("The Court over the course of many years has consistently interpreted the language of the Clause in light of its purpose.").

ordinance imposed by the City of Valdez, Alaska. The Court identified four ways the ordinance might be constitutional as a personal property tax, although the Court ultimately held the tax at issue unconstitutional on other grounds.[2]

Polar Tankers involved an ordinance imposing a personal property tax on "boats and vessels of at least 95 feet in length that regularly travel to the City, are kept or used within the City, or which annually take on at least $1 million worth of cargo or engage in other business transactions of comparable value in the City."[3] A majority of seven Justices held the ordinance violated the Duty of Tonnage Clause[4] based on their findings that the ordinance applied in practice only to certain large vessels, the amount owed was effectively based on vessel capacity (i.e., tonnage), and a single entry into Valdez's port made the vessel liable to pay the tax. Further, the City did not impose the tax to compensate for a service provided. Thus, the ordinance's actual operation rendered it a duty of tonnage, not a personal property tax.[5]

Despite the 7-2 holding of *Polar Tankers*, the Justices diverged on how to approach determining whether the ordinance might qualify as a personal property tax, debating the principles and implications of the *State Tonnage Tax Cases* and *Wheeling*. Justice Stephen Breyer, writing for a plurality of four Justices, concluded that personal property taxes may be constitutional and not violate the general prohibition on duties of tonnage if vessels are taxed in the same manner as other property, as held in *Wheeling*. More precisely, this plurality interpreted the "same manner" requirement of *Wheeling* to require a state to impose similar taxes upon other businesses, effectively reading "same manner" as a non-discrimination requirement.[6] Justice Breyer concluded that the Valdez ordinance failed this requirement, as it applied in practice almost exclusively to large vessels.[7]

By contrast, Justice John Paul Stevens, joined in dissent by Justice David Souter, argued that the "same manner" criterion, as set out in *Wheeling* and the *State Tonnage Tax Cases*, required only that a property tax on vessels be calculated based on property valuation, instead on tonnage.[8] Chief Justice John Roberts, joined by Justice Clarence Thomas, wrote separately, contending that personal property taxes may be imposed only on a state's citizens, not on visiting vessels.[9] Justice Samuel Alito, in a concurrence, stated he disagreed with Justice Breyer's view regarding taxation, but offered no further comment.[10]

Finally, the Constitution permits states to impose duties of tonnage with congressional consent. However, as noted in dicta by the Supreme Court, the Constitution does not specify when or how such consent must be given.[11] To date, the Supreme Court has not had occasion to decide when or how congressional consent would be granted.

[2] *Id.*

[3] *Id.* at 5.

[4] *Id.* at 9–11; *id.* at 17 (Roberts, C.J., concurring in part and concurring in the judgment).

[5] *Id.* at 9–11; *id.* at 17.

[6] *Id.* at 12.

[7] *Id.*

[8] *Id.* at 22–23 (Stevens, J., dissenting).

[9] *Id.* at 18 (Roberts, C.J., concurring in part and concurring in the judgment).

[10] *Id.* at 19–20 (Alito, J., concurring in part and concurring in the judgment).

[11] Virginia v. Tennessee, 148 U.S. 503, 521 (1893).

ArtI.S10.C3.2 States and Military Affairs

Article I, Section 10, Clause 3:

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

The Supreme Court has stated that this provision contemplates the use of the state's military power to put down an armed insurrection too strong to be controlled by civil authority,[1] and held that the organization and maintenance of an active state militia is not a keeping of troops in time of peace within the prohibition of this clause.[2] The Supreme Court has also held that the divestments of state power in this Clause, together with Congress's express authority to build and maintain the Armed Forces under Article 1, Section 8, Clauses 12 and 13, reflect "a complete delegation of authority to the Federal Government to provide for the common defense" and show that the states renounced their right to interfere with national policy in this area in the plan of the Convention.[3]

ArtI.S10.C3.3 Compact Clause

ArtI.S10.C3.3.1 Overview of Compact Clause

Article I, Section 10, Clause 3:

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

The Compact Clause prohibits states from entering into "any Agreement or Compact with another State" or with a foreign government without the consent of Congress.[1] Whereas other provisions in Article I, Section 10 categorically deny states certain powers,[2] the Compact Clause allows states to retain what the Supreme Court has described as the sovereign right to make agreements and compacts, provided Congress consents.[3]

According to the Supreme Court, there is little difference between "agreements" and "compacts" in this clause.[4] Both terms refer to contracts between governments—although a compact may reflect a more "formal and serious engagement" than an agreement.[5] Once

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[1] Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849).

[2] Presser v. Illinois, 116 U.S. 252 (1886).

[3] Torres v. Tex. Dep't of Pub. Safety, No. 20-603, slip op. 6 (U.S. June 29, 2022) (holding that the states waived their sovereign immunity under Congress's Article I power pursuant to the plan of the Convention, such that Congress may enforce certain federal reemployment protections by authorizing private litigation against noncompliant state employers that do not wish to consent to suit).

[1] U.S. Const. art. I, § 10, cls. 1–2.

[2] *See* U.S. Const. art. I, § 10, cls. 1–2 (prohibiting states from, among other things, entering into treaties, coining money, impairing contracts, granting titles of nobility, and regulating most imports and exports). *See also* ArtI.S10.C1.1 Foreign Policy by States to ArtI.S10.C3.3.6 Legal Effect and Interpretation of Compacts.

[3] *See, e.g.,* Poole v. Fleeger's Lessee, 36 U.S. 185, 208–09 (1837) (explaining that the Constitution requres consent for a compact between states and that, in this instance, such consent had "been expressly given").

[4] *See*, *e.g.*, Virginia v. Tennessee, 148 U.S. 503, 520, 537 (1893); Rhode Island v. Massachusetts, 37 U.S. 657, 725 (1838).

[5] *Virginia*, 148 U.S. at 520. *See* Texas v. New Mexico, 482 U.S. 124, 128 (1987) (noting that a "Compact is, after all, a contract" between sovereigns) (quoting Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 285 (1959) (Frankfurter, J., dissenting)); Virginia v. West Virginia, 78 U.S. 39, 59 (1870) ("[A]greement means the mutual consent

approved by Congress, agreements and compacts have the force of federal law.[6] As a result, agreement and compacts have dual functions: they operate as contracts between governments and, if approved by Congress, part of the law of the United States.[7]

The ability to form compacts with other governments is a defining characteristic of sovereignty.[8] In the Compact Clause, the Constitution adapts the sovereign's traditional compact-making power to the American constitutional system in which both the Federal Government and the states have sovereign authority.[9] The clause safeguards national interests by giving Congress control over matters that reach beyond state lines but are not suitable for direct federal regulation.[10] It also protects states' interests by limiting an individual state's power to form compacts that might disadvantage other states or regional interests.[11]

A literal reading of the Compact Clause would require congressional approval for any agreement or compact.[12] In the context of interstate compacts, however, the Supreme Court has adopted a functional interpretation in which only compacts that increase the political power of the states while undermining federal sovereignty require congressional consent.[13] The Supreme Court has not said whether the same interpretation applies to states' compacts with foreign governments, but the proliferation of states' pacts[14] with foreign officials suggests Congress's approval is not required in many cases.[15]

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of the parties to a given proposition . . . ."); *see also Compact*, Black's Law Dictionary (11th ed. 2019) (defining "compact" as "[a]n agreement or covenant between two or more parties, esp. between governments or states"). Because the distinctions between "Agreement" and "Compact," are minor, this essay uses the terms interchangeably.

[6] *See* ArtI.S10.C3.3.6 Legal Effect and Interpretation of Compacts.

[7] For background on the Supremacy Clause, see ArtVI.C2.1 Overview of Supremacy Clause.

[8] *See, e.g.*, *Poole*, 36 U.S. at 209; Rhode Island v. Massachusetts, 37 U.S. 657, 725 (1838); ArtII.S2.C2.1.2 Historical Background on Treaty-Making Power (discussing the importance of international agreement-making to the concept of sovereignty).

[9] *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104 (1938). For discussion of the dual sovereignty doctrine, see Amdt5.3.3 Dual Sovereignty Doctrine.

[10] *See* Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275, 282 n.7 (1959). *See also* Texas v. New Mexico, No. 141, Orig., slip op. at 4 (U.S. Mar. 5, 2018) (noting that the Compact Clause "ensures that the Legislature can 'check any infringement of the rights of the national government.'") (quoting 3 Joseph Story, Commentaries on the Constitution of the United States § 1397 (1833)); Cuyler v. Adams, 449 U.S. 433, 440 (1981) ("[T]he Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority."); West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 27–28 (1951) (describing compacts as a "supple device" for addressing regional problems while protecting national interests).

[11] *See* Florida v. Georgia, 58 U.S. 478, 494 (1854).

[12] *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 459 (1978).

[13] *See*, *e.g.*, Cuyler v. Adams, 449 U.S. 433, 440 (1981); *U.S. Steel Corp.*, 434 U.S. at 468; New Hampshire v. Maine, 426 U.S. 363, 369–370 (1976); Virginia v. Tennessee, 148 U.S. 503, 519 (1893). For background on functionalism as a method of constitutional interpretation, see Intro.8.8 Structuralism and Constitutional Interpretation.

[14] This set of essays uses "pact" as a generic term for any international commitment to which a state is a party, regardless of its form, title, and whether it is legally binding.

[15] *See* ArtI.S10.C3.3.5 Requirement of Congressional Consent to Compacts. For discussion of the effect of historical practice on constitutional interpretation, see Intro.8.9 Historical Practices and Constitutional Interpretation.

ArtI.S10.C3.3.2 Historical Background on Compact Clause

Article I, Section 10, Clause 3:

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

The roots of the Compact Clause can be traced to interstate boundary disputes during the colonial period in American history.[1] As population in North America expanded and moved westward, some colonies sought control over greater shares of territory.[2] At the same time, land grants in the colonies' royal charters were often vague and indefinite, which led to disagreements about colonial borders.[3] The British legal system provided two methods for the colonies to resolve these disputes: a litigation-like process before the British Royal Commission or private negotiations between the colonies followed by settlements that were approved by the Crown.[4] Both processes were precursors to provisions in the Constitution. The litigation-like process continued in Article III, Section 2, which gives the Supreme Court original jurisdiction over disputes between states.[5] The private settlement process carried over into the Compact Clause.

In the period after the Revolutionary War but before the Constitution was adopted, the Articles of Confederation shifted the British system of compact-making slightly. The Articles of Confederation allowed the states to negotiate independently and form compacts, but they required approval from the newly created Congress rather than the Crown.[6] Despite the requirement for congressional consent, several states entered into interstate compacts without seeking approval during the Articles of Confederation period.[7]

At the Constitutional Convention, James Madison cited states' unapproved compacts as one reason to strengthen the National Government's general power over the states in a new system of government.[8] Later in the convention, the Committee of Detail included what would become the Compact Clause in its drafts of the Constitution,[9] and the Committee of Style

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[1] *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 692 (1925).

[2] *See id.*

[3] *See*, *e.g.*, Rhode Island v. Massachusetts, 37 U.S. 657, 724 (1838); Virginia v. Tennessee, 148 U.S. 503, 504–07 (1893).

[4] *See* Frankfurter & Landis, *supra* note 1, at 693–95. *See also* Rhode Island v. Massachusetts, 37 U.S. at 739–44 (discussing boundary settlement processes in Great Britain).

[5] *See* ArtIII.S2.C2.2 Supreme Court Original Jurisdiction. The Supreme Court regularly encourages states to resolve their disputes through compacts rather than litigation. *See*, *e.g.*, Vermont v. New York, 417 U.S. 270, 277–78 (1974).

[6] Article VI of the Articles of Confederation states: "No State, without the Consent of the united States, in congress assembled, shall . . . enter into any confer[ ]ence, agreement, alliance, or treaty, with any King prince or state . . . . No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the united states, in congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue." Articles of Confederation of 1781, art. VI, paras. 1, 3.

[7] *See* Frankfurter & Landis, *supra* note 1, at 732.

[8] *See* 1 The Records of the Federal Convention of 1787, at 316 (Max Farrand ed., 1911) [hereinafter Farrand's Records] ("[N]o two or more States can form among themselves any treaties . . . without the consent of Cong[ress] yet Virgi[ni]a & Mary[lan]d in one instance—Pen[nsylvania] & N[ew] Jersey in another, have entered into compacts, without previous application or subsequent apology.").

[9] The Committee of Detail's first draft provided: "No State shall enter into any . . . Treaty, Alliance (or) Confederation (with any foreign Power nor with[out] Cons[ent] of U.S. into any agreem[ent] or compact w[ith] (any other) another State or Power . . . ." 2 Farrand's Records, *supra* note 8, at 169. The Committee of Detail's later draft, which was submitted to the Constitutional Convention, stated: "No State, without the consent of the Legislature of the

revised the clause into its final form.[10] Minor elements of the Compact Clause differ from the Articles of Confederation,[11] but the clause retained its basic structure in which states can form agreements and compacts with one another and with foreign governments, provided Congress consents.[12]

Apart from Madison's remark about unapproved compacts, the Framers said little about the Compact Clause during the Constitutional Convention and state ratification debates.[13] In the *Federalist No. 44*, Madison wrote that the "particulars" of the Compact Clause "are either so obvious, or have been so fully developed, that they may be passed over without remark."[14] Despite Madison's confidence that the clause is self-explanatory, compact-making practice has evolved, and disagreements have required courts to interpret the Compact Clause's scope and requirements.[15]

ArtI.S10.C3.3.3 Subject Matter of Compacts

Article I, Section 10, Clause 3:

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

As instruments based on the combined powers of Congress and the states, compacts have a broad base of authority that can be leveraged for many governmental endeavors.[1] For many years after the Constitution was adopted, boundary disputes were the predominate subject of all compacts and agreements.[2] After the turn of the twentieth century, states began to use

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United states, shall . . . enter into any agreement or compact with another State, or with any foreign power . . . ." 2 Farrand's Records, *supra* note 8, at 187. Earlier in the Convention, Alexander Hamilton had proposed a draft constitution that included a similar clause. *See* 3 Farrand's Records, *supra* note 8, at 630 ("No State shall enter into a Treaty, alliance, or contract with another, or with a foreign power without the consent of the United States.").

[10] *See* 2 Farrand's Records, *supra* note 8, at 597 (revisions by Committee of Style); *See* 2 Farrand's Records, *supra* note 8, at 657 (final version of the Compact Clause in the Constitution).

[11] The Compact Clause conditionally allows "any Agreement or Compact" when Congress consents, but Clause 1 of Article I, Section 10 forbids the states from entering into three types of pacts—treaties, alliances, and confederations—even if Congress approves. *See* U.S. Const., art. I, § 10, cls. 1, 3. By contrast, the Articles of Confederation did not create a second category of pacts that were forbidden no matter if Congress consents. *See* Articles of Confederation of 1781, art. VI, paras. 1, 3. The Framers' writings suggest each category of pact mentioned in these provisions had a distinct and commonly understood meaning when the Constitution was drafted. *See* U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 460–62 (1978). According to the Supreme Court, however, the meaning of these terms of art were lost within a generation, leaving later jurists and scholars to debate different theories of distinction. *See U.S. Steel Corp.*, 434 U.S. at 463.

[12] *Compare* Articles of Confederation of 1781, art. VI, paras. 1, 3, *with* U.S. Const., art. I, § 10, cl. 3.

[13] *See U.S. Steel Corp.*, 434 U.S. at 460–62 ("The records of the Constitutional Convention . . . are barren of any clue as to the precise contours of the agreements and compacts governed by the Compact Clause. . . . The records of the state ratification conventions also shed no light.").

[14] The Federalist No. 44 (James Madison).

[15] *See* ArtI.S10.C3.3.3 Subject Matter of Compacts and ArtI.S10.C3.3.6 Legal Effect and Interpretation of Compacts.

[1] *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 Yale L. J. 685, 688 (1925). The Supreme Court has stated in dicta that compacts may not be used to alter the Constitutional structure of government. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. 421, 433 (1855) (stating that Congress cannot not lose its power to regulate interstate commerce through a compact); Wilson v. Mason, 5 U.S. 45, 61, 2 L. Ed. 29 (1801) (declining to adopt a construction of an compact that would "annul the [C]onstitution" by depriving federal courts of constitutionally provided jurisdiction).

[2] *See*, *e.g.*, Frankfurter & Landis, *supra* note 1, at 735–48; Richard H. Leach, *The Federal Government and Interstate Compacts*, 29 Fordham L. Rev. 421, 421–22 (1961). The first compact approved under the Constitution was an

interstate compacts more often as a tool for solving complex regional problems.[3] States made compacts to apportion interstate water bodies, particularly rivers in the Western United States,[4] and to manage interstate resources and properties, such as oil and gas,[5] fisheries,[6] and parks.[7] States also began to use compacts for major public undertakings and infrastructure projects, such as the Port of New York and New Jersey.[8]

During this time, Congress began to pass legislation that provided advance consent to whole classes of compacts on some subjects. In one notable example, Congress passed legislation consenting to any interstate compact for the prevention of crime.[9] This law led to several widely adopted compacts addressing probationers' and parolees' travel between states and other law enforcement matters.[10]

Interstate compact usage eventually evolved to address an even wider range of issues. Congress authorized compacts addressing subjects as varied as education,[11] urban planning,[12] tourism and historic preservation,[13] tax,[14] emergency aid,[15] fire prevention,[16] transportation,[17] sewage disposal,[18] and radioactive waste management.[19]

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agreement between Virginia and the delegates of the then-district of Kentucky to set boundaries between Virginia the newly formed State of Kentucky. *See* 1 Stat. 189 (1791). *See also* De Veau v. Braisted, 363 U.S. 144, 154 (1960) (discussing history of congressional approval of state compacts).

[3] *See* Leach, *supra* note 2, at 421–22; Duncan B. Hollis, *The Elusive Foreign Compact*, 73 Mo. L. Rev. 1071, 1074–75 (2008). *See also* West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 27 (1951) ("The growing interdependence of regional interests, calling for regional adjustments, has brought extensive use of interstate compacts.").

[4] *See*, *e.g.*, La Plata River Compact, Pub. L. No. 68-346, 43 Stat. 796 (1925); South Platte River Compact, Pub. L. No. 69-37, 44 Stat. 195 (1926); Colorado River Compact, Pub. L. No. 70-642, § 13, 45 Stat. 1057 (1928); Rio Grande Compact of 1938, Pub. L. No. 76-96, 53 Stat. 785 (1939); Republican River Compact, Pub. L. No. 78-60, 57 Stat. 86 (1943).

[5] *See*, *e.g.*, Interstate Compact to Preserve Oil and Gas, Pub. Res. No. 74-64, 49 Stat. 939 (1935).

[6] *See*, *e.g.*, Columbia River Compact, Pub. L. No. 65-123, 40 Stat. 515 (1918); Pacific Marine Fisheries Compact, Pub. L. No. 80-232, 61 Stat. 419 (1947).

[7] *See*, *e.g.*, Palisades Interstate Park Compact, Pub. Res. No. 75-65, 50 Stat. 719 (1937); Breaks Interstate Park Compact, Pub. L. No. 83-543, 68 Stat. 571 (1954).

[8] *See* Joint Resolution Granting Consent of Congress to an Agreement or Compact for the Creation of the Port of New York District and the Establishment of the Port of New York Authority, Pub. Res. No. 67-17, 42 Stat. 174 (1921).

[9] *See* An Act Granting Consent of Congress to Any Two or More States to Enter into Agreements or Compacts for Cooperative Effort and Mutual Assistance in the Prevention of Crime, Pub. L. No. 73-292, 48 Stat. 909 (1934) (codified at 4 U.S.C. § 112).

[10] *See*, *e.g.*, Interstate Compact for Juveniles, codified in Va. Code Ann. § 16.1-323; Interstate Corrections Compact, codified in Ky. Rev. Stat. Ann. § 196.610; Agreement on Detainers, codified in Ala. Code § 15-9-81; New England Corrections Compact, codified in Conn. Gen. Stat. Ann. § 18–102; New England Police Compact, codified in 42 R.I. Gen. Laws Ann. § 42-37-1; Western Corrections Compact, codified in Wyo. Stat. Ann. § 7-3-401.

[11] *See*, *e.g.*, Western Regional Education Compact, Pub. L. No. 83–226, 67 Stat. 490 (1953); New Hampshire-Vermont Interstate School Compact, Pub. L. No. 91-21, 83 Stat. 14 (1969).

[12] *See*, *e.g.*, Delaware Valley Urban Area Compact, codified in N.J. Stat. Ann. §§ 32:27-1–32:27-27 (advance congressional consent provided by the Housing Act of 1961, Pub. L. No. 87-70, § 310, 75 Stat. 170 (1961) (previously codified in 40 U.S.C. § 461, *repealed by* Pub. L. No. 97-35, § 313, 95 Stat. 398 (1981))).

[13] *See*, *e.g.*, Historic Chattahoochee Compact, Pub. L. No. 95-462, 92 Stat 1271 (1978); Cumbres and Toltec Scenic Railroad Compact, Pub. L. No. 93-467, 88 Stat. 1421 (1974).

[14] *See* Compact on Taxation of Motor Fuels Consumed by Interstate Buses, Pub. L. No. 89-11, 79 Stat. 58 (1965).

[15] *See* Interstate Compact for Mutual Military Aid in an Emergency, Pub. L. No. 82-434, 66 Stat. 315 (1952) (amended by Pub. L. No. 84-564, 70 Stat. 247 (1956); Emergency Management Assistance Compact; Pub. L. No. 104-321, 110 Stat. 3877 (1996).

[16] *See*, *e.g.*, South Central Forest Fire Protection Compact, Pub. L. No. 83-642, 68 Stat. 783 (1954); Middle Atlantic Interstate Forest Fire Protection Compact, Pub. L. No. 84-790, 70 Stat. 636 (1956); Northwest Fire Protection Agreement, Pub. L. No. 105-377, 112 Stat. 33391 (1998).

[17] *See*, *e.g.*, Joint Resolution Granting the Consent of Congress to the Several States to Negotiate and Enter into Compacts for the Purpose of Promoting Highway Safety, Pub. L. No. 85-684, 72 Stat. 635 (1957).

Some compacts create administrative bodies empowered to implement the compact's requirements.[20] For example, in *West Virginia ex rel. Dyer v. Sims*, the Supreme Court addressed the Ohio River Valley Sanitation Compact, which authorized an interstate commission to issue orders requiring compliance with sewage disposal restrictions in interstate waterbodies.[21] A West Virginia state court deemed the compact invalid under the theory that it unlawfully delegated the state's sovereign power to a body outside the state.[22] The Supreme Court, however, reasoned that the "Framers left the [s]tates free to settle regional controversies in diverse ways[,]" including by delegating a state's traditional sovereign authority to an interstate compact commission.[23]

Unlike interstate compacts, Congress has given consent to a much smaller set of agreements between states and foreign governments.[24] The nature of states' pacts with foreign governments can be "elusive," as one Compact Clause scholar described it,[25] because states often make international pacts without seeking congressional approval.[26] Congress has approved state agreements with foreign governments on some distinct subjects, such as agreements for transnational highway infrastructure and bridges[27] and compacts with Canadian providences and territories for cross-border fire prevention[28] and emergency management.[29]

In a unique case, Congress authorized the Great Lakes Basin Compact—which included several states, Ontario, and Quebec—but declined to allow the Canadian provinces to join.[30]

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[18] *See* New Hampshire-Vermont Interstate Sewage Waste Disposal Facilities Compact, Pub. L. No. 94-403, 90 Stat. 1221 (1976).

[19] *See*, *e.g.*, 42 U.S.C. § 2021d; 42 U.S.C. § 2021d note.

[20] *See* Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 472 U.S. 159, 164 (1985) (describing the creation of a joint organization or body as one "classic indicia of a compact").

[21] *See* 341 U.S. 22, 24–25 (1951).

[22] *See West Virginia ex rel. Dyer*, 341 U.S. at 26–30.

[23] *See id.* at 26–31.

[24] *See* Hollis, *supra* note 3, at 1075.

[25] *See generally* Hollis, *supra* note 3.

[26] For discussion of the state's increase use of pacts with foreign governments that do not receive congressional approval, see ArtI.S10.C3.3.5 Requirement of Congressional Consent to Compacts.

[27] *See* Act to Authorize the Construction and Maintenance of a Bridge Across the Niagara River, 16 Stat. 173 (1870); Joint Resolution Granting Consent to New York to Enter into an Agreement or Compact with Canada for the Establishment of the Niagara Frontier Port Authority, Pub. L. No. 824, 70 Stat. 701 (1956), *repealed by* Pub. L. No. 85–145, 71 Stat. 367 (1957); 33 U.S.C. § 535a (granting consent to construction of international bridges to Canada and Mexico). In 1958, Congress authorized a compact between Minnesota and Manitoba, Canada for a highway construction project, but construction was never went forward. *See* Act of Sept. 2, 1958, Pub. L. No. 85–877, § 1, 72 Stat. 1701.

[28] *See* Act Granting the Consent and Approval of Congress to an Interstate Forest Fire Protection Compact, 63 Stat. 271 (1949); Act Granting the Consent and Approval of Congress to the Participation of certain Provinces of the Dominion of Canada in the Northeastern Interstate Forest Fire Protection Compact, Pub. L. No. 340, § 1, 66 Stat. 71 (1952), *repealed by* Act of June 30, 1978, Pub. L. No. 95–307, § 8, 92 Stat. 353 (agreements formed under the repealed authorization remain in effect under 16 U.S.C. § 1647(b)); Act Granting Consent and Approval of Congress to an Interstate Forest Fire Protection Compact, Pub. L. No. 105–377, 112 Stat. 3391 (1998).

[29] *See* International Emergency Management Assistance Memorandum of Understanding, Pub. L. No. 110–171, 121 Stat. 2467 (2007); Pacific Northwest Emergency Management Arrangement, Pub. L. No. 105–381, 112 Stat. 3402 (1998).

[30] *See* Act Granting Consent of Congress to a Great Lakes Basin Compact, Pub. L. No. 90–419 § 2, 82 Stat. 414 (1968).

Executive Branch officials believed Canadian participation would conflict with an existing treaty between the United States and Canada and interfere with the Federal Government's powers over foreign affairs.[31]

ArtI.S10.C3.3.4 Congressional Consent to Compacts

Article I, Section 10, Clause 3:

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

The Constitution does not dictate the timing or manner in which Congress must consent to a compact. The Supreme Court has interpreted the Constitution's silence to mean that Congress may use its wisdom and discretion to choose how and when it gives consent.[1] In an 1893 case, the Supreme Court stated that Congress ordinarily should provide authorization before the states join and carry out a compact, but Congress may consent later if the compact addresses an issue that is best considered after its "nature is fully developed[.]"[2] The Court has further explained that Congress can consent to a compact either in advance or by giving approval after the states already negotiated and joined the compact.[3]

As the number of compacts has increased over time, Congress has developed different ways of providing consent. Congress frequently approves specific compacts,[4] but it also has given approval in advance to broad classes of compacts.[5] Congress has, at times, given consent for an indefinite period;[6] other times it has put an end date on its authorization.[7] When approving a compact, Congress can consent to the participating states' later adoption of legislation that implements the compact.[8] Congress also can impose conditions on its consent, provided the conditions are "appropriate to the subject" and do not exceed a constitutional limitation.[9]

Congress's consent to a compact can be inferred from the circumstances and need not be expressly stated.[10] For example, when a compact sets up a formal procedure for resolving an

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[31] *See The Great Lakes Basin: Hearings before the Subcomm. on the Great Lakes Basin, S. Comm. Foreign Relations*, 84TH CONG. 6–9 (1956) (written statements of Robert C. Hill, Assistant Sec'y of State, and William P. Rogers, Deputy Att'y Gen.).

[1] *See* Green v. Biddle, 21 U.S. 1, 85–83 (1823) ("[T]he constitution makes no provision respecting the mode or form in which the consent of Congress is to be signified, very properly leaving that matter to the wisdom of that body . . . .").

[2] Virginia v. Tennessee, 148 U.S. 503, 521 (1893).

[3] Cuyler v. Adams, 449 U.S. 433, 440–41 (1981). Although not required under the Constitution, Congress often presents compacts which it has authorized to the President for approval. *See* Duncan B. Hollis, *The Elusive Foreign Compact*, 73 MO. L. REV. 1071, 1103 n.30 (2008).

[4] *See e.g.*, Columbia River Compact, Pub. L. No. 65–123, 40 Stat. 515 (1918).

[5] *See*, *e.g.*, 4 U.S.C. § 112; 42 U.S.C. § 2021d(2); 33 U.S.C. § 567a.

[6] *See supra* note 5.

[7] *See*, *e.g.*, 7 U.S.C. § 7256(3).

[8] *See* De Veau v. Braisted, 363 U.S. 144, 150–51 (1960).

[9] James v. Dravo Contracting Co., 302 U.S. 134, 148 (1937). *See also*, *e.g.*, Arizona v. California, 292 U.S. 341, 351–52 (1934) (discussing conditions on the Colorado River Compact imposed by the Boulder Canyon Project Act of 1928); 7 U.S.C. § 7256(2) (limiting the Northeast Interstate Diary Compact).

[10] *See*, *e.g.*, Virginia v. Tennessee, 148 U.S. at 522; Virginia v. West Virginia, 78 U.S. 39, 60 (1870).

interstate problem, such as arbitration, the Supreme Court has held that consent can be inferred if Congress expressed approval of the proceedings' results.[11]

ArtI.S10.C3.3.5 Requirement of Congressional Consent to Compacts

Article I, Section 10, Clause 3:

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

One of the most common questions to arise in Compact Clause cases is whether congressional consent is required for a particular state commitment.[1] The plain language of the Compact Clause suggests congressional approval is mandatory for "any" compact with another state or foreign government,[2] but the Supreme Court has not adopted a literal interpretation of the clause in all cases. In the context of interstate compacts, the Supreme Court has held that only compacts that increase states' power and diminish federal supremacy need Congress's consent.[3] The Court has not said whether the same interpretation applies to states' compacts with foreign governments, but the frequency with which states make international pacts suggests congressional approval often is unnecessary.[4]

The closest the Supreme Court has come to invalidating a compact for lack of congressional approval came in a non-controlling 1840 opinion about a state's agreement with a foreign official.[5] In *Holmes v. Jennison*, the Governor of Vermont ordered a resident of Quebec (then part of Great Britain) arrested and returned to Quebec to stand trial for murder even though the United States did not have an extradition treaty with Britain at the time.[6] A crucial legal issue—whether the Supreme Court had jurisdiction—turned on the whether the Governor of Vermont had arrested the fugitive under an informal "agreement" with Canadian authorities within the meaning of the Compact Clause.[7] The case ultimately ended with an equally divided court on the jurisdiction issue,[8] with four Justices determining that the governor made an agreement that should have been submitted to Congress for consent.[9] This four-Justice

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[11] *See, e.g.*, Wharton v. Wise, 153 U.S. 155, 172–73 (1894); Virginia v. Tennessee, 148 U.S. at 537; Green v. Biddle, 21 U.S. 1, 86–87 (1823).

[1] *See e.g.*, Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 472 U.S. 159, 175 (1985); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 469–70 (1978); New Hampshire v. Maine, 426 U.S. 363, 370 (1976); Virginia v. Tennessee, 148 U.S. 503, 518–19 (1893).

[2] *See U.S. Steel Corp*, 434 U.S. at 459 ("Read literally, the Compact Clause would require the States to obtain congressional approval before entering into any agreement among themselves, irrespective of form, subject, duration, or interest to the United States.").

[3] *See Ne. Bancorp, Inc.*, 472 U.S. at 175; *U.S. Steel Corp.*, 434 U.S. at 469–70; New Hampshire v. Maine, 426 U.S. at 370; Virginia v. Tennessee, 148 U.S. at 518–19. *See also* St. Louis & S.F. Ry. v. James, 161 U.S. 545, 562 (1896) (holding that state legislation authorizing a railroad organized under the laws of one state to extend services into a second state, subject to the second state's regulations, did not require congressional approval).

[4] *See infra* note 12.

[5] Holmes v. Jennison, 39 U.S. (14 Pet.) 540 (1840) (affirmed by an equally divided court).

[6] *See id.* at 561 (Taney, C.J.).

[7] The Supreme Court had jurisdiction if the lower court's decision was final and implicated a question of whether Vermont's actions were "repugnant to the constitution[.]" An Act to Establish the Judicial Courts United States, 1 Stat. 73, 85 (1789). The constitutional repugnancy element hinged on whether the Governor of Vermont made an "agreement" under the Compact Clause. *See Holmes*, 39 U.S. at 562–86 (Taney, C.J.).

[8] When the Supreme Court is made up of an even number of justices and is equally divided on the merits of a case, the lower court's decision is affirmed. *See* Durant v. Essex Co., 74 U.S. 107 (1868).

[9] *See Holmes*, 39 U.S. at 573–74 (Taney, C.J.).

opinion, written by Chief Justice Roger Taney, was based on a literal interpretation of the Compact Clause that viewed congressional approval as necessary for "every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties."[10]

Chief Justice Taney's opinion has been influential, and the Supreme Court later cited it positively,[11] but the view that all pacts between states and foreign governments require Congress's consent has not been supported in practice.[12] To the contrary, states often conclude pacts with foreign officials without congressional approval, and the Supreme Court eventually developed a new line of cases that more narrowly interprets the congressional consent requirement in the context of interstate compacts.[13]

In 1893, the Supreme Court expressed doubt in *Virginia v. Tennessee* that Congress must approve every interstate compact regardless of its relevance to the Federal Government.[14] The *Virginia* Court saw no reason congressional approval would be necessary for compacts "to which the United States can have no possible objection" or desire to interfere.[15] The Court gave several examples of hypothetical agreements that would not concern the United States, such as two states contracting to send exhibits to the Chicago World's Fair via the Erie Canal.[16] Rather than require congressional approval in every case, the *Virginia* Court reasoned that interstate compacts only need Congress's consent if they have the potential to "increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."[17]

In later cases, the Supreme Court repeated *Virginia*'s test for determining when congressional consent is necessary and clarified how it applies to modern interstate compacts.[18] In *U.S. Steel Corp. v. Multistate Tax Commission*, for example, the Supreme Court held that a compact creating uniform rules for state taxation of multistate corporations did not require congressional consent even though it increased the states' bargaining power in relation to the taxed companies.[19] *Virginia*'s test does not focus on whether the compact makes

[10] *Id.* at 572.

[11] *See* United States v. Rauscher, 119 U.S. 407, 414 (1886) ("[T]here can be little doubt of the soundness of the opinion of Chief Justice [Taney], that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country, which has undoubtedly been conferred upon the federal government[.]"); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 465 n. 15 (1978) (discussing the consistency of Chief Justice Taney's opinion with later Compact Clause jurisprudence). The Supreme Court of Vermont relied, in part, on Chief Justice Taney's opinion in later proceedings when it concluded that the governor lacked the constitutional authority to transfer the fugitive to Canadian officials. See *Ex parte* Holmes, 12 Vt. 631, 635–42 (1840).

[12] *See* Memorandum from William H. Taft, IV, Legal Adviser, Dep't of State, to Senator Byron L. Dorgan (Nov. 20, 2001) [Taft Memorandum], *in* Digest of United States Practice in International Law 2001, at 182 (Sally J. Cummins & David P. Stewart eds., 2001) [2001 Digest] ("In general, the notion articulated by Chief Justice Taney that all U.S. state agreements constitute compacts that require congressional consent has not been widely supported."); Duncan B. Hollis, *Unpacking the Compact Clause*, 88 Tex. L. Rev. 741, 747–60 (2010) (cataloging and describing state agreements with foreign governments that did not receive congressional approval); Ryan M. Scoville, *The International Commitments of the Fifty States*, UCLA L. Rev. (forthcoming 2022) (updating research on the proliferation of states' agreements with foreign governments).

[13] *See supra* notes 1 & 12.

[14] *See* 148 U.S. 503, 518–19 (1893).

[15] *See id.* at 518.

[16] *See id.*

[17] *See id.* at 519.

[18] *See* Ne. Bancorp, Inc. v. Bd. of Governors of Fed. Rsrv. Sys., 472 U.S. 159, 175 (1985); U.S. Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 469–70 (1978); New Hampshire v. Maine, 426 U.S. 363, 370 (1976).

[19] *See U.S. Steel Corp.*, 434 U.S. at 472–73.

the states more influential in general, the *U.S. Steel Corp.* Court explained, but whether it could enhance the states' power in relation to the Federal Government.[20]

The Supreme Court has also suggested that some engagements between states do not qualify as agreements or compacts at all.[21] In *Northeast Bancorp, Inc. v. Board of Governors of Federal Reserve System*,[22] Supreme Court rejected a Compact Clause challenge on the rationale that a system for reciprocal state legislation[23] lacked four "classic indicia of a compact" in the constitutional sense.[24] According to Court, those indicia are: (1) the creation of a joint organization or body; (2) conditioning one state's action on the actions of other states; (3) restrictions on states' ability to modify or repeal their laws unilaterally; and (4) a requirement for reciprocal constraints among all states.[25] The *Northeast Bancorp, Inc.* Court also held that, even if it assumed a compact existed, the scheme was authorized under existing federal banking law,[26] and therefore could infringe federal supremacy under the *Virginia* standard for congressional consent.[27]

After *Northeast Bancorp, Inc.*, the Supreme Court's interstate compact jurisprudence appears to establish a two-part inquiry for determining whether congressional consent is necessary: is the arrangement at issue a "compact or agreement" for constitutional purposes, and, if so, does it belong in that class of compacts described in *Virginia* that require congressional approval because it affects federal supremacy?[28] Unless the answer to both questions is "yes," consent is not mandatory.

While the Supreme Court's interstate compact cases are the most well-developed jurisprudence on the congressional consent issue, the Court has never held that these cases apply to states' *international* pacts with foreign governments.[29] Some scholars argue that two types of compacts present different concerns and should not share the same standard.[30] The greater weight of authority adopted in lower courts and Executive Branch statements, however, suggests *Virginia* applies in both scenarios.[31]

[20] *See id.* at 473.

[21] *See Ne. Bancorp, Inc.*, 472 U.S. at 175.

[22] 472 U.S. 159.

[23] *Northeast Bancorp, Inc.* concerned a system of reciprocal state legislation in which Massachusetts and Connecticut passed state laws that only allowed banks in their states to be acquired by New England-based holding companies. *See id.* at 164.

[24] *See id.*

[25] *See id.*

[26] *See* Bank Holding Company Act, 18 U.S.C. §§ 1841–52.

[27] *Ne. Bancorp, Inc.*, 472 U.S. at 176.

[28] *Accord*, *e.g.*, Taft Memorandum, *supra* note 12, *in* 2001 Digest, *supra* note 12, at 185; Hollis, *supra* note 12, at 765.

[29] *See*, *e.g.*, Taft Memorandum, *supra* note 12, *in* 2001 Digest, *supra* note 12, at 184 ("[I]t is not a settled question that the *Virginia* standard applies to state compacts with foreign powers[.]").

[30] *See*, *e.g.*, Edward T. Swaine, *Does Federalism Constrain the Treaty Power?*, 103 Colum. L. Rev. 403, 506 (2003); Hollis, *supra* note 12, at 769–804.

[31] *See*, *e.g.*, United States v. California, 444 F. Supp. 3d 1181, 1196 n.13 (E.D. Cal. 2020); McHenry Cnty. v. Brady, 37 N.D. 59, 59 (1917); *In re* Manuel P., 215 Cal. App. 3d 48, 68–69 (Ct. App. 1989); Taft Memorandum, *supra* note 12, *in* 2001 Digest, *supra* note 12, at 184–85; Restatement (Third) of the Foreign Relations Law of the United States §302 cmt. f (1987); Louis Henkin, Foreign Affairs and the U.S. Constitution 152 (2d ed. 1997).

ArtI.S10.C3.3.6 Legal Effect and Interpretation of Compacts

Article I, Section 10, Clause 3:

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

Once Congress consents to a compact, the compact "transforms" from a contract between governments into a law of the United States.[1] As federal law, a congressionally approved compact preempts inconsistent state law,[2] and no court may order relief inconsistent with its terms.[3] The Supreme Court has held that boundaries established by congressionally approved interstate compacts bind the states' citizens and are conclusive as to their rights.[4] The Court also has held that compacts that equitably apportion interstate waterbodies can affect private property rights.[5]

The Supreme Court has final authority to decide a compact's meaning and validity.[6] The Court need not defer to state courts' views on whether a compact complies with the law of the states that joined it. Thus, in *West Virginia ex rel. Dyer*, the Supreme Court declined to adopt the highest state court in West Virginia's interpretation of whether an interstate compact complied with the West Virginia state constitution[7] even though the Court ordinarily defers to state courts' interpretation of their own state law.[8]

The Supreme Court often hears interstate compact cases through the Constitution's grant of original jurisdiction to hear disputes between states.[9] This means that interstate compact cases with only states as parties go directly to the Supreme Court without proceedings in lower courts. The Supreme Court views its role in these cases as different from its more standard disputes on appellate jurisdiction.[10] It approaches original jurisdiction cases in an "untechnical spirit" that allows the Court to mold the process in a way that best promotes the ends of justice.[11]

When private litigants are parties to cases involving compacts, the suits do not fall under the Supreme Court's original jurisdiction, but they can still be heard in federal courts because

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[1] *See* Cuyler v. Adams, 449 U.S. 433, 440 (1981). *See also* Texas v. New Mexico, No. 141, Orig., slip op. at 4 (U.S. Mar. 5, 2018); Kansas v. Nebraska, 574 U.S. 445, 456 n.5 (2015); Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 628 n.8 (2013); Alabama v. North Carolina, 560 U.S. 330, 351 (2010); Texas v. New Mexico, 482 U.S. 124, 128 (1987); Wedding v. Meyler, 192 U.S. 573, 582 (1904); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 566 (1851).

[2] *See*, *e.g.*, *Tarrant Reg'l Water Dist.*, 569 U.S. at 627–28 (analyzing whether the Red River Compact preempted Oklahoma state water allocation statutes).

[3] *See*, *e.g.*, New Jersey v. New York, 523 U.S. 767, 811 (1999); *Culyer*, 449 U.S. at 438; Arizona v. California, 373 U.S. 546, 565–66 (1963); Washington v. Oregon, 211 U.S. 127, 135 (1908).

[4] *See*, *e.g.*, Virginia v. Tennessee, 148 U.S. 503, 525 (1893); Rhode Island v. Massachusetts, 37 U.S. 657, 725 (1838); Poole v. Fleeger, 36 U.S. 185, 209–10 (1837).

[5] *See* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 104–06 (1938).

[6] *See*, *e.g.*, Nebraska v. Iowa, 406 U.S. 117, 118 n.1 (1972); Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 278 (1959); West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 28 (1951).

[7] *See West Virginia ex rel. Dyer*, 341 U.S. at 28–32.

[8] *See*, *e.g.*, Cunningham v. California, 549 U.S. 270, 306 n.8 (2007); Mullaney v. Wilbur, 421 U.S. 684, 691 (1975).

[9] *See* U.S. Const. art. III, § 2, cl. 2. For background on the Supreme Court's original jurisdiction and authority to hear suits between states, see ArtIII.S2.C2.2 Supreme Court Original Jurisdiction.

[10] *See*, *e.g.*, Florida v. Georgia, No. 142, Orig., slip op. at 10 (U.S. Apr. 1, 2018); Kansas v. Nebraska, No. 126, Orig., slip op. at 6 (U.S. Feb. 24, 2015); Kentucky v. Dennison, 65 U.S. (24 How.) 66, 98 (1861).

[11] *Florida*, No. 142, Orig., slip op. at 10 (quoting Virginia v. West Virginia, 220 U.S. 1, 27 (1911)).

they require interpretation of compacts in their status as federal law.[12] A compact that permits a state entity to "sue and be sued" waives the state's sovereign immunity provided under the Eleventh Amendment and can permit a private party to sue a state entity.[13]

Along with being federal law, compacts are contracts between states or between states and foreign governments.[14] As a result, the Supreme Court has, at times, used contract law remedies and principles in compact cases.[15] In *Green v. Biddle*, the Court held that interstate compacts fall under the protection of the Contract Clause,[16] which prohibits states from passing laws that impair contract rights.[17] At the same time, there are limits on how far the Supreme Court will treat compacts as ordinary contracts. In *Alabama v. North Carolina*, the Court declined to read an implied duty of good faith and fair dealing into an interstate compact even though the Court acknowledged every contract imposes that duty.[18]

[12] *See*, *e.g.*, Cuyler v. Adams, 449 U.S. 433, 439 (1981).

[13] *See* Petty v. Tenn.-Mo. Bridge Comm'n, 359 U.S. 275, 278–82 (1959). For discussion of the state sovereign immunity and the Eleventh Amendment, see Amdt11.5.1 General Scope of State Sovereign Immunity.

[14] *See*, *e.g.*, Texas v. New Mexico, 482 U.S. 124, 128 (1987).

[15] *See*, *e.g.*, Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 628 (2013); Texas v. New Mexico, 482 U.S. at 128; Kentucky v. Indiana, 281 U.S. 163, 177–78 (1930) (discussing the Court's ability to order specific performance in interstate compact cases between states).

[16] U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .)." *See also supra* ArtI.S10.C1.6.1 Overview of Contract Clause.

[17] *See* Green v. Biddle, 21 U.S. 1, 92 (1823) ("[A] State has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals."). *See also* Olin v. Kitzmiller, 259 U.S. 260, 262–63 (1922) (analyzing whether an Oregon fishing license law violated the Contract Clause by impairing the Columbia River Compact).

[18] *See* Alabama v. North Carolina, 560 U.S. 330, 351–52 (2010).